UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI,

and

FRANK W. DUNHAM, JR., As Next Friend of Yaser Esam Hamdi,

Petitioners,

v. **Civil Action No. 2:02cv348**

DONALD RUMSFELD,
Secretary of Defense,

and

COMMANDER W.R. PAULETTE,
Norfolk Naval Brig
Norfolk, Virginia,

Respondents.

RESPONDENTS' OBJECTIONS TO MAGISTRATE JUDGE'S MAY 20, 2002 ORDER REGARDING ACCESS

Pursuant to Fed.R.Civ.P. 72 and 28 U.S.C. § 1651, Respondents, by and through the undersigned counsel, hereby file objections to and seek vacatur of that part of the May 20, 2002 Order of the Magistrate Judge requiring that the federal public defender's office be given immediate unmonitored access to Yaser Hamdi. In support of its objections, respondents offer the attached Memorandum of Points and Authorities in Support.

Respondents request oral argument on their Objections.

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INTRODUCTION

On May 20, 2002, the magistrate judge in this case entered an Order requiring the custodians of the Naval Brig at Naval Station Norfolk to act within five days to provide the federal Public Defender with private, unmonitored consultations with an enemy combatant who was seized in Afghanistan and is now held under the control of the United States military. See

Order (attached as Ex. A.) That extraordinary Order was erroneous for several reasons and must be vacated.[1]

First, the magistrate judge entered an order granting partial relief on this habeas petition without properly determining that the Court has jurisdiction to proceed. In fact, the Court lacks jurisdiction because the magistrate judge improperly permitted the Public Defender to proceed as next friend for the detainee. The Public Defender has not alleged any relationship whatsoever with the detainee. To the contrary, as underscored by his request for access, he has never met the detainee or communicated with him in any way. He thus cannot satisfy the demanding test for next friend standing established by the Supreme Court in Whitmore v. Arkansas, 495 U.S. 149 (1990). This Court therefore lacks jurisdiction.

Second, the magistrate judge disregarded the "next-friend" nature of the petition by improperly appointing the Public Defender as counsel for the detainee. It is undisputed that the detainee himself is not "seeking relief" from this Court, 18 U.S.C. § 3006A (2000), and thus he is not a party for whom counsel may be appointed under section 3006A. Rather, there is currently only one party petitioner in this case – the Public Defender himself as next friend for the detainee. Accordingly, the Public Defender could properly be appointed in this case only if he can be appointed as counsel for himself as next friend – an anomaly that neither the magistrate judge nor the parties have addressed. The too-hasty approach to standing and appointment of counsel reflected in these proceedings demonstrate that the magistrate judge has failed carefully to examine and distinguish between two critical issues that must be addressed before this case can proceed: (i) whether there is a party seeking to invoke the court's jurisdiction who has standing to do so, and (ii) whether that party can properly be represented at taxpayer expense by the Public Defender.

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[1] In filing this objection, respondents do not waive any arguments that may be raised in their answer to the petition, due on June 13, 2002. In particular, respondents note that Secretary of Defense Donald Rumsfeld is not properly named as a respondent. See, e.g., Chatman-Bey v. Thornburgh, 864 F.2d 804, 811 (D.C. Cir. 1988).

Third, even if those flaws could be remedied, the problem remains that magistrate judges are expressly forbidden by statute from granting injunctive relief. See 28 U.S.C. § 636(b)(1)(A), (B) (2000). The Order was thus entirely ultra vires.

Thus, the fundamental question presented here is whether the magistrate judge improperly ordered relief without addressing a series of issues demonstrating that the Court in fact has no power to act and that the Public Defender had no statutory authority to proceed.

It bears emphasis that any petition such as this challenging the detention of an enemy combatant 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. The United States is currently engaged in combat operations against the al Qaida terrorist network and remaining members of the Taliban in Afghanistan. Detention of enemy combatants is a critical part of that operation. Courts are usually loath to tread on such ground unless required to do so. In addition, in the context of the current conflict – in which al Qaida manuals have shown that terrorists are trained to pass messages upon capture through unwitting intermediaries[2] – an Order such as this mandating unmonitored access to an enemy combatant necessarily implicates important security concerns. Where such issues are at stake, it is vitally important that matters such as the standing of a purported next friend, the statutory authority of the Public Defender to proceed, and the authority of the magistrate judge to enter an order be carefully examined to ensure that this Court's jurisdiction has been properly invoked before relief is ordered.

