The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Lieutenant Commander CHARLES SWIFT, a resident of the State of Washington, as next of friend for SALIM AHMED HAMDAN,
Military Commission Detainee
Camp Echo,
Guantanamo Bay Naval Base,
Guantanamo Bay, Cuba,

Petitioner,

v.

DONALD H. RUMSFELD, United States Secretary of Defense; JOHN D. ALTENBURG, JR., Appointing Authority of Military Commissions, Department of Defense; Brigadier General THOMAS L. HEMINGWAY, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General JAY HOOD, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; and GEORGE W. BUSH, President of the United States,

Respondents.

NO. CV04-0777L

MEMORANDUM OF ARTHUR R. MILLER AS AMICUS CURIAE IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS OR TRANSFER

NOTED ON MOTION CALENDAR: July 27, 2004

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae is a professor of law who has devoted his entire career to the study and explication of federal civil procedure. Respondents' motion to dismiss or transfer raises important questions about mandamus jurisdiction, next-friend standing, and habeas venue. Moreover, in support of their motion, Respondents have relied – mistakenly – on a treatise co-authored by Amicus. (Resp. Mot. 13.) Amicus submits this memorandum in opposition to Respondents' motion because he believes that Petitioner's effort to secure mandamus and/or habeas relief from this Court is proper, and that Respondents' arguments to the contrary are without merit.

ARGUMENT

Respondents naturally want to make this case go away. If they cannot make the case go away, they hope to send it a forum they presumably regard as more favorable. This Court should keep the case.

I. Petitioner Is a Proper Next Friend.

Next-friend standing enables third parties to seek relief "on behalf of detained prisoners, who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves." Whitmore v. Arkansas, 495 U.S. 149, 162 (1990). Congress has authorized next-friend standing for habeas corpus claims. See 28 U.S.C. § 2242 ("Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf."). Federal courts also recognize next-friend standing in mandamus and other civil actions. See, e.g., Whitmore, 495 U.S. at 163 n.4; Gonzalez v. Reno, 86 F. Supp. 2d 1167, 1184–86 (S.D. Fla. 2000), aff'd, 212 F.3d 1338, 1346 (11th Cir. 2000).

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In Coalition of Clergy, Lawyers, and Professors v. Bush, 310 F.3d 1153 (9th Cir. 2002) ("Coalition of Clergy"), the Ninth Circuit stated the Whitmore test for next-friend standing:

> In order to establish next-friend standing, 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.

Id. at 1159-60 (citing Massie ex rel. Kroll v. Woodford, 244 F.3d 1192, 1194 (9th Cir. 2001) (per curiam)); see Whitmore, 495 U.S. at 163–64. The Whitmore test has also been applied in mandamus proceedings. See Gonzalez, 86 F. Supp. at 1184–86. Petitioner satisfies both prongs of this test.

Respondents do not dispute that Petitioner satisfies the second prong. They argue, however, that Petitioner has not shown that Hamdan is "unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability." (Resp. Mot. 3.) Respondents take too crabbed a view of this requirement. Their view, if accepted in this case, would sacrifice Hamdan's constitutional rights and defeat the purpose of next-friend standing.

Respondents argue that Hamdan cannot be shown to lack access to the courts because Petitioner was able to meet with Hamdan before filing the petition and obtained Hamdan's signature on an affidavit submitted in this action. (Resp. Mem. 4-5.) But access to counsel does not equal access to court. Padilla's counsel, like Petitioner, had consulted with her client several times before filing her next-friend petition, and she was allowed to proceed as his next friend. See Padilla v. Rumsfeld, 352 F.3d 695, 700, 703-04 (2d Cir. 2003), rev'd on other grounds, 124 S. Ct. 2711 (2004).

Indeed, the Ninth Circuit has indicated that lack of access to counsel might preclude a court from finding the party authorized to proceed as next friend. Speaking of Guantanamo

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detainees who lack "a relative, friend, or even a diplomatic delegation able or willing to act on their behalf," the Ninth Circuit has stated:

> In such an extreme case it is plausible that a person with "some" relationship conveying some modicum of authority or consent, "significant" in comparison to the detainee's other relationships, could serve as the next friend. . . . The existence of some relationship, whether it be from authorized representation to friendship or alliance to familial, serves as an objective basis for discerning the "intruder" or "uninvited meddler" from the true "next friend."

Coalition of Clergy, supra, 310 F.3d at 1162 (emphasis added). Hamdan, by his affidavit, provided Petitioner with such "authority or consent." Petitioner should not be barred from proceeding as Hamdan's next friend on the ground that Hamdan authorized him to do so.

