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 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 for 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; GEORGE W. BUSH, President of the United States,

Respondents.

NO. CV04-0777L

PETITIONER'S MOTION FOR ORDER AUTHORIZING LIMITED DISCOVERY

Note on Motion Calendar:
July 23, 2004

PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

I. PRELIMINARY STATEMENT

Petitioner Lieutenant Commander Charles Swift respectfully requests leave to engage in limited discovery from Respondents, designed to elicit evidence regarding the claims set forth in the Petition filed herein. It is well settled that this Court has both the authority and the duty to permit such discovery under the circumstances present here, where Petitioner has had no opportunity to review or challenge the evidence against him, and no opportunity to develop facts that would establish the illegality of his continued detention. The discovery sought by this motion consists of seven (7) document requests, and a single Rule 30(b)(6) deposition of a representative of Respondents.

II. FACTUAL BACKGROUND

Petitioner is acting as "next-friend" for Salim Ahmed Hamdan, who is currently being held in solitary confinement by U.S. military authorities at Camp Echo, Guantanamo Bay Naval Base, Cuba. As set forth in the Petition, Mr. Hamdan was seized in Afghanistan and sold into the custody of U.S. military forces in late 2001. He was subsequently transported to Guantanamo Naval Base, where he is being held as an alleged enemy combatant. In July 2003, Mr. Hamdan was identified as one of six individuals subject to President Bush's November 13, 2001, Executive Order relating to the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism ("the Military Order"). The Military Order purports to provide, by Executive fiat, that anyone subject to its terms, if tried, shall be tried by military commission, without the right of review by any civilian court, whether federal, state, or international.

PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

Mr. Hamdan denies that he ever was a combatant engaged in hostilities against the United States or its allies. Mr. Hamdan further denies that he ever planned or participated in terrorist acts against the United States or its citizens, or harbored anyone who did.

The Petition filed in this matter seeks either a writ of mandamus, or in the alternative, a writ of habeas corpus. The Petition asserts, among other things, that no commission established pursuant to the Military Order can have personal jurisdiction over Mr. Hamdan, because he never engaged in the activities enumerated in the Military Order to identify persons subject to its terms. The Petition further alleges that the Military Order is unconstitutional, and that Respondents, by their lengthy and continuing detention of Mr. Hamdan in solitary confinement, have violated the Constitution, laws, treaties, and regulations of the United States in numerous respects. It alleges that statutes, including those governing mandamus, habeas corpus, and the Administrative Procedures Act, confer power on this Court to hear these claims.

Mr. Hamdan has been given no opportunity to face his accusers, to review or challenge the evidence against him (if it exists), or to marshal facts and offer evidence in his own defense. In this respect, of course, this proceeding is different from a typical habeas action, where a trial has already occurred and a prisoner nevertheless asserts that the process was flawed. In this case, no legal process has been afforded to Mr. Hamdan, other than the process under way in this action.[1]

The discovery sought by Petitioner consists of seven (7) document requests and a single Rule 30(b)(6) deposition of a representative of Respondents. The document requests

---

[1] While Mr. Hamdan has been told that he will be charged and tried before a military commission, and assigned military defense counsel (Lt. Commander Swift) for purposes of negotiating a plea, no charges have been brought.

PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

call for all documents that refer or relate to Mr. Hamdan personally, the circumstances of his capture and confinement, the information obtained from Mr. Hamdan, the reasons for his detention and his identification as a person subject to the Military Order, and the reasons for the delay in bringing charges against him. The proposed topics for examination of a Rule 30(b)(6) representative are essentially the same, in order that the deponent might authenticate and answer questions about the documents produced. Copies of Petitioner's Requests for Production of Documents, and the Notice of Rule 30(b)(6) Deposition, are attached to the Proposed Order submitted herewith.

