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 OPPOSITION TO RESPONDENTS' MOTION TO DISMISS OR TRANSFER

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I. PRELIMINARY STATEMENT

Respondents' motion to dismiss for lack of standing should be denied because (1) Salim Hamdan has no meaningful access to the Court, and Lt. Commander Swift is truly devoted to his best interests, making Swift a proper "next friend" to bring this action on behalf of Hamdan, and (2) even in the absence of next friend status, Swift has third party standing.

Respondents' motion to transfer venue should be denied because (1) this is primarily a mandamus case, governed by the permissive venue provisions of 28 U.S.C. § 1391(e), (2) Swift is a resident of this District, such that venue in this Court is proper, (3) neither the convenience of the parties nor the interests of justice are served by transfer of this case, given the paramount importance of speedy adjudication and the inevitable delay that will result from transfer, and (4) even if mandamus were not available here (which it is), the recent decisions in Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) and Gherebi v. Bush, No. 03-55785, WL 1534166 (9th Cir. July 8, 2004) ("Gherebi II") do not require transfer.

The only evidence before the Court is that submitted by Petitioner, which goes to issues such as Hamdan's inaccessibility, his mental competence, restrictions on Swift in his efforts to represent Hamdan, Swift's place of residence, the connections of this case to the forum, and the harm resulting from delay. This uncontroverted evidence, and the legal authority discussed below, establish that Swift has standing and that venue is proper in this Court. For these reasons, Respondents' motion should be denied.

II. ARGUMENT

A. Lt. Commander Swift Has Standing as "Next Friend" to Hamdan

The Petition and supporting declarations set forth facts establishing that Swift serves as a proper next friend in this case. Under Whitmore v. Arkansas, 495 U.S. 149 (1990), two criteria must be satisfied for next friend status: (1) "an adequate explanation . . . why the real party in interest cannot appear on his own behalf" and (2) the next friend "must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate." Id. at 163. Respondents dispute only the first of these factors, on the basis of meetings at Guantanamo that the Government has permitted between Swift and

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Hamdan, and on Swift's success in obtaining a signed affidavit from Hamdan. The Government authorized the meetings only for the purpose of assisting Hamdan in the negotiation of a plea agreement, and they have occurred at the Government's sufferance, not as a matter of right recognized by the Government. At the time the affidavit was signed and the Petition filed, there was a grave risk that Swift would never see Hamdan again, and that Hamdan would have no ability to communicate again with the Court. To pretend that Hamdan has unimpeded access to the Court because he has a military lawyer who is under orders from the President *not* to bring a federal lawsuit on Hamdan's behalf is to ignore the realities of this situation.

1. Hamdan Lacks Meaningful Access to the Courts

There is considerable irony, not to mention audacity, in the Government's assertion that Hamdan has access to the courts and could bring this Petition in his own name. The primary reason for holding prisoners at Guantanamo in the first place was to deny them access to the federal courts. Now that the Supreme Court has refused to countenance that tactic, Respondents seek dismissal of this case based on the alleged access that Hamdan has, and presumably had all along. This claim is, of course, in notable tension with the fact that the Government has refused to move Hamdan even 100 yards to Camp Delta, let alone to the mainland where he might have been able to file a verified Petition in his own name. In any event, case law makes clear that the constitutional standard for access to the courts is not close to being met in this case.

It is telling that the Government can find not even one case, despite the 326 *years* of next-friend petitions, in which next friend status has been denied because of a signed affidavit or meetings with Lawyers. Indeed, such an equation would reduce the meaning of "access" to virtually nothing. As the Court has indicated in the context of prisoners' rights, "[*m*]*eaningful* access to the courts is the touchstone." Bounds v. Smith, 430 U.S. 817, 823 (1977) (emphasis added and internal quotation marks omitted).

It is well settled that meaningful access to the courts is necessarily dependent on conditions that are wholly absent in this case:

> [A]ccess to courts entails not only freedom to file pleadings but also freedom to employ, without retaliation or harassment, those accessories without which legal

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> claims cannot be effectively asserted: a law library containing basic legal materials; legal assistance both from lawyers and from other inmates; and the ability to communicate with courts, attorneys, and public officials.[1]

Indeed, with respect to Guantanamo detainees (and not even those who, like Hamdan, have been held in solitary confinement for eight months), the Ninth Circuit recently observed:

> [I]t is evident that the detainees are being held in a secure facility in an isolated area of the world, on a United States Naval Base in a foreign country, to which United States citizens are severely restricted from traveling. The detainees are not able to meet with lawyers, and have been denied access to file petitions in United States courts on their own behalf. As stated by the district court, and conceded by the Government at argument, "***from a practical point of view the detainees cannot be said to have unimpeded or free access to court***."[2]

In this case, the undisputed facts establish that Hamdan lacks meaningful access to the courts. Unable to leave his cell, confer with other inmates, contact his family, consult or understand legal materials, speak or read English, Hamdan has no means by which to communicate with anyone outside the Naval Base other than through his infrequent and irregular exchanges with Swift. While the two have managed to confer on several occasions, such contact occurs only at the sufferance of the Government, requiring translators, security clearances, and daunting logistical arrangements that the Government can either make available, or decline to make available, at its whim. Swift serves at the

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[1] Ruiz v. Estelle, 679 F.2d 1115, 1153-54 (5th Cir. 1982) (affirming the lower court's finding of a pattern of unjustifiable obstruction of a prisoners' access to the court) (footnote omitted), modified on other grounds, 688 F.2d 266 (5th Cir. 1982); accord Bounds, 430 U.S. at 828; Cornett v. Donovan, 51 F.3d 894, 897 (9th Cir. 1995) (recognizing the affirmative obligations that states have to ensure meaningful access to inmates).