Moreover, the fact that Hamdan could sign his name to an affidavit (see Resp. Mot. 4) does not mean that he is able "to litigate his own cause." According to Petitioner, Hamdan does not speak English or understand legal materials. (Pet. Opp. to Resp. Mot. to Dismiss or Transfer 4, 7 ("Pet. Opp.".) In addition, Hamdan had been held in solitary confinement for eight months when the petition was filed, raising questions about his mental competence. Pet. ¶¶ 27-30. Even if Hamdan is deemed not to lack access to court in the literal sense that he is able to sign pleadings, for constitutional purposes the touchstone for next friend standing must be "meaningful" access. See King v. Atiyeh, 814 F.2d 565, 568 (9th Cir. 1987). Holding literal access sufficient would sacrifice the constitutional rights of prisoners and defeat the very purpose of next-friend representation.

II. Petitioner Has Properly Invoked the Court's Mandamus Jurisdiction.

A. Mandamus Lies to Compel Respondents to Perform Their Constitutional Duties.

Under 28 U.S.C. § 1361, mandamus lies to compel federal officials to perform their duties under the Constitution and other applicable law. That is what Petitioner seeks – to compel

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Respondents to treat Hamdan as the Constitution, international law, and their own regulations assertedly require. Petitioner claims that the military commission process to which Respondents propose to subject and are subjecting Hamdan is unconstitutional and otherwise contrary to law; and Petitioner seeks Hamdan's release from the solitary confinement to which he has been consigned as part of that assertedly unconstitutional and unlawful process.

Preiser v. Rodriguez, 411 U.S. 495 (1973) (cited at Resp. Mem. 10-11), does not limit Petitioner to asserting such claims or seeking such relief in a habeas action. Preiser held that 22 U.S.C. § 2254 ("State Custody") makes habeas the excusive remedy for state prisoners challenging the fact or duration of their confinement. Hamdan is not a state prisoner, and Petitioner challenges not only the fact but also the military commission process by which Respondents propose to try Hamdan and the conditions of Hamdan's confinement pursuant to that process.

Under Ninth Circuit law, Hamdan may challenge the constitutionality of the military commission system, and seek release from solitary confinement, in a mandamus action. See Workman v. Mitchell, 502 F.2d 1201, 1205-06 (9th Cir. 1974) (federal district court had mandamus jurisdiction to order compliance with due process requirements in federal prison disciplinary proceedings, including jurisdiction to declare due process requirements applicable to such proceedings); Mead v. Parker, 464 F.2d 1108, 1112 (9th Cir. 1972) (district court had mandamus jurisdiction of purported class action filed by federal inmates alleging that prison authorities had refused to provide them access to adequate legal materials).

B. This Court Is a Proper Venue for This Mandamus Action.

The federal mandamus statute provides that relief in a case such as this may be sought in "any judicial district" in which the petitioner resides. 28 U.S.C. § 1391(e)(3). As an alien,

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Hamdan does not reside in any judicial district; but Petitioner's state of residence is Washington. In light of the purposes of Section 1391, there is no good reason why Section 1391(e)(3) should not extend to a next friend in such a circumstance, and no good reason why this Court should not decide the important constitutional issues that Petitioner raises.

In permitting mandamus to be sought in the district where the petitioner resides, Congress intended "to permit an action which is essentially against the United States to be brought locally rather than in the District of Columbia as would normally be required if Washington, D.C., is the official residence of the agency sued." Gilbert v. DaGrossa, 756 F.2d 1455, 1460 (9th Cir. 1985) (citing Stafford v. Briggs, 444 U.S. 527, 539-40 (1980)); see also Jarrett v. Resor, 426 F.2d 213, 216 (9th Cir. 1970). Congress made this possible notwithstanding the potential inconvenience to the federal defendants:

> Even though the burden of defending multiple suits while in office may be onerous, the United States Attorney in each of the districts and the Department of Justice carry that burden. In a mandamus suit only rarely would the officer himself be obliged to travel to the district in which the case was heard; if so obliged, the travel would be at Government expense. When an official leaves office, his personal involvement in a mandamus suit effectively ends and his successor carries on. No personal cost or inconvenience is incurred, either while in office or later. It was with this understanding that Congress sought to ameliorate the inconvenience and expense to private plaintiffs seeking relief from the action or inaction of their Government.

Stafford, 444 U.S. at 544 (citing H.R. Rep. No. 536, 87th Cong., 2d Sess. 3 (1962); S. Rep. No. 1992, 87th Cong., 2d Sess. 3 (1962)).