III. ARGUMENT

A. Discovery is Appropriate in Mandamus Actions, and Justified Here

Discovery is permissible in mandamus actions such as this, and amply justified in this case. See, e.g., Judicial Watch, Inc. v. National Energy Policy Development Group, 233 F. Supp.2d 16, 29 (D.D.C. 2002) ("courts have found discovery to be appropriate [in mandamus actions] where an agency has either completely abrogated its enforcement responsibilities or acted clearly outside the bounds of relevant statutes"); see also Conservation Law Foundation of New England, Inc. v. Clark, 590 F. Supp. 1467, 1472-73 (D. Mass. 1984) ("Courts have indicated that independent fact finding under mandamus is appropriate in some circumstances, even where agency action is under review") (citing cases). In this case, Petitioner alleges that Respondents have acted clearly outside the bounds of applicable statutes and regulations governing the confinement and treatment of Mr. Hamdan, and violated the Constitution and the Geneva Conventions by failing to perform clear, non-discretionary duties owed to Mr. Hamdan. (See Petition, counts I – VIII.) Accordingly, the requested discovery into the facts relating to those topics should be permitted.

PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

B. The Court Has the Authority and the Duty to Permit Discovery in a Habeas Proceeding if Necessary to "Dispose of the Matter as Law and Justice Require"

Even if this Court were to decline to permit discovery for purposes of Petitioner's request for a writ of mandaumus, discovery is permissible and justified in connection with Petitioner's alternative request for a writ of habeas corpus. Discovery in a habeas corpus proceeding is permitted at the discretion of the court "for good cause shown." Hayes v. Woodford, 301 F.3d 1054, 1065 n.6 (9th Cir. 2002). "Good cause" to permit discovery exists "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is… entitled to relief." Bracey v. Gramley, 520 U.S. 899, 908-909 (1997) (quoting Harris v. Nelson, 394 U.S. 286, 299 (1969)). The Supreme Court's observations in Harris, the seminal case on the issue of discovery in habeas actions, are particularly pertinent here, such that lengthy quotation from that opinion is justified:

> The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its pre-eminent role is recognized by the admonition in the Constitution that: "The Privilege of the Writ of Habeas Corpus shall not be suspended…." U.S. Const., Art. I, § 9, cl. 2. The scope and flexibility of the writ – its capacity to reach all manner of illegal detention – its ability to cut through barriers of form and procedural mazes – have always been jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.
>
> * * *
>
> It is now established beyond the reach of reasonable dispute that the federal courts not only may grant evidentiary hearings to applicants, but must do so upon an appropriate showing. And this Court has emphasized, taking into account the office of the writ and the fact that

PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

the petitioner, being in custody, is usually handicapped in developing the evidence needed to support in necessary detail the facts alleged in his petition, that a habeas corpus proceeding must not be allowed to founder in a "procedural morass."

There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law. This Court has insistently said that the power of the federal courts to conduct inquiry in habeas corpus is equal to the responsibility which the writ involves: "The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary." Townsend v. Sain, [372 U.S. 293], at 312, 83 S.Ct. [745,] at 757.

* * *

Petitioners in habeas corpus proceedings, as the Congress and this Court have emphasized,… are entitled to careful consideration and plenary processing of their claims including full opportunity for presentation of the relevant facts. Congress has provided that once a petition for a writ of habeas corpus is filed, unless the court is of the opinion that the petitioner is not entitled to an order to show cause, the writ must be awarded "forthwith," or an order to show cause must be issued. 28 U.S.C. § 2243. Thereafter, if the court concludes that the petitioner is entitled to an evidentiary hearing, it shall order one to be held promptly. 28 U.S.C. § 2243.

Flexible provision is made for the taking of evidence by oral testimony, by deposition, or upon affidavit and written interrogatory. 28 U.S.C. § 2246. Cf. §§ 2245, 2254(e). The court shall "summarily hear and determine the facts, and dispose of the matter as law and justice require." 28 U.S.C. § 2243. But with respect to the method for securing facts where necessary to accomplish the objective of the proceedings Congress has been largely silent. Clearly, in these circumstances, the habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial

PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

> usage. Where their duties require it, this is the inescapable obligation of the courts.
>
> * * *
>
> At any time in the proceedings, when the court considers that it is necessary to do so in order that a fair and meaningful evidentiary hearing may be held so that the court may properly "dispose of the matter as law and justice require," either on its own motion or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings with respect to development, before or in conjunction with the hearing of the facts relevant to the claims advanced by the parties, as may be "necessary or appropriate in the aid of (its jurisdiction)… and agreeable to the usages and principles of law." 28 U.S.C. § 1651 [the All Writs Act].
>
> * * *
>
> Where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in civil or criminal rules or elsewhere in the "usages and principles of law."