[2] Coalition of Clergy v. Bush, 310 F.3d 1153, 1161 (9th Cir. 2002) (quoting the district court, 189 F. Supp. 2d 1036, 1042 (C.D. Ca. 2002)) (emphasis added). Of course, Hamdan's situation is somewhat different because Swift has been assigned to represent him. However, Hamdan is worse off in that he is in solitary confinement, and Swift's access to Hamdan can be cut off at the whim of the Government. See Declaration of Lieutenant Commander Charles Swift ("Swift Decl.") at ¶ 9, filed herewith. In any event, the numerous other barriers, logistical and practical, make it exceptionally difficult to meet Coalition of Clergy's standard of "unimpeded or free access to court." Indeed, even when the Government provides resources to a prisoner to pursue his legal rights, a court must consider the totality of the circumstances before it can find that individual has meaningful access to the courts. See, e.g., Twyman v. Crisp, 584 F.2d 352, 357 (10th Cir. 1978); King v. Atiyeh, 814 F.2d 565, 568 (9th Cir. 1987) ("There is no established minimum requirement that a state must meet in order to provide indigent inmates with adequate access to the courts. Instead, a reviewing court should focus on whether the individual plaintiff before it has been denied meaningful access."). An individual lacks access to the court if practical impediments preclude him from using necessary resources. See, e.g., Lindquist v. Idaho State Bd. of Corrections, 776 F.2d 851, 858 (9th Cir. 1985) ("The existence of an adequate law library does not provide for meaningful access to the courts if the inmates are not allowed a reasonable amount of time to use the library.").

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pleasure of his commanding officers, and can be re-assigned from this case at any moment, completely foreclosing access to Hamdan.[3] On top of all this, the Government claims that information that Hamdan would bring to this Court's attention is "classified" or "protected."[4] Collectively, these conditions gravely impair his ability to bring this case on his own behalf, and certainly constitute an adequate explanation for why a next friend is appropriate.

2. There Are Factual Questions about Hamdan's Mental Competence After His Prolonged Incarceration in Solitary Confinement

In addition, next friend status is independently justified because of questions about Hamdan's mental competence following eight months of solitary confinement. See Declaration of Dr. Daryl Matthews dated March 31, 2004 ("Matthews Decl.") at¶¶ 8-15. Mental incompetence on the part of a detainee is a recognized basis for approving next friend standing. Whitmore, 495 U.S. at 162-63.

Solitary confinement is an "infamous punishment." In re Medley, 134 U.S. 160, 168-69 (1890). Long-term solitary confinement qualifies as oppressive pretrial incarceration, and has put Hamdan at risk of severe and possibly long-term psychological injury.[5] Symptoms of such distress have already been observed. See Matthews Decl. at ¶¶ 11, 13. Swift's request to military authorities

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[3] See Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1500 (C.D. Cal. 1988) (recognizing the "prejudice" to a detainee's case when the Government "prevent[s] attorneys from meeting with and preparing their client's cases"); cf. Ali v. Ashcroft, 346 F.3d 873, 890 n.8 (9th Cir. 2003) ("The district court further reasoned that Petitioners had made a strong showing of next friend standing because the putative class members may not have access to the court due to frequent transfer and lack of access to counsel . . .") (internal quotation marks omitted).

[4] There is no way to envision Mr. Hamdan as having "access" to the Court when the evidence for and against the Government's claim that Mr. Hamdan is properly before a military commission is evidence that Mr. Hamdan cannot see. One function of a counsel with a security clearance is to make sure that the "access" enjoyed to the court is viable.

[5] American courts have long recognized the severe impacts of solitary confinement upon mental health. See, e.g., id. at 168 ("[E]xperience demonstrated that there were serious objections to [solitary confinement]. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still committed suicide . . . ."); Bono v. Saxbe, 450 F. Supp. 934, 946-47 (D.C. Ill. 1978) (reviewing the "debilitating mental effect" on inmates imposed by the "odious" punishment of solitary confinement, and equating them with "medieval tortures such as the rack and screw."). The likelihood that Mr. Hamdan has and will continue to suffer prolonged psychological damage as a result of his solitary confinement has already "substantially affect[ed] his capacity" to "appreciate his position and [to] make a rational choice with respect to continuing or abandoning further litigation." Rees v. Peyton, 384 U.S. 312, 314 (1966). This permits next friend status. See Rohan ex rel. Gates v. Woodford, 334 F.3d 803, 817 (9th Cir. 2003) ("Requiring counsel to identify with particularity what petitioner would tell them were he competent, rather than merely the general areas where he could potentially assist, sets an unrealistically high bar under the circumstances.")

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that they permit an independent psychological evaluation of Hamdan has been denied. Under these circumstances, where genuine questions exist concerning Hamdan's mental competence, the Ninth Circuit's previous case law on competence all but require the assistance of a next friend. Where, as here, the "record discloses a genuine basis for concern," there "is a threshold showing of mental incompetency" sufficient for the purposes of collateral review. See Rohan, 334 F.3d at 814 (granting a stay in habeas proceedings based on concerns about a petitioner's mental competence); Calderon v. U.S. District Court (Kelly V), 163 F.3d 350 (9th Cir. 1998) (en banc) (equitably tolling AEDPA's one-year statute of limitations for filing habeas petitions based on concerns about a petitioner's mental competence), overruled in unrelated part by Woodford v. Garceau, 538 U.S. 202 (2003). In this case, the concerns about Hamdan's mental competence are the direct result of actions taken by Respondents. The case law, and the interests of justice, require that the Court approve Swift's next-friend status.[6]

3. The Language Barrier Also Justifies Use of a Next Friend

There is yet another disability plaguing Hamdan that independently justifies Swift's service as his next friend. In clarifying the "many instances and circumstances under which it may not be possible nor feasible that the detained person shall sign and verify" a habeas complaint, the courts have confirmed that one "proper use of the 'next friend' application" comes when a prisoner cannot "understand the English language or the situation, particularly in the case of aliens . . . ." Weber v. Garza, 570 F.2d 511, 514 n.4 (5th Cir. 1978). Hamdan falls squarely within this category.[7] See Declaration of Lieutenant Commander Charles Swift ("Swift Decl.") at ¶ 3, filed herewith. This is not a situation where, through the good offices of friends, family, or others, a translator can be hired to assist Hamdan to overcome this disability. Here, with Hamdan in solitary confinement on a military