BACKGROUND

A. The Conflict in Afghanistan and the Detainee's Capture

On September 11, 2001, the al Qaida terrorist organization launched a large-scale, coordinated attack on the United States and killed approximately 3,000 persons. In response, Congress passed a resolution, S.J. Res. 23, authorizing the President to use force against the

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[2] A copy of an al Qaida traning manual containing such instructions is available at www.usdoj.gov:80/ag/trainingmanual.htm.

"nations, organizations, or persons" that "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or [that] harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The President, acting under his authority as Commander in Chief, and with congressional support, dispatched the armed forces of the United States to Afghanistan to seek out and subdue the al Qaida terrorist network and the Taliban regime that had supported and protected that network.

In the course of operations in Afghanistan, U.S. and allied forces captured hundreds of enemy combatants. The detainee at issue in this case, Yaser Hamdi, was seized as an enemy combatant. As the petition filed by the Public Defender correctly states, the detainee was taken into custody by the U.S. military in Afghanistan. *See* Pet. ¶¶ 10, 13. The military has determined that he should continue to be detained as an enemy combatant under the laws of war, and he is currently being held at the Naval Station Brig at Norfolk.

The United States has formally notified the government of Saudi Arabia that the detainee is one of several Saudi nationals being held by the United States as combatants seized in the conflict in Afghanistan. As will be explained more fully in respondents' response to the Petition, the authority of the United States to seize and detain enemy combatants for the duration of an armed conflict is well settled.[3] The policy of the United States is that all detainees captured in Afghanistan have been and will continue to be treated humanely and consistent with the principles of the Geneva Convention. Consistent with that policy, the detainee has been permitted a visit from representatives of the International Committee of the Red Cross (ICRC) since his arrival at Norfolk, just as other detainees from the conflict in Afghanistan who are held elsewhere under the control of the U.S. military have been permitted such visits. In addition, the detainee is permitted to send mail, subject to screening.

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[3] See, e.g., Ex parte Quirin, 317 U.S. 1, 31 (1942) (stating that "[u]nlawful combatants are . . . subject to capture and detention"); see generally L. Oppenheim, International Law 368-69 (H. Lauterpacht ed., 7th ed. 1952). It makes no difference that the detainee may be a U.S. citizen. See Quirin, 317 U.S. at 37-38 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful . . . ."); In re Territo, 156 F.2d 142, 145 (9th Cir. 1946).

B. The Petition for Habeas Corpus

On May 10, 2002, the federal Public Defender ("Public Defender") for the Eastern District of Virginia, Mr. Frank W. Dunham, Jr., filed a petition for habeas corpus naming as petitioners both the detainee (Yaser Esam Hamdi) and himself as next friend for the detainee. The petition sought as relief, among other things, that the Court "Order Respondents to permit counsel to meet and confer with the [sic] Mr. Hamdi in private and unmonitored communications." Pet. at 7.

The Public Defender concededly filed this pleading in the detainee's name without ever having had any communication with the detainee. See Pet. ¶¶ 4, 13, 21. The Public Defender had been in contact, however, with the detainee's father. See id. ¶ 4. Indeed, the Public Defender attached to the Petition a power of attorney from the detainee's father granting a lawyer in Qatar power to proceed on his behalf and a letter from this lawyer. That letter did not request that the Public Defender file an action on behalf of the detainee's father (or on behalf of the detainee). Instead, the lawyer stated that he was "interested to work with you [the Public Defender] in this case and do whatever you can to ensure that he [the detainee] is given a fair trial in the court." Letter of May 8, 2002 from Dr. Najeeb al Nauimi to Mr. Frank Dunham (attached as Ex. B). The Public Defender did not, on the basis of this letter, seek to have the detainee's father appointed as next friend.

The Public Defender also sought to be appointed counsel for the detainee. After a statement from the detainee's father was filed stating that the detainee "has no assets whatsoever, with which he will be able to retain the services of a lawyer," Statement of Esam Fouad Hamdi (attached as Ex. C), the magistrate judge to whom the case had been assigned appointed the Public Defender counsel for the detainee. See Order of May 14, 2002 (attached as Ex. D).