Respondents contend that a treatise co-authored by Amicus supports their position that venue in this Court is not to be decided on the basis of Petitioner's residence (Resp. Mem. 13), but the cited portion of the treatise does not answer the question. It states:

> In any action in which a guardian ad litem or next friend sues or defends on behalf of an infant or incompetent, the representative is a nominal party only; the action

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> must be brought in the name of the real party in interest – the infant or incompetent – and his citizenship generally is considered determinative for diversity of citizenship and venue purposes. Although general guardians and other more permanent fiduciaries may sue in their own name as authorized by Rule 17(a), a 1988 amendment to the diversity statute now makes the citizenship of the ward controlling.

6A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1570, at 505 (1990) ("W, M & K"). Clearly this passage is not adverting to a situation such as this. Hamdan is an alien and therefore not a citizen of any state. Accordingly, the principle stated in Rule 17(a) for next-friend cases provides no guidance in determining venue under Section 1391(e) in a mandamus action brought under Section 1361.[1]

In the absence of a governing inconsistent statute, Section 1391(e)(3) should apply. The default should not be the district in which the defendant resides: First, such a default would write Section 1391(e)(3) out of the Mandamus and Venue Statute in any next-friend action brought on behalf of an alien, contrary to the "fundamental canon of statutory construction that a statute should not be construed so as to render any of its provisions mere surplusage. See, e.g., United States v. Wenner, 351 F.3d 969, 975 (9th Cir. 2003). Second, such a default would be inconsistent with the policy of the Mandamus and Venue Statute to make it easier for parties to bring mandamus actions outside the District of Columbia and to avoid the concentration of actions in a single district. Third, such a default also would provide the United States with an incentive to move prisoners to locations where there are no federal courts in order to force

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[1] Under 28 U.S.C. § 1391(d), an alien may be sued in any district in which he can be served. As the treatise states, Section 1391 "is properly regarded, not as a venue restriction at all, but rather as a declaration of the long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and special." 15 W, M & C § 3810 (citing Brunette Mach. Works Ltd. v. Kockum Indus., Inc., 406 U.S. 706, 713 (1962)). Because no statute speaks to the case in which an alien is the plaintiff, if an alien is the plaintiff, then – except as some special venue statute may be applicable – suit must be brought in the district in which all defendants reside or, since 1966, the district in which the claim arose. See id. The "special statute" here is Section 1391(e)(3).

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mandamus actions into the District of Columbia – a forum-shopping tactic that risks overloading the docket of the district court of the District of Columbia.

Congress and the Supreme Court have acknowledged the importance of avoiding a concentration of cases in only a few districts. With regard to statutory habeas provisions, for example, Congress was "not motivated solely by a desire to insure that the disputes could be resolved in the most convenient forum. It was also a critical part of the congressional purpose to avoid the vastly disproportionate burden of handling habeas corpus petitions which had fallen, prior to the amendments, on those districts in which large numbers of prisoners are confined." Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 498 n.13 (1973). See also Strait, 406 U.S. at 435 (rejecting an interpretation of 28 U.S.C. § 2241 that would result in a "concentration of similar cases" in one district). The interests of the district courts generally, as well as the detainees seeking a timely review of their petitions, are served by a dispersal of mandamus and habeas cases. See Armentero v. INS, 340 F.3d 1058, 1069-70 (9th Cir. 2003).

III. Habeas Venue in This Court Is Also Proper.

A. Habeas Venue Is Proper Under the Doctrine of Pendent Venue.

Under the doctrine of pendent venue, where venue is proper for a plaintiff's principal cause of action, additional claims may be added for which venue would not individually be proper. See Burnett v. Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86, 98 (D.D.C. 2003); 15 W, M & C § 3808 (discussing pendent venue). The doctrine is often applied where, as here, venue over one claim is already established under a specialized venue statute. See Rodriguez v. Chandler, 641 F. Supp. 1292, 1302 (S.D.N.Y. 1986). Courts will apply the doctrine where the claims originate from a common nucleus of operative fact and there are common issues of proof or witnesses. See, e.g., Reuber v. United States, 750 F.2d 1039, 1048 (D.C. Cir. 1984); see

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Beattie, 756 F.2d at 103; Rodriguez, 641 F. Supp. at 1302. This instant action clearly calls for application of the doctrine.