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[6] In Rohan, the court noted that "next friends and guardians who could act on an incompetent's behalf were familiar at common law." 334 F.3d at 808 (citing 1 WILLIAM BLACKSTONE COMMENTARIES *448-54). Whitmore notes that the general concept of next-friend standing "has long been an accepted basis for jurisdiction in certain circumstances." 495 U.S. at 162. Respondents do not contest this, and any reading that would limit such standing to the habeas context is further undermined by the Court's discussion of next-friend standing "outside the habeas corpus context on behalf of infants, other minors, and adult mental incompetents." Id. at 163, n. 4.

[7] While it might be feared that this rule would make next-friend standing available in immigration cases, immigrants have made a voluntary decision to come to America and could be held to a standard of constructive knowledge of the language and procedures of the United States. No such argument can be advanced for Mr. Hamdan.

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base remote from his home and family, where security clearances are required, and where civilians cannot travel except with Government permission, the language barrier is insuperable in the absence of next friend assistance. The Court should not close its eyes to these realities, nor enter the Government's Kafkaesque world whereby something as bare as a signature on a piece of paper "conclusively establishes" that Hamdan has access to the courts in his own name.

4. Concerns about Undue Expansion of the Doctrine Are Not Present Here

Whitmore merely requires that a 'next friend' must provide *an adequate explanation*—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action." 495 U.S. at 163 (emphasis added). The Supreme Court grounded its holding in a policy concern that is inapplicable in this case:

> These limitations on the "next friend" doctrine are driven by the recognition that '[i]t was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends.' . . . Indeed, if there were no restriction on 'next friend' standing in federal courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of Art. III simply by assuming the mantle of 'next friend.'

Id. at 164 (internal citations omitted). Such concerns are absent here, where Hamdan has specifically authorized Swift to serve as his next friend.

It is equally groundless to suppose that Swift is merely a litigant with some ax to grind (i.e., has only a "generalized interest in constitutional governance"), because here Swift's service as next friend is for his client, and to vindicate his own interests. See, e.g., Warren v. Cardwell, 621 F.2d 319, 321 n.1 (9th Cir. 1980).[8]

Properly read, Whitmore confirms that where the next friend is not an intruder or uninvited meddler, the "practice of a next friend applying for a writ is ancient and fully accepted." Weber, 570 F.2d at 514 n.4. Indeed, the Government's argument is precluded by Toth v. Quarles, 350 U.S. 11

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[8] The facts of Whitmore similarly confirm its inapplicability to the present case. In Whitmore, the prisoner had, in a prior evidentiary hearing in court, given a "knowing, intelligent, and voluntary waiver of his right to proceed;" the state had held a competency hearing which in turn affirmed the trial court's finding; and the prisoner's access to court was "unimpeded." 495 U.S. at 165. Indeed, the prisoner had only waived his right to appeal after being convicted on the basis of a full trial on the merits.

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(1955), a case that is central to Whitmore, 495 U.S., at 162. In Toth, next friend standing was permitted because the serviceman was in Korea, despite the fact that he had two JAG defense lawyers and civilian counsel representing him, any of whom could have filed a signed petition from Toth.[9] Nevertheless, the Supreme Court not only heard the case (a case that, on the Government's theory in Swift it lacked subject-matter jurisdiction to hear), it also invoked the venerable principle that "[t]here are dangers lurking in military trials which are sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowed jurisdiction deemed absolutely essential. . . ." 350 U.S. at 22. Likewise, in Padilla, the Supreme Court did not question the next friend standing of the attorney assigned to represent Padilla, even though this attorney had been able to meet with Padilla over many weeks when he was first taken into custody, and again after the district court ordered further access to counsel.[10] In sum, the case law

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[9] As the D.C. Circuit summarized the facts:

> On May 13, 1953, [Toth] was apprehended by military personnel at his place of employment in Pittsburgh, Pennsylvania. After various events, including conversations and statements the details of which are in dispute, he was taken by military authorities by plane to Korea, where he was confined pending investigation and trial. Two qualified military counsel were assigned to represent him, and a civilian lawyer from Pittsburgh, retained by his family, flew to Korea with the assistance of the Air Force.
>
> Toth's sister filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia. A rule to show cause was issued; after hearing the writ was issued; Toth was produced in court; a hearing was held, and Toth was ordered released. The Secretary of the Air Force appealed. The order of release was stayed pending this appeal, and Toth was given liberty under bond.

Talbott v. United States, 215 F.2d 22, 24-25 (D.C. Cir. 1954), overruled by Toth, 350 U.S. 11 (1955). See also *Toth Confused by Arrest*, N.Y. Times, May 28, 1953, at p. 4.

[10] See Padilla v. Rumsfeld, 352 F.3d 695, 703-04 (2d Cir. 2003) ("From May 15 to June 9, 2002, [Padilla's lawyer] met with him in an effort to vacate the material witness warrant and to secure his release."), reversed and remanded on other grounds by Rumsfeld v. Padilla, 124 S. Ct. 2711 (U.S. 2004); Padilla, 124 S. Ct. at 2716 n.5 ("the District Court . . . granted [Padilla] monitored access to counsel"). While Padilla, at certain points in time, may (or may not) have been less accessible to his counsel than Hamdan, the Government's present suggestion that the particular facts of that situation were the "key predicate" for next friend status is wholly without support. On the contrary, the Second Circuit held simply that Padilla's situation constituted more than sufficient grounds for next friend standing. 352 F.3d at 703 ("There is *no dispute* that Padilla is unable to file a petition on his own behalf—he is being held incommunicado.") (emphasis added). More relevant than any differences in the degree or form of accessibility is the following factual similarity: like Padilla, Hamdan

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reveals a treatment of next friend that is very different from the one implied by the Government. Indeed, courts have regarded the service of a next friend quite favorably in the context of habeas petitions, particularly when the petition has been brought by someone who is not an uninvited meddler.