The magistrate judge initially scheduled respondents' answer to be due on Thursday, May 23, 2002. Upon respondents' motion for an extension of time, the magistrate judge held a hearing on Monday, May 20, 2002, and granted respondents an extension until June 13, 2002. At the same hearing, however, the Public Defender orally requested that he be given immediate

access to the detainee. The magistrate judge granted relief upon this oral motion and entered an Order requiring the government to provide the Public Defender access for private, unmonitored consultations with the detainee within five days. See Order at 2 (attached as Ex. A).

ARGUMENT

I. BECAUSE THE PUBLIC DEFENDER IS NOT A PROPER NEXT FRIEND, THE COURT LACKS JURISDICTION OVER THE CASE.

It is well established that a court cannot order preliminary relief without first determining that it has jurisdiction over the underlying action. See Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464, 470 (5th Cir. 1985) ("'The district court has no power to grant an interlocutory or final injunction against a party over whom it has not acquired jurisdiction,' and an order granting an interlocutory injunction in these circumstances 'is erroneous as a matter of law.'") (citation omitted); Commonwealth of Virginia v. Watt, 741 F.2d 37 (4th Cir. 1984) (reversing issuance of a preliminary injunction because the district court had no subject-matter jurisdiction over the underlying action). Here, the magistrate judge erred in issuing a preliminary order requiring the United States to provide the Public Defender with access to the detainee without first properly considering whether the Public Defender had standing to bring the underlying habeas action. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing the[] elements [of standing]"). Because the Public Defender clearly does not have standing to bring the underlying habeas action, the magistrate judge's order must be vacated.

Although the detainee's name is included in the caption of the habeas petition, it is undisputed that he did not himself file the habeas petition, and that he did not request that it be filed on his behalf. Rather, the Public Defender filed the underlying action after some contact with the detainee's father, and the Public Defender named himself -- not the father -- as next friend. It is therefore the Public Defender that bears the burden of demonstrating that he has standing to bring the action.

As a general rule, to establish standing the "complainant must allege an injury to himself that is 'distinct and palpable.'" Whitmore, 495 U.S. at 155 (emphasis added) (citations omitted). Here, it is undisputed that the Public Defender has not himself suffered any legal injury. Instead, the Public Defender is attempting to assert that he has standing to bring the action as the detainee's "next friend." Because the Public Defender cannot qualify for "next friend" status under the exacting standards established by the Supreme Court in Whitmore, however, this court has no jurisdiction over the underlying habeas action and the magistrate judge's order must be vacated.

As the Ninth Circuit has explained, "the putative next friend must show: (1) that the petitioner is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability; and (2) the next friend has some significant relationship with, and is truly dedicated to the best interests of, the petitioner." Massie ex rel. Kroll v. Woodford, 244 F.3d 1192, 1194 (9th Cir. 2001) (citing Whitmore, 495 U.S. at 164). See also Amerson v. State of Iowa, 59 F.3d 92, 93 n.3 (8th Cir. 1995) ("next friend has burden to establish why real party in interest cannot prosecute habeas petition, that 'next friend' is 'truly dedicated' to best interests of person on whose behalf she litigates, and that she has some significant relationship with [the] real party in interest"), cert. denied, 516 U.S. 1080 (1996); In re Zettlemoyer, 53 F.3d 24, 27 n.4 (3d Cir. 1995) (same). The Supreme Court has emphasized that these limits on next friend standing "are driven by the recognition that '[i]t was not intended that the writ of habeas corpus should be availed of, as a matter of course, by intruders or uninvited meddlers, styling themselves next friends.'" Whitmore, 495 U.S. at 164 (quoting United States ex rel. Bryant v. Houston, 273 F. 915, 916 (2d Cir. 1921)). The restrictions ensure that a "litigant asserting only a generalized interest in constitutional governance" cannot "circumvent the jurisdictional limits of Art. III simply by assuming the mantle of 'next friend.'" Id.