B. Habeas Venue Is Proper Because the Instant Action Is Not a "Core Habeas" Action.

In Padilla, the Supreme Court held that "core habeas" proceedings – i.e., those seeking release from custody – must name the petitioner's immediate physical custodian as respondent and be brought in the district of confinement. Rumsfeld v. Padilla, 124 S. Ct. 2711, 159 L. Ed. 2d 513, 535 (2004). But "the immediate physical custodian rule . . . does not apply when a habeas petitioner challenges something other than his present physical confinement." Id. at 529; see Braden, 410 U.S. at 488 – 89; Strait, 406 U.S. at 344. Here, Hamdan challenges the military commission process to which Respondents propose to subject him and the solitary confinement in which he has been placed as part of that process. The immediate-custodian rule does not apply.

Respondents themselves have acknowledged that Hamdan's detention and trial by a military commission raise "two completely different questions," thus making clear their view that a successful challenge to the military commission process would not necessarily result in Hamdan's release or reduce the duration of his Hamdan's confinement.[2]

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[2] A background briefing held on the day that Hamdan was certified to be tried by a military commission included the following exchange between a reporter and a "senior defense official":

> Q: So is it possible then that somebody could go through a commission, be found not guilty, and then have them say well, congratulations, you're not guilty but you're still an enemy combatant so back into wherever we're holding you?
>
> Senior Defense Official: As a legal matter, they're two completely different questions. They're not being held because of any criminal activity or any charges. They're being held because they're enemy combatants in an ongoing armed conflict.

(footnote cont'd)

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Here, moreover, Hamdan's immediate custodian is not located in any judicial district. Hamdan, like Braden, therefore "may name as respondent the entity or person who exercises legal control with respect to the challenged 'custody.'" Padilla, 124 S. Ct. 2711, 159 L. Ed. 2d at 529 (emphasis added); see also Strait, 406 U.S. at 345-46; cf. Armentero v. INS, 340 F.3d 1058, 1070 (9th Cir. 2003) (endorsing, in immigration detention cases, "a different concept of 'custodian,' one based more on the legal reality of control than the technicalities of who administers on a day-to-day basis the facility in which an individual is detained"). As the sole authorities with power to relieve Hamdan from trial before a military commission, President Bush, Secretary Rumsfeld, and Deputy Secretary Wolfowitz are proper respondents[3]; and "[s]o long as . . . [they] can be reached by service of process, the court can issue a writ 'within its jurisdiction' requiring that the prisoner be brought before the court for a hearing on his claim, . . . even if the prisoner himself is confined outside the court's territorial jurisdiction," Braden, 410 U.S. at 452-53; see also Rasul v. Bush, 124 S. Ct. 2686, 159 L. Ed. 2d 548, 559 (2004).

> What we're talking about with military commissions is a criminal process so in that regard they're two distinct issues.
>
> Background Briefing on Military Commissions, July 3, 2003, available at http://www.defenselink.mil/transcripts/2003/tr20030703-0323.html.

[3] According to the Defense Department, before an individual is designated for trial before a military commission, "the [P]resident [first has] to determine [that] someone is subject to his order," and "an appointing authority . . . will then refer charges to the commission." See Defense Department Background Briefing Re: Release of Military Commission Instructions, Fed. News Serv., May 2, 2003 (acknowledging that "the [S]ecretary [and] the [P]resident . . . are the people [who] deem[ ] the individual to be worthy of trial" before the commission). Secretary Rumsfeld, the so-called "appointing authority," delegated control over the commissions to Deputy Secretary of Defense Paul Wolfowitz. See id. (noting that "[t]he appointing authority, as of now, is the [S]ecretary of Defense, and he may delegate that responsibility, if he decides to do that"); see also Neil A. Lewis, Threats and Responses: The Tribunals, N.Y. Times, July 4, 2003, at A1 (reporting that "the [P]resident . . . designat[es] any captives eligible for trial by military commission" and that Deputy Secretary Wolfowitz, "who was given authority over the commissions by Defense Secretary Donald H. Rumsfeld," "decides which of [the detainees] will be charged with crimes").

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C. This Case Is Governed by Rasul

As the Ninth Circuit has recognized, "the [Rasul] Court noted an exception to the immediate custodian and district of confinement rules 'where an American citizen is detained outside the territorial jurisdiction of any district court," Gherebi v. Bush, No. 03-55785, slip op. at 31-32 (9th Cir. July 8, 2004) (quoting Padilla, 124 S. Ct. 2711, 159 L. Ed. 2d at 528 n.9 (citing Braden, 410 U.S. at 498)), and this "exception applies to alien detainees at Guantanamo Bay," Id. at 32 (citing Rasul, 124 S. Ct. 2686, 159 L. Ed. 2d at 554; and Padilla, 124 S. Ct. 2711, 159 L. Ed. 2d at 538 (Kennedy, J., concurring)). The Supreme Court noted that "[i]n such cases, [it has] allowed the petitioner to name as respondent a supervisory official." Padilla, 124 S. Ct. 2711, 159 L. Ed. 2d at 535 n.16 (citing Burns v. Wilson, 346 U.S. 137, 137 (1953); and United States ex rel. Toth v. Quarles, 350 U.S. 11, 11 (1955)). In this case, the only appropriate "supervisory official[s]" in the United States are the named respondents.