Finally, it should be noted that in Hamdi, the Government did not contest the next friend status of Hamdi's father, despite the fact that it simultaneously permitted Hamdi to meet with counsel. See Govt. Br. in Opp., Hamdi v. Rumsfeld, No. 03-6696, at 26 n.11. To the contrary, the Government *used* the next-friend status to show the Supreme Court that it had afforded due process. See id. at 35-36. If Respondents' position in this case—that a meeting with a lawyer automatically precludes litigation by a next friend—were correct, then the Supreme Court would have been required to dismiss Hamdi for lack of jurisdiction. Of course, the Supreme Court did no such thing.[11]

In short, the undisputed facts of this case establish that Hamdan lacks meaningful access to the courts and requires the services of a next friend. Indeed, it is hard to imagine anyone under the control of federal or state authorities who faces greater difficulties on that score. If these facts are, as Respondents contend, insufficient to justify Swift's standing as next friend, then the next friend doctrine has become a dead letter. However, because that doctrine serves a vital role in the administration of justice, and because it is not nearly as restrictive as Respondents contend, Swift should be recognized as Hamdan's next friend.

B. Lt. Commander Swift Also Has Third Party Standing in this Action

The general principle that a "litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties," Powers v. Ohio, 499 U.S. 400, 410 (1991), does not stem from the Article III "case or controversy" requirement, but rather from

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has met with only one person in the past two years who could serve as his "next friend" in this proceeding, and as in Padilla, that person is the one bringing suit.

[11] The Government's view that Swift should be dismissed is also inconsistent with its submission to the United States Supreme Court in Padilla, which tried to keep Supreme Court jurisdiction to overrule the Second Circuit. See Brief of the United States, No. 03-1027, Rumsfeld v. Padilla, 124 S. Ct. at 10 n.4 ("Since the court of appeals' decision, the military has allowed Padilla access to respondent Newman. See n.5, infra. Because Padilla is no longer inaccessible, the petition can be amended on remand to convert it to a direct petition.").

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prudential concerns.[12] Thus, while a plaintiff must generally assert his or her own legal rights, courts have "allowed this rule to be disregarded when plaintiffs meet certain requirements." Tesmer v. Granholm, 333 F.3d 683, 691 (6th Cir. 2003), cert. granted, Kowalski v. Tesmer, 124 S. Ct. 1144 (U.S. Jan 20, 2004) (No. 03-407). See also HENRY MELVIN HART & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM at 175-76 (5th ed. 2003) (stating that modern courts "routinely" find third-party standing upon "some sort" of showing). Third-party standing is permissible where "three important criteria are satisfied: The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests." Powers, 499 U.S. at 410-11 (internal citations omitted). Respondents challenge only "injury in fact."

However, Swift has alleged a concrete and direct injury to himself – being forced to operate within an illegal and unjust set of rules and regulations that inhibit his ability to represent his client and violate the ethical code he has followed over the course of a decade-long career as a military lawyer. Swift is under orders to defend Hamdan. Yet he is also under an Order from the President not to bring federal litigation. To bring this lawsuit could expose him to penal and ethical sanctions. See Swift Decl. at ¶ 8. To not bring it would be less than his ethical duty to zealously defend his client using all means available to him under the law. In this freighted setting, this effort to declare the President's Order illegal is essential to vindicate Swift's ethical, reputational, professional, and legal responsibilities.[13] The dollars and cents at issue in other attorney-standing cases pale in comparison.

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[12] They seek to ensure ripe claims and zealous advocacy. They attempt to prevent courts from "deciding questions of broad social import where no individual rights would be vindicated and . . . limit access to the federal courts to those litigants best suited to assert a particular claim." Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 99-100 (1979). All of these concerns are satisfied here.

[13] Many have explained that ethics bars participation by attorneys in the commissions:

> It is NADCL's position, by unanimous vote . . . that it is unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation. . . . A military or a civilian lawyer…must provide a zealous and independent defense, nothwithstanding the severe limitations on counsel and the denials of

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The general ethical problems with the commissions are particularly striking in this case. At the time the Petition was filed, Swift was authorized to represent Hamdan for the sole purpose of negotiating a plea. See id. at ¶ 2. The only way Swift could vindicate his role as defense counsel, and not be subject to the possibility of termination of his attorney/client relationship should a plea not be arranged, was to litigate the legality of the Military Order itself. See id. at ¶¶ 3-9. In such a setting, the possibility of a coerced confession looms large—for the only way Hamdan could guarantee access to a lawyer would be to plead guilty. Were Swift complicit in such a coerced confession, it would have gravely undermined his reputation and ethics.

With far less for the attorney at stake, courts have recognized third-party standing. For example, in Wounded Knee Legal Defense/Offense Committee v. FBI, 507 F.2d 1281 (8th Cir. 1974), a group of lawyers successfully asserted third-party standing in cases involving the Sixth Amendment rights of their Native American clients. The court stated:

> Appellees' contention that the Committee has not alleged an actual injury sufficiently personal to present a justiciable case or controversy cannot stand in light of our decision in Nyberg v. City of Virginia, 495 F.2d 1342, 1344 (8th Cir. 1974), wherein we held that the rights of medical doctors to freely practice medicine are so 'inextricably bound up' with the privacy rights of their patients that the doctors have standing to challenge the validity of abortion laws. See also Doe v. Bolton, 410 U.S. 179 (1973). With even stronger force it may be said that a lawyer has standing to challenge any act which interferes with his professional obligation to his client and thereby, through the lawyer, invades the client's constitutional right to counsel.