The Public Defender clearly does not meet the second prong of the Whitmore test. "The burden is on the 'next friend' clearly to establish the propriety of his status and thereby justify the jurisdiction of the court." Id. (emphasis added). As the Supreme Court has warned, "'next

friend' standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another." Id. at 163. Instead, the Public Defender must present "clear evidence" establishing the basis for satisfying both prongs of the Whitmore test. Brewer v. Lewis, 989 F.2d 1021, 1026 (9th Cir. 1993) (emphasis added). Far from meeting this standard, the Public Defender has not asserted that he has any relationship whatsoever with the detainee. He has utterly failed to allege, let alone present "clear evidence" of, any meaningful relationship between himself and the detainee. Indeed, the Public Defender acknowledges that he has never met or spoken with the detainee, and that he does not even know whether the detainee speaks English such that he could communicate with him. Hearing Transcript at 26 (May 20, 2002) ("Trans.") (attached as Ex. E).

Close relatives, such as parents, siblings, and spouses, have been found to have a sufficient relationship to act as next friends. See, e.g., Vargas v. Lambert, 159 F.3d 1161, 1168 (9th Cir. 1998) (parent); Smith ex rel. Missouri Public Defender Comm'n v. Armontrout, 812 F.2d 1050 (8th Cir. 1987) (brother), cert. denied 483 U.S. 1033 (1987); In re Ferrens, 8 F. Cas. 1158, 1159 (S.D.N.Y. 1869) (wife). But more distant relatives and acquaintances generally do not have a sufficient relationship. See, e.g., Davis v. Austin, 492 F. Supp. 273 (N.D. Ga. 1980) (neither detainee's first cousin nor a minister who had counseled detainee could sue as next friend) (cited with approval in Whitmore, 495 U.S. at 164). The Public Defender here has not attempted to establish even that remote a connection with the detainee. Indeed, the Public Defender readily admitted before the magistrate judge that he has no idea whether the detainee actually desires to challenge his confinement by attempting to invoke the jurisdiction of the courts of the United States, or which claims he would want to press. Trans. 12 ("Mr. Hamdi might tell us . . . I don't want an infidel Christian lawyer representing me on a habeas corpus petition in the United States district court").

In a similar case decided just last month, the Eleventh Circuit rejected an attorney's claim that he had "next friend" standing to bring a habeas petition on behalf of a death row inmate. See Sanchez-Velasco v. Sec'y of the Dept. of Corrections, 287 F.3d 1015 (11th Cir. 2002). The

court noted that the attorney had "never represented [the prisoner] before.… He had never spoken with him.… He had no relationship at all with him, much less a significant one." Id. at 1027. Like the attorney in Sanchez-Velasco, the Public Defender is plainly a "stranger to the detained person[] and [his] case" who does not qualify for next friend standing. Whitmore, 495 U.S. at 164 (citing Rosenberg v. United States, 346 U.S. 273, 291-92, 73 S.Ct. 1152, 97 L.Ed. 1607 (1953) (Jackson, J., concurring with five other Justices)).[4]

The Public Defender's lack of standing, moreover, cannot be overlooked as if it were merely an error in placing the wrong name on the caption of this case. It is true that another individual – the detainee's father, who has already been tangentially involved in this matter – may well have a sufficiently significant relationship to assert next friend standing. So far, however, no one has shown that the detainee's father seeks that role. And the attorney from Qatar who has apparently been given power to act on the detainee's father's behalf indicated to the Public Defender only that he sought to work with the Public Defender to "do whatever you can to ensure that he [the detainee] is given a fair trial in the court." Ex. B.

Even if the detainee's father were to authorize the Public Defender to bring a next friend petition in his name, moreover, that would only give rise to additional legal questions. For example, although it may be possible for the Public Defender to be appointed to represent next-friend petitioners under certain circumstances, see In re Heidnik, 112 F.3d 105, 112 (3d Cir. 1997), it would have to be determined whether the detainee's father qualifies for such assistance under the standards set forth 18 U.S.C. § 3006(A). Those standards require, among other things, that the applicant demonstrate that he is financially eligible. "The burden of proving inadequate financial means . . . lies with the defendant." United States v. Bauer, 956 F.2d 693, 694 (7th Cir.), cert. denied, 506 U.S. 882 (1992). The father has filed an affidavit stating that he "will be

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[4] Attorneys have occasionally been treated as appropriate "next friends" of prisoners, but only where the attorney has had a longstanding relationship with the prisoner on whose behalf he is litigating. See, e.g., Miller ex rel. Jones v. Stewart, 231 F.3d 1248, 1251, 1254 (9th Cir. 2000) (attorney had represented prisoner in prior proceedings), stay vacated by 531 U.S. 986 (2000); Ford v. Haley, 179 F.3d 1342, 1345 (11th Cir. 1999), vacated by 195 F.3d 603 (11th Cir. 1999).