Rasul also confirms that the Western District is a proper venue for this action. As the Court observed in Braden and reaffirmed in Rasul, "a district court acts 'within [its] respective jurisdiction' . . . as long as 'the custodian can be reached by service of process.'" Rasul, 124 S. Ct. 2686, 159 L. Ed. 2d at 559 (alteration in the original) (quoting Braden, 410 U.S. at 494-95); see also Ex parte Endo, 323 U.S. 283, 306 (1944) ("[T]he court may act if there is a respondent within reach of its process who has custody of the petitioner."); cf. Rasul, 124 S. Ct. 2686, 159 L. Ed. 2d at 576 (Scalia, J., dissenting) (recognizing that under Rasul "Guantanamo Bay detainees can petition in any of the 94 federal judicial districts").

In Padilla, the Court noted that extra-territorial habeas claims are often filed in the district where the respondent resides, but the Court did not intimate that a petitioner may seek relief only in the respondent's district of residence. See Padilla, 124 S. Ct. 2711, 159 L. Ed. 2d at 531. In

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the two cases cited in Padilla as support for the extra-territorial exception, the Court focused on whether servicemen federal district courts had habeas jurisdiction of extra-territorial court-martials. The Court did not consider which specific federal court should have jurisdiction over such habeas claims. See Burns, 346 U.S. at 137 (allowing, without discussion of proper venue, court-martial convicts held in Guam to sue the Secretary of Defense in the District of Columbia); Quarles, 350 U.S. at 11 (allowing, without discussion of venue, a court-martial convict held in Korea to sue the Secretary of the Air Force in the District of Columbia). In Rasul-type habeas challenges, traditional venue considerations apply. Cf. Armentero, 340 F.3d at *1070 (citing Braden, 410 U.S. at 493-94, and Henderson v. I.N.S., 157 F.3d 106, 128 (1998)) ("District courts may use traditional venue considerations to control where detainees bring habeas petitions.")

Because Hamdan's petition falls under the Braden and Rasul exceptions to the immediate custodian and district of confinement rules, the petition can be entertained by any court that has personal jurisdiction over his custodians. See Padilla, 124 S. Ct. 2711, 159 L. Ed. 2d at 538 (Kennedy, J., concurring) (citing Braden, 410 U.S. at 493; and Moore v. Olson, 368 F.3d 757, 759-60 (7th Cir. 2004) (observing that "the question of the proper location for a habeas petition is best understood as a question of personal jurisdiction or venue). Respondents here have the requisite "minimum contacts," Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), to satisfy Washington state's long-arm statute, see Wash. Rev. Code Ann. § 4.28.185 (West 2004), which "extends jurisdiction to the limits of due process," Ali v. Ashcroft, 346 F.3d 873, 889 (9th Cir. 2003) (quoting Chan v. Soc'y Expeditions, Inc., 39 F.3d 1398, 1405 (9th Cir. 1994)) (internal quotation marks omitted) (noting, as an example, that the Attorney General is subject to service of process in Washington state). Indeed, the activities of Respondents are substantial and systematic throughout Washington: for example, the state is the site of a number of military

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installations and facilities, see Office of the Deputy Under Sec'y of Def., Dep't of Def., Base Structure Report: Fiscal Year 2003 Baseline 15 (2003), available at http://www.defenselink.mil/pubs/almanac/almanac/Graphics/BSR_03.pdf.[4]

CONCLUSION

For the foregoing reasons, Respondents' Motion to Dismiss or Transfer should be denied.

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[4] In addition, Petitioner contends that this Court can exercise personal jurisdiction over Hamdan's immediate custodian pursuant to Rule 4(k)(2), which provides:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, servicing a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

Fed. R. Civ. P. 4(k)(2). Under this rule, the appropriate constitutional inquiry is whether the defendant has sufficient contacts with the United States under the Fifth Amendment Due Process Clause, not whether the defendant has sufficient contacts with any particular State under the Fourteenth Amendment Due Process Clause. See 4 W & M § 1068.1 and 4B W & M §§ 1124, 1125; Advisory Committee Notes, 1993 Amendments. See also Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1126-27 (9th Cir. 2002) (analyzing the defendant's 'national contacts' under Rule 4(k)(2)).

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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