> due process and attorney-client confidentiality and privilege by military commission instructions. The problem with these military commissions is that full zealous representation likely will not and cannot be achieved because of severe and unreasonable limits imposed by the government, in violation of the UCMJ and treaties the United States has signed. . . .

National Association of Criminal Defense Lawyers, Legal Ethics Opinion Regarding Military Commissions, available at http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicsopinions/ $FILE/Ethics_Op_03-04.pdf. See also REPORT OF THE ABA TASK FORCE ON TREATMENT OF ENEMY COMBATANTS, (August 2003) available at http://www.abanet.org/media/aug03/ABACivilianDefenseCounselCorrectedFinalReport Recommendation08031.pdf. Respondents mistakenly claim that Swift's argument would give "all appointed attorneys" standing, when in reality it would only give standing to those under orders to defend clients before an illegal military commission.

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Id. at 1284.[14] As these cases demonstrate, courts have been particularly generous about granting third party standing to lawyers when the treatment of a client interferes with the lawyer's professional obligations to provide effective assistance of counsel. Accordingly, even if next friend standing were unavailable to Swift, this Court should have no trouble finding that Swift has third party standing to challenge adjudicatory procedures that not only violate Hamdan's rights, but impair Swift's ability to adequately represent his client.

C. Respondents' Motion to Transfer Venue Should be Denied Because This is Primarily a Mandamus Action

1. Mandamus Is Appropriate Here Because the Primary Challenge Will Not Necessarily Affect the Fact or Duration of Confinement

Respondents argue in the alternative that the Court must transfer this action to the District of Columbia based on Gherebi II. This argument fails, however, because venue in this mandamus case is governed by the liberal venue provision at 28 U.S.C. § 1391(e), not the restrictive habeas statute, 28 U.S.C. § 2241. Respondents attempt to overcome this obvious difference from Gherebi by essentially asking the Court to dismiss Petitioner's mandamus claim as a matter of law.[15]

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[14] Likewise, in Keker v. Procunier, 398 F. Supp. 756 (D.C. Cal. 1975), the court granted third party standing to attorneys to attack prison regulations that interfered with rights to counsel. The injury to the attorneys was found in the interference with their right to practice their profession: "This court can discern no reason why attorneys should not be afforded the same scope of constitutional protection [to practice their profession] as is afforded to physicians." Id. at 760.

The Government interprets United States v. Triplett, 494 U.S. 715 (1990) to mean that third-party standing for lawyers will found only in cases where the abrogation of a client's constitutional rights has a direct financial or reputational effect on the lawyer. A direct injury exists to Swift; moreover, nothing in Triplett says what the Government says that it does. Triplett merely says that courts *have* found third-party standing in cases where lawyers assert direct financial and reputation injuries.

Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989), again, found lawyers' monetary stake *sufficient* for third-party standing. That case never said such a stake was *necessary*. Respondents' citation is misleading, particularly since the quoted portion comes from the Article III analysis, and neglects the Court's powerful words about attorney third-party standing: "The attorney-client relationship between petitioner and Reckmeyer, like the doctor-patient relationship in Baird, is one of special consequence; and like Baird, it is credibly alleged that the statute at issue here may "materially impair the ability of" third persons in Reckmeyer's position to exercise their constitutional rights. Petitioner therefore satisfies our requirements for jus tertii standing." Caplin, 491 U.S. at 623, n.3.

[15] It should be noted than in granting leave to file this motion, the Court instructed Respondents to "assume mandamus is available and still argue the venue issues, rather than go to the merits of the mandamus itself." (See transcript of July 16, 2004 status conference, at 11, Declaration of Harry H. Schneider, Jr., Ex. A.) Respondents have ignored that

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It is well settled that an action for mandamus is a proper avenue for relief when officers of the United States, particularly military ones, act in violation of the Constitution and U.S. law. See Petitioner's Memorandum in Support of Petition for Writ of Mandamus Pursuant to 28 U.S.C. § 1361 or, in the Alternative, Writ of Habeas Corpus ("Petr.'s Supp. Memo") at 7. Respondents' argument that mandamus relief is unavailable here is simply wrong. This is illustrated by Benny v. United States Parole Comm'n, 295 F.3d 977 (9th Cir. 2002), a case that Respondents themselves rely upon. In Benny, a federal parolee petitioned for a writ of habeas corpus, or for a writ of mandamus, to either terminate supervision (a form of "custody" for purposes of habeas corpus jurisdiction (id. at 989 n.9)), or to compel an early termination hearing and decision. The Ninth Circuit affirmed the district court's denial of Benny's primary request for termination of supervision, but held that it should have granted his request for a writ of mandamus to order the Parole Commission to hold a termination hearing and make a decision. Among the issues that the Ninth Circuit addressed was whether habeas or mandamus was the proper cause of action to compel the hearing. The Court held that ***habeas was not proper***, as the outcome of the hearing was uncertain, so it could not be said to definitely affect the fact or duration of confinement:

> The Commission's impropriety lies in being late in determining whether to terminate Benny's parole supervision under the Parole Act's early termination provision. This procedural violation does not affect Benny's current custody. . . . The Commission may still find that Benny is not sufficiently rehabilitated and consequently deny early termination. Benny's duration of confinement then would stand unaffected by the delay in making an early termination decision…The fact or duration of Benny's custody is not causally linked to the Commission's delay in making an early termination decision. We conclude that habeas corpus is not the proper process to compel the Commission to hold an early termination hearing and make a decision as prescribed by § 4211(c)(1) [the federal Parole Commission and Reorganization Act].