unable to provide funds for the legal services which [his] son will require." Ex. C. But such an assertion that an applicant is "unable to provide" funds is wholly inadequate to establish eligibility for appointed counsel. An applicant normally must provide a complete statement of his assets. As the Seventh Circuit has explained, "[i]t is not enough to claim inability to hire a lawyer and back up the claim with an affidavit; the statute provides for 'appropriate inquiry' into the veracity of that claim." Bauer, 956 F.2d at 694. The father's statement that he is "unable" to provide funds, after all, may amount to no more than a statement that he is "unwilling" to provide funds for this matter. There is no other indication that the detainee's father is indigent. To the contrary, public press reports indicate that he "holds a prestigious job in a private company in the Jubail Industrial City."[5] If that is the case, then even if the father may proceed as a next friend, he likely cannot be represented by the Public Defender.

None of these issues concerning the detainee's father, of course, need be addressed by the Court now. They demonstrate, however, that the magistrate judge issued the Order without addressing serious questions going to the very power of the Court to act that would necessarily arise if a careful inquiry into the Public Defender's status as next friend were conducted. These issues should have been addressed before injunctive relief was granted.

II. EVEN IF THE COURT HAD JURISDICTION OVER THE ACTION, THE MAGISTRATE JUDGE HAD NO POWER TO APPOINT THE PUBLIC DEFENDER TO ACT AS COUNSEL FOR THE DETAINEE, WHO IS NOT EVEN A PARTY BEFORE THE COURT.

Even if the Court had jurisdiction in this case, it has not been established that the Public Defender has statutory authority to proceed as counsel. The magistrate judge concluded that the Public Defender could be appointed as counsel for the detainee. But that was plainly erroneous.

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5 Abdul Rahman Almotawa, "Saudi seeks release of son from US jail," Arab News, May 3, 2002, (available at: http://www.arabnews.com/sarticle.asp?sct=esame on a habeas corpus petition in the United States district courtÓ).

He could not be appointed counsel for the detainee because the detainee is not a party before the Court. The detainee has not sought relief and has not sought to have counsel appointed for him.

The statute governing appointment of counsel, 18 U.S.C. § 3006A(a)(2)(B), provides that "[w]henever . . . the interests of justice so require, representation may be provided for any financially eligible person who . . . is seeking relief under section 2241, 2254, or 2255 of title 28." (emphasis added). The plain text of the statute makes it clear that the Court has the power to appoint counsel only for a person who is "seeking relief."[6] Here, because the detainee is not himself "seeking relief under section 2241," the magistrate judge's order appointing the Public Defender to act as counsel for him is invalid. The statute, after all, does not permit the Court to appoint counsel for a person whom the Public Defender thinks should be seeking relief, but who is not.

The Third Circuit made these limitations clear in In re Heidnik, 112 F.3d 105 (3d Cir. 1997), a case in a posture similar to this one. There, the daughter of a prisoner filed a habeas petition in the prisoner's name. She appended a motion to the petition seeking to be appointed the next friend of her father, and she further sought to have counsel appointed to represent her father. The court first noted that because the daughter brought the action, she should be substituted as the proper party in the case. Id. at 107 n.1. The court further directed that on remand, the district court should appoint counsel, not for the prisoner, but rather for her. Id. at 112. This holding reaffirms the statutory requirement that counsel can be appointed only for the party that has actually filed the habeas petition.[7]

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6 See also Battle v. Armontrout, 902 F.2d 701, 702 (8th Cir. 1990) (outlining two part test requiring (i) that there be a litigant presenting a claim to the court and (ii) that it be in the interests of justice to appoint counsel); Reese v. Fulcomer, 946 F.2d 247, 263-64 (3d Cir. 1991), cert. denied, 503 U.S. 988, 112 S.Ct. 1679, 118 L.Ed.2d 396 (1992) (same); Watson v. United States, No. CIV. 97-2979, CRIM 92-00672-01, 1997 WL 667152 at *4 (E.D. Pa. Oct. 3, 1997) (same).