Harris, 394 U.S. at 290-92, 298-300 (reversing an appellate decision disallowing the use of interrogatories in a habeas action, and remanding for further proceedings) (some citations omitted).

C. Discovery in a Habeas Proceeding is Appropriate Despite Allegations that the Petitioner is an Enemy Combatant

The fundamental principles of Harris v. Nelson were recently reaffirmed by the Supreme Court in Hamdi v. Rumsfeld, 542 U.S. ____ (June 28, 2004), a habeas proceeding where, as here, the Government alleges that the petitioner is held as an enemy combatant. In Hamdi, the Court rejected the Government's argument that inquiry into the facts surrounding

PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

the detention would "intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war." Id., slip op. at 25. Despite these protests about the burden allegedly posed by discovery and factfinding, the Court held that a "citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Id., slip op. at 26.[2] The Court stated:

> The Government has made clear in its briefing that documentation regarding battlefield detainees already is kept in the ordinary course of military affairs. Any factfinding imposition created by requiring a knowledgeable affiant to summarize these records to an independent tribunal is a minimal one. Likewise, arguments that military officers ought not have to wage war under the threat of litigation lose much of their steam when factual disputes at enemy combatant hearings are limited to the alleged combatant's acts. This focus meddles little, if at all, in the strategy or conduct of war, inquiring only into the appropriateness of continuing to detain an individual claimed to have taken up arms against the United States. While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion is necessarily wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here. Cf. Korematsu v. United States, 323 U.S. 214, 233-234 (1944) (Murphy, J., dissenting) ("[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled"); Sterling v. Constantin, 287 U.S. 378, 401 (1932)

---

[2] While this case involves an alien rather than a U.S. citizen, the Court noted in Rasul v. Bush, 542 U.S. ____ (June 28, 2004), that "the [habeas] statute draws no distinction between Americans and aliens held in federal custody." Id., slip op. at 12. The Court therefore concluded that "Aliens held at the [Guantanamo Naval Base in Cuba], no less than American citizens, are entitled to invoke the federal courts' authority under § 2241." Id., slip op. at 12-13. Accordingly, as the statute does not distinguish between citizens and non-citizens, the discovery available to a non-citizen who seeks the Great Writ should be no less complete than that available to a U.S. citizen.

PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions").

* * *

[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government…. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake…. Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions. See [INS v.] St Cyr, 533 U.S. [289], at 301 [(2001)] ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest").

* * *

[A] habeas court in a case such as this may accept affidavit evidence like that contained in the Mobbs Declaration [in which a Defense Department official summarized the relevant records and reports relating to the capture and detention of the petitioner], so long as it also permits the alleged combatant to present his own factual case to rebut the Government's return. We anticipate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental. We have no reason to doubt that courts faced with these sensitive matters will pay proper heed to both the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.

PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

Hamdi, 542 U.S. ____, slip op. at 28-30, 32 (June 28, 2004).

Accordingly, assertions by the Government in this case that the requested discovery will jeopardize national security, or otherwise impose an undue burden on the military, should not be grounds for denying the limited discovery sought by Petitioner. Rather, consistent with Hamdi, this Court should authorize discovery that permits Petitioner to "receive notice of the factual basis for his classification [as an enemy combatant], and a fair opportunity to rebut the Government's factual assertions." The discovery requested by this motion is calculated to do just that, without going beyond what is necessary to develop facts sufficient to support Petitioner's claims. Petitioner is not seeking to depose high-ranking government officials, nor use the discovery process to interfere in any way with military operations. Instead, Petitioner has carefully limited his requests to the minimum necessary to examine whether the President's determination of July 3, 2003, that Mr. Hamdan is an illegal enemy combatant, is accurate.[3]

D. There is Good Cause to Permit the Requested Discovery

The requested discovery is reasonably calculated to develop facts relevant to the claims asserted in the Petition, which if established, entitle Petitioner to relief from this Court. Petitioner denies that he was ever a combatant engaged in, or planning, hostilities against the United States or its allies. If he is correct, then his detention is illegal. In this connection, it is important to emphasize that Petitioner has had no opportunity to challenge or respond to the allegation that is an enemy combatant. The Government has presented no evidence, in any forum, to support that allegation. Likewise, Petitioner has been given no opportunity to test

[3] Petitioner has not been provided a copy of the July 3, 2003, determination that Mr. Hamdan is an illegal enemy combatant, nor has he seen any documentation that led to that Presidential finding.

PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

the Government's assertion that he is an illegal combatant subject to trial before a military commission. Here again, the Government has presented no evidence, in any forum, to show that Petitioner is a person subject to the President's Military Order (i.e., the Executive Order that purports to suspend the writ of habeas corpus for non-citizens and subject those detained pursuant to that Order to trial by military commission). Indeed, despite the fact that he has now been held in solitary confinement (or, as the Government styles it, "pre-commission segregation") for over two hundred days (and that after having been already detained for approximately two years), Petitioner has not even been charged with an offense that would make him subject to trial before any tribunal. Under these circumstances, there is "good cause" to permit the limited discovery requested by this motion. Indeed, Petitioner's requested discovery is essential to "permit[] the alleged combatant to present his own factual case to rebut the Government's return." Hamdi, slip op. at 32.

Consistent with the guidance provided by the Supreme Court in Hamdi, the discovery requests propounded by Petitioner in this case are narrowly tailored to elicit evidence specific to Petitioner's individual circumstances and conduct. The requests relate to him personally, seeking evidence bearing on the Government's determination that he was an enemy combatant at the time of his capture, that by his conduct he falls within the categories identified in the President's Military Order, as well as evidence concerning the conditions of his confinement that bear on the reliability of whatever prejudicial admissions the Government conceivably may have obtained from him during his lengthy incarceration.

In Hamdi, the Government acknowledged that "documentation regarding battlefield detainees already is kept in the ordinary course of military affairs." If true in that case, then presumably the same is true with respect to Mr. Hamdan. Petitioner believes that obtaining whatever documents exist concerning Mr. Hamdan's activities, capture, and detention will be

PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

crucial to his ability to show that he was not a combatant, he never planned or participated in acts hostile to the United States or its allies, and he never harbored anyone who did. Likewise, a single Rule 30(b)(6) deposition of a representative of Respondents regarding Mr. Hamdan's conduct, capture, and detention is necessary to authenticate and answer questions about the documents produced. Petitioner is prepared to travel to any location proposed by Respondents to conduct this deposition. This is a minimal imposition on Respondents, particularly when balanced against the complete deprivation of liberty suffered by Mr. Hamdan in this case, a condition imposed upon him without any process, any opportunity to review or challenge the evidence against him, or to develop and offer counter evidence in his own defense.

IV. CONCLUSION

For all of the foregoing reasons, Petitioner requests that the Court authorize discovery in the form of the Requests for Production of Documents and the Rule 30(b)(6) Deposition Notice attached to the Proposed Order submitted herewith.

Respectfully submitted this 7th day of July, 2004.

NEAL KATYAL

By /s/

Neal Katyal, D.C. Bar #462071
600 New Jersey Avenue, NW
Washington, D.C. 20001
(202) 662-9000
Attorney for Petitioner

LIEUTENANT COMMANDER CHARLES SWIFT

By /s/
Lieutenant Commander Charles Swift
N.C. Bar #21084
Petitioner, as Next Friend for Salim Ahmed Hamdan

PERKINS COIE LLP

By /s/ Harry H. Schneider, Jr.
Harry H. Schneider, Jr., WSBA #9404
Joseph M. McMillan, WSBA # 26527
David R. East, WSBA #31481
Charles C. Sipos, WSBA #32825
Attorneys for Petitioner

PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this 7th day of July, 2004, I caused to be served a true and correct copy of **Petitioner's Motion for Order Authorizing Limited Discovery** and **[Proposed] Order Granting Petitioner's Motion for Order Authorizing Limited Discovery** upon the following, at the addresses stated below, via the method of service indicated:

Mr. John McKay
Brian C. Kipnis
U.S. Attorney's Office
601 Union Street, Suite 5100
Seattle, WA 98101

X	Via hand delivery
___	Via Certified Mail, Return Receipt Requested
___	Via Overnight Delivery
___	Via Facsimile
___	Via E-filing

DATED at Seattle, Washington, this 7th day of July, 2004.

PERKINS COIE LLP

By /s/ Harry H. Schneider, Jr.
Harry H. Schneider, Jr., WSBA #9404
Joseph M. McMillan, WSBA # 26527
David R. East, WSBA #31481
Charles C. Sipos, WSBA #32825
Attorneys for Petitioner

PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 583-8888