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instruction by filing what is essentially a Rule 12(b)(6) motion to dismiss Petitioner's request for a writ of mandamus, arguing that, as a matter of law, mandamus is not available. The Court's instruction quite properly recognized that in considering a threshold motion to transfer venue, the Court does not reach the merits of the claims asserted. See, e.g., McDonnell Douglas Corp. v. Polin, 429 F.2d 30, 30-31 (3d Cir. 1970) (holding that inquiry into the merits of the claims should only occur after there has been a "determination of the preliminary question of transfer," raised by a motion to transfer venue pursuant to 28 U.S.C. § 1404(a)).

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Id. at 989. Instead, the Ninth Circuit held that mandamus was proper. Id. at 990. Notably, the Court saw no difficulty with the district court disposing of certain claims pursuant to the habeas cause of action (i.e., those that went to the fact or duration of confinement) and others pursuant to mandamus (i.e., those that went to a procedure statutorily due to the petitioner).

Subsequently, in Ramirez v. Galaza, 334 F.3d 850 (9th Cir. 2003), the Ninth Circuit again addressed the scope of habeas jurisdiction, and reiterated that habeas stands as the sole cause of action ***only*** where the fact or duration of confinement is at issue. "Habeas jurisdiction is absent…where a successful challenge to a prison condition will not necessarily shorten the prisoner's sentence." Id. at 859. The Court held that a prisoner's action alleging Due Process violations could proceed under 42 U.S.C. § 1983, because, "if successful, [the petitioner] will not necessarily shorten the length of his confinement." Id. at 859.

> Where the prison's alleged constitutional error does not increase the prisoner's total period of confinement, a successful § 1983 action would not necessarily result in an earlier release from incarceration, and hence, does not intrude upon the "heart" of habeas jurisdiction.

Id. at 858.

The holdings of those cases apply here. Swift is not "challenging the very fact or duration of [Hamdan's] physical imprisonment." Respondents' Motion to Dismiss or Transfer ("Resp.'s Motion") at 11. Prior to the July 2003 finding that Hamdan is subject to the President's Military Order, Hamdan was already facing indefinite detention due to his status as an "enemy combatant." This action challenges the legality of the military commission process and the debilitating conditions of Hamdan's confinement, i.e., his solitary confinement in Camp Echo. However, as in Benny and Ramirez, remedying the procedural violations that arise from that process, and the illegal conditions of confinement, will not necessarily result in ending, or even shortening, Hamdan's detention. It is entirely possible that even after an appropriate adjudication of his status and of the claims against him (i.e., adjudication in a forum and pursuant to a process that fully respects his rights under the Constitution, laws, and treaties of the United States), he will be nevertheless be found to be an enemy combatant lawfully detained as a POW, or a war criminal duly convicted and sentenced under U.S. law as enacted by Congress, or in conformity with customary international law. Thus, the thrust of the

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Petition filed herein is not to prove facts that will require Hamdan's release, or shorten the period of his confinement, but to ensure that a process is put in place that respects his rights.

Should there be any doubt about what this Petition challenges, the *Government has admitted* that it can detain someone even after a Military Commission acquits someone because detention is a "completely different questio[n]" and that detention and commissions are "two distinct issues." On the day that Hamdan was made eligible to be tried by commission, the Defense Department stated that "there is no change to [his] status. They are being held as enemy combatants right now. They are being held simply as a function of the war on terrorism and detained because they are a threat to the United States." http://www.defenselink.mil/transcripts/2003/tr20030703-0323.html, attached as Exhibit A to the Declaration of Lieutenant Commander Charles Swift dated April 5, 2004 ("April 5th Swift Decl."). A reporter then asked:

> 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?
>
> A: (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. What we're talking about with military commissions is a criminal process so in that regard they're two distinct issues.

The Government, in effect, attacks a phantom petition when it characterizes this case as a "core" habeas action for release from confinement. Lt. Commander Swift has never once said that Hamdan ought to be released if the military commissions are found unconstitutional. It is true that Petitioner (out of an abundance of caution given the rules governing successive habeas petitions) includes within his Prayer for Relief a request that the Court, "[o]rder Respondents promptly to justify as lawful any continued detention of Mr. Hamdan" and "retain jurisdiction over this matter to permit Mr. Hamdan to respond to arguments advanced by Respondents on matters related to his continued detention." Petition for Writ of Mandamus Pursuant to 28 U.S.C. § 1361 or, in the Alternative, Writ of Habeas Corpus ("Petition") at 25. However, these aspects of the requested relief go to ***process***, and are

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sought because Respondents have been holding Hamdan for over two years without affording him any process.

Granting the requested relief in full would not necessarily affect the fact or duration of Hamdan's confinement. In this respect, Petitioner's claims for relief are no different from the claim asserted by the federal parolee in Benny that he was entitled to an early termination hearing. Mandamus rather than habeas was the proper procedure in that case because the outcome of the hearing was uncertain, and might (or might not) result in a refusal to terminate the confinement at issue. So, too, providing Hamdan with process might (or might not) result in changes in the conditions, location, or extent of his confinement. At this juncture, the outcome is entirely speculative. The Ninth Circuit has made clear that such speculation is insufficient to bar a non-habeas claim. Thus, in Neal v. Shimoda, 131 F.3d 818 (9th Cir. 1997), the Ninth Circuit allowed prisoners to bring § 1983 actions against their classification as sex offenders because a judgment in their favor would "in no way ***guarantee*** parole or ***necessarily*** shorten their prison sentences by a single day." Id. at 824 (emphases added). See also Ramirez, 334 F.3d at 858-59 (stating three times that the key inquiry is whether relief would "necessarily" alter fact or duration of confinement). In this case, all that can be said with certainty is that ordering the relief requested by Hamdan would not "necessarily" alter the fact or duration of his confinement.