7 Even if section 3006A were not as clear in directing that counsel can be appointed only for a person "seeking relief," such a requirement would have to be read into the statute to make it conform to settled law governing attorney-client relationships. "[A]n attorney-client relationship is contractual in nature, and thus is the product of an agreement of the parties." Smathers v. GBA Assocs. Ltd. Partnership, No. 168058, 2001 WL 546352 at *2 (Va. Cir. Ct. March 14,

The magistrate judge simply ignored the statutory restriction permitting the appointment of counsel solely for a party seeking relief before the court. In effect, the magistrate judge treated the Public Defender as the party invoking the court's jurisdiction when he permitted the Public Defender to proceed as next friend, but when it came to establishing that the Public Defender could be appointed as counsel, he shifted gears and proceeded as if the action had been brought by the detainee himself so that the Public Defender could be appointed as counsel for him. This mix and match approach is not permissible. It created perhaps the most glaring flaw in this case. The only party petitioner actually before this Court (assuming arguendo that he has standing) is the Public Defender in his role as next friend for the detainee. As the Third Circuit's decision in Heidnik establishes, if counsel is appointed in such a case, it is properly appointed for the next friend. Here that would produce the bizarre result of the Public Defender being appointed as counsel to represent himself in his capacity as next friend. Needless to say, it is doubtful that such an approach could be permitted. Again, however, the magistrate judge granted relief without considering such issues, which upon full consideration will likely demonstrate that the Public Defender lacks statutory capacity to proceed with this case.[8]

III. THE MAGISTRATE JUDGE LACKED STATUTORY AUTHORITY TO PROVIDE INJUNCTIVE RELIEF IN THE FORM OF AN ORDER REQUIRING ACCESS TO THE DETAINEE.

Even putting the errors outlined above to one side, the magistrate judge clearly exceeded his statutory authority by granting injunctive relief in the form of the Order requiring that the

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2001) (citing Island Depositors Economic Protection Corp. v. Hayes, 64 F.3d 22, 27 (1st Cir.1995)). Thus, no attorney-client relationship could be created between the detainee and the Public Defender unless the detainee sought it. The Court cannot simply order by fiat an attorney- client relationship.

8 The magistrate judge's suggestion that he could order the detainee brought into court to inquire into his indigency, see Trans. at 13, merely foreshadows further possible errors in the conduct of this proceeding. First, unless there is a proper party with standing, this Court's jurisdiction has not been properly invoked and the magistrate judge would lack authority to enter any such order. Second, since the detainee has not sought relief from the court, counsel cannot be appointed for him in any event and his indigency is irrelevant.

Public Defender be granted access to the detainee. The Federal Magistrates Act, 28 U.S.C. § 631-39 et seq. (2000), explicitly prohibits a magistrate judge from deciding a motion for injunctive relief in the absence of the consent of the parties. On matters referred to a magistrate judge under 28 U.S.C. § 636(b)(1)(A), the magistrate judge may "determine any pretrial matter pending before the court, except a motion for injunctive relief." (emphasis added). With respect to such motions – and for all matters referred to a magistrate under section 636(b)(1)(B) for a report and recommendation – the magistrate judge may, at most, conduct hearings and "submit to a judge of the court proposed findings of fact and recommendations for the disposition." 28 U.S.C. § 636(b)(1)(B). He may not order relief in the form of injunctions directing access to prisoners in habeas cases. These restrictions on a magistrate judge's authority apply unless the parties have consented to have their cause heard by a magistrate judge. See id. § 636(c). In this case, respondents have not consented to the authority of the magistrate judge under section 636(c).

The Order at issue plainly exceeds the bounds of the statute by providing injunctive relief. In fact, the Order is effectively a preliminary injunction granting part of the relief that the Public Defender sought on the merits of this habeas petition. The prayer for relief in the habeas petition seeks, among other things, that the Court "Order Respondents to permit counsel to meet and confer with the Mr. Hamdi [sic] in private and unmonitored communications." Pet. at 7. The Order requiring access within 5 days – and in the form of consultations "without military personnel present" – cannot be characterized as anything other than an injunction granting precisely the relief that the Public Defender sought. It is thus outside the magistrate judge's statutory authority. See, e.g., Reynaga v. Cammisa, 971 F.2d 414, 416-417 (9th Cir. 1992) (magistrate judge lacked authority to stay Section 1983 action pending exhaustion of administrative remedies because magistrate's imposition of a stay "effectively denied Reynaga's request for an injunction"); Highdata Software Corp. v. Kothandan, 160 F.Supp.2d 167, 168 (D.N.H. 2001) (magistrate judge lacked authority to grant injunctive relief); American Tourmaline Fields v. International Paper Co., No. CIV. A. 3:96-CV-3363-D, 1999 WL 325021