The Government's argument that Hamdan can *only* bring a habeas petition is particularly inappropriate since it comes without any explanation of what policy aims Petitioner is supposedly circumventing via mandamus. Unlike Preiser v. Rodriguez, 411 U.S. 475 (1973), where the fear was that Section 1983 would permit an end-run around the exhaustion requirements set up to promote the doctrine of federalism, see id. at 489-90, the Government has not explained how or why the exhaustion rules would differ between the habeas and mandamus contexts, or whether those rules (to the extent they exist at all in the military context) would apply with the same force as something so cardinal to our system as Preiser's federalism.[16] Indeed, the writ of Mandamus enjoys a special solicitude in

[16] United States v. McVeigh, 106 F.3d 325 (10th Cir. 1997) stands only for the limited proposition that mandamus cannot be used to evade the limitations set by Congress in 18 U.S.C. § 3731 on the Government's right to appeal a criminal

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American constitutional law. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). It is exceptionally difficult to claim that mandamus—subject to a revered status at the Founding that has never dissipated—somehow evades Congressional intent. That is why the Government offers no case holding that mandamus is inappropriate when habeas corpus is available. While such an argument might be made about §1983, which after all was drafted near the time federal habeas corpus was extended to review state courts, see 14 Stat. 385 (1867), it is entirely unconvincing against the historic writ of mandamus.

In the end, Respondents' heavy reliance on Preiser is misplaced. That case does not bar this mandamus action. A further illustration of this is seen in Holmes v. United States Board of Parole, 541 F.2d 1243 (7th Cir. 1976). In that case, a prisoner requested a writ of mandamus challenging the Government's decision to classify him as a "special offender" without a hearing. The court held that mandamus relief was appropriate, rejecting the Government's reliance on Preiser for the proposition "that habeas corpus is available to a federal prisoner attacking the conditions of confinement."[17] Respondents offer not a single Ninth Circuit case to the contrary.[18] To claim that only habeas can be used to challenge failures on the part of the military to conform to its own regulations would create new law about the limits of mandamus that have never been accepted.

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case. Id. at 332. The Government has not pointed to any similar "important interests" set by Congress in this case that would be safeguarded by limiting review to the habeas statute.

[17] Id. at 1248. "In accordance" with its decision, the court noted that "several other circuits have deemed the mandamus remedy appropriate to challenge conditions of confinement." Id. (citing Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975); Workman v. Mitchell, 502 F.2d 1201 (9th Cir. 1974); Mead v. Parker, 464 F.2d 1108 (9th Cir. 1972); Taylor v. Blackwell, 418 F.2d 199 (5th Cir. 1969); Barnett v. Rodgers, 133 U.S. App. D.C. 296, 410 F.2d 995 (1969); Long v. Parker, 390 F.2d 816 (3d Cir. 1968); Toles v. Katzenbach, 385 F.2d 107 (9th Cir. 1967), vacated, 392 U.S. 662, 88 S. Ct. 2292, 20 L. Ed. 2d 1353 (1968); Walker v. Blackwell, 360 F.2d 66(5th Cir. 1966)).

[18] In Workman, the Ninth Circuit held that mandamus was an appropriate vehicle for prisoners to challenge punishment procedures in a federal penitentiary. See 502 F.2d at 1205 ("The district court unquestionably had jurisdiction, under the mandamus statute, 28 U.S.C. § 1361, to require defendants, all of whom were officers or employees of the United States, or an agency thereof, to perform the ministerial duty of complying with their own regulations."). The appropriateness of mandamus is even stronger here because Swift is not merely challenging his particular situation; rather, he is challenging a larger national policy of illegally subjecting detainees to military tribunals. In a closely similar context, the Second Circuit has observed, "[i]ndeed, the present action is a more appealing candidate for mandamus than those earlier cases, since Kahane is in effect challenging a nationwide policy of the Bureau of Prisons rather than the conditions of confinement in a single penitentiary." Kahane, 527 F.2d at 493 n.1.

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2. Habeas Claims Can Be Heard in This District Under the Doctrine of Pendent Venue

This Petition seeks primarily mandamus relief. However, to the extent that any aspect of the relief requested is addressed by means of habeas corpus, the pendent habeas claim should not affect this Court's consideration of the mandamus claims. The Ninth Circuit has found that habeas corpus and mandamus claims can exist simultaneously in the same action. See Mead v. Parker, 464 F.2d 1108 (9th Cir. 1972). This holding has been affirmed in other decisions.[19]

Moreover, even if there are some claims in this action that could only be the subject of habeas relief, those claims should nevertheless remain before this Court as pendent to the mandamus claims. Respondents completely ignore this fact, for an entirely different set of rules apply when the habeas claim is pendent to another set of claims for which venue lies. See Petr.'s Supp. Memo at 26 (citing pendent venue cases); see also Burnett v. Al Baraka Investment, 274 F. Supp. 2d 86, 98 (D.D.C. 2003); Rodriguez v. Chandler, 641 F. Supp. 1292, 1302 (S.D.N.Y. 1986). This is why the Government's invocation of Judge Matz's Gherebi decision backfires. For the policy identified by Respondents is precisely the one that underlies the doctrine of pendent venue—it would make no sense to send the habeas part of this action to the District of Columbia when (unlike in Padilla and Gherebi) mandamus claims are already properly before this Court. As such, the entire case properly belongs before this Court, even were the Petition to raise "core" habeas challenges, which it does not.

D. Swift Is a Resident of Washington, Making Venue Proper in This District under the Mandamus and Venue Act

Respondents acknowledge that the purpose of the Mandamus and Venue Act, 28 U.S.C. § 1391(e), was "to provide ***nationwide venue for the convenience of individual plaintiffs*** in actions which are nominally against an individual officer but are in reality against the Government." Resp.'s

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[19] See, e.g., DiStefano v. Fed. Bureau of Prisons, 2004 WL396999, at 3 (S.D.N.Y. Mar. 4, 2004) ("Because jurisdiction is available under both § 2241 and § 1361, it is not necessary to consider whether DiStefano may also bring a claim for a declaratory judgment under 28 U.S.C. § 2201."); Zucker v. Menifee, 2004 WL 102779 (S.D.N.Y. Jan. 21, 2004) (concluding that court has jurisdiction under *both* the federal habeas and mandamus statutes to challenge the Bureau of Prisons' policy regarding transfer of federal prisoners to halfway houses); O'Rourke v. Smith, 1983 U.S. Dist. LEXIS 13496, at *3-4, *7 (S.D.N.Y. Sept. 23, 1983) (concluding that court had "jurisdiction of these claims pursuant to 28 U.S.C. § 2241 and, alternatively, 28 U.S.C. § 1361" and stating that "conditions of confinement may be challenged by means of a petition for a writ of habeas corpus" and "pursuant to 28 U.S.C. § 1361").

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Motion at 13, quoting Stafford v. Briggs, 444 U.S. 527, 542 (1980) (emphasis added). Respondents also acknowledge that, under the statute, venue is proper in the place where the petitioner "resides." 28 U.S.C. § 1391(e)(3).[20] The Supreme Court has discussed the legislative impetus for the Act:

> Without doubt, under § 1391(e), ***venue lies in every one of the 95 federal districts***, and suits may be pending in a dozen or several dozen at any one time. 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 (emphasis added); see also Ashe v. McNamara, 355 F.2d 277, 279 (1st. Cir. 1965) (allowing plaintiff to use home district to sue the Secretary of Defense to challenge his dishonorable discharge and noting that after the adoption of § 1391 "obstacles which until recently might have impeded this suit in any district other than the District of Columbia, no longer exist."). A central animating factor for the 1962 Act was to avoid the congestion and delay that resulted when all mandamus cases had to be brought in the District of Columbia.[21]

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[20] Petitioner has never relied upon 1391(e)(4) as the Government contends, since there has not been an (e)(4) provision since 1990. See Pub. L. 101-650, § 311(3) (consolidating Sec. 1391(e)). Petitioner relies on (e)(3). The permissive venue provision of the 1962 Mandamus and Venue Act is discussed in the Memorandum of Law filed in support of the Petition. That discussion, see Petr.'s Supp Memo at 7-9, 24-25, is incorporated herein.

[21]

> Congress found that no sound reason required all actions against federal officials to be litigated exclusively in the District of Columbia (S. Rep. No. 1992, 87th Cong., 2d Sess. 3 (1962) U.S. Code Congressional and Administrative News, p. 2784, and expressed the view that the more liberal venue provisions would materially reduce congestion in the District Court for the District of Columbia which is "already heavily burdened" and where "substantial delays are incurred." H.R.Rep.No.536, 87th Cong., 1st Sess. 3 (1961).

Starnes v. McGuire, 512 F.2d 918, 923 n.2 (D.C. Cir. 1974) (citation omitted); see also id. at 932 ("Although congestion alone is not sufficient reason for transfer, relative docket congestion and potential speed of resolution is an appropriate factor to be considered.")

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Respondent's motion is a transparent attempt to turn the clock back to 1961, when suits against Government officials had to be brought in the District of Columbia. In 1962, Congress made an explicit choice to permit plaintiffs to impose some hardships on the federal Government in mandamus actions. The Padilla decision suggests that habeas corpus is governed by a quite different set of objectives.[22]

In this case, Petitioner has come forward with evidence that he resides in this District. See April 5th Swift Decl. at ¶¶ 2-7. Nevertheless, Respondents assert that a next friend is only a "nominal party," and for purposes of determining venue, courts look to the real party in interest. Respondents cite a treatise, but no cases, to support this assertion. That treatise, in turn, provides only one case dealing explicitly with venue, Blackwell v. Vance Trucking Co., 139 F. Supp. 103 (E.D.S.C. 1956).[23] Blackwell was concerned about litigants deliberately naming nominal parties in order to "create venue in the federal court." Id. at 105. In this case, by contrast, there can be no allegation that Hamdan deliberately manufactured venue. Hamdan did not select Swift because of his residence in Washington State; the Government selected Swift.

Blackwell has never been cited for the Government's venue proposition, by any court, anywhere. And whatever the merits of Blackwell, neither it nor any other case offered by the Government touches upon venue when the "real party" lacks a domicile and cannot provide a basis for venue. The cases cited by the Government merely concern situations where forum shopping concerns arise because of a conflict between the residence of the "real party" and the "nominal" one. It is not clear that forum shopping concerns are even tenable when it comes to 1391(e)(3) (see Stafford, 444 U.S. at 544 ("[w]ithout doubt, under § 1391(e), venue lies in every one of the 95 federal districts, and

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[22] See Feliciano v. Laird, 426 F.2d 424, 426 (2d Cir. 1970) ("The government raises a preliminary objection to the petition for habeas corpus, challenging the jurisdiction of the Eastern District [of New York] and this court. As we are treating this as a petition for mandamus, we do not consider the issue. Original jurisdiction to issue mandamus has been vested in the several district courts, 28 U.S.C. § 1361 (1964), and venue is proper, 28 U.S.C. § 1391(e) (1964).").

[23] The other cases are concerned with preventing litigants from manufacturing diversity jurisdiction—and thereby gaining access to the federal courts in the first instance—by naming as a nominal party a diverse citizen. Where, as here, the federal courts already have jurisdiction under both habeas and mandamus, and the only remaining question is *which* federal district this action can be brought, the concern is clearly not implicated.

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suits may be pending in a dozen or several dozen at any one time.")). And the essential point is that forum shopping is impossible when no conflict between the nominal and real parties exist. In those settings, there must be a default rule, and there is nothing to suggest that the default rule is to eviscerate (e)(3) and give the *defendants* the power to select the forum. Such a result is inconsistent with the text, history, and precedent surrounding the 1962 Act.

Finally, Respondent's argument ignores the real interest that Swift has in this action in his own right, an interest that makes him something other than a "nominal" party. Indeed, the only "nominal" parties in this case are the named Respondents. As Stafford recognized, mandamus actions "are ***nominally*** against an individual officer but are in reality against the