(N.D. Tex. 1999) (magistrate judge cannot determine preliminary injunction application); Geas v. Dubois, 868 F.Supp. 19, 24 n.12 (D. Mass. 1994) (magistrate judge lacks authority to grant temporary restraining order).

IV. THE IMPORTANCE OF THE ISSUES HERE UNDERSCORES THE NEED FOR CAREFUL AND ORDERLY CONSIDERATION OF MATTERS SUCH AS STANDING AND THE PUBLIC DEFENDER'S POWER TO PROCEED.

As the foregoing demonstrates, by granting the Public Defender access to the detainee, the magistrate judge placed the cart before the horse in this proceeding. A series of errors led to an Order that improperly granted relief before a number of defects in the case going to the very power of the Court and the Public Defender to proceed could be addressed. In fact, the magistrate judge ordered preliminary relief that is inextricably bound up with the merits of the petition – indeed, it is part of the relief sought on the merits of the petition. See Pet. at 7. Before any such relief could be ordered, the magistrate judge should have ensured that there was an orderly opportunity to raise the issues outlined above.

It may be that some of the defects outlined above can be remedied.. At present, however, the combination of an improper next friend with an improper appointment of the Public Defender as counsel for an ineligible person has bootstrapped both the Court and the Public Defender into a position to proceed without any assessment of the central flaw in this case: namely, no party has been identified who (1) properly has standing to bring the habeas petition (and who seeks to do so), who is also (2) eligible for representation by the Public Defender. Each of those issues – and others – must be addressed in an orderly fashion before the Court exercises its jurisdiction to order relief.

Orderly inquiry into these issues is especially appropriate in a case where the Court is being asked to exercise its jurisdiction to review actions of the military taken under the President's power as Commander in Chief to direct wartime operations. Courts are normally circumspect in approaching 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); cf. Johnson v. Eisentrager, 339 U.S. 763 (1950) (describing inherent interference with conduct of war that habeas litigation by enemy prisoners entails). Here, at a minimum, respect for the important interests at stake in the case require a careful and orderly procedure to inquire into the authority of the Court to proceed before relief is ordered.

If these issues had been considered in the proper order, moreover, it also would have permitted respondents to explain additional consequences of the form of relief that was provided. There are substantial government interests in regulating any contemplated access to the detainee that at a minimum should be taken into consideration before the Court rules on the issue. For example, the military must have the ability to interrogate detainees for any intelligence about al Qaida, its assets, and its plans. Any contacts with outsiders can interfere with the success of the interrogation effort. By prematurely ordering unrestricted access to the detainee, the magistrate judge ensured that the impact that access would have on the interrogation effort could not even be considered in addressing whether access to the detainee could be ordered and if so under what conditions.

Similarly, the magistrate judge ordered that the Public Defender be provided private, unmonitored meetings with the detainee, instructing that access should be provided "without military personnel present." Order at 2. But that requirement ignores a significant security concern. It is well known that an al Qaida training manual uncovered by the United States provides instructions for passing concealed messages to their colleagues from behind bars after they have been captured – even through unwitting intermediaries. There is legitimate cause for concern that any combatants seized in Afghanistan, al Qaida or not, may have received similar training. This detainee in particular presents a specific concern to the United States related to force protection because he has been to the detention facility at Guantanamo Bay, he has seen the procedures used there for security, and thus is in a position to communicate valuable information to enemies of the United States. The Order here, directing immediate, unmonitored access ensured that the court did not even consider appropriate screening or monitoring procedures that

will be necessary for addressing such critical security interests.

CONCLUSION

For the foregoing reasons, the Court should vacate the Order requiring access to the detainee and permit respondents to address the issues of standing and statutory authority of the Public Defender – in addition to any other issues – in an orderly fashion in their response to the Petition.

Respectfully submitted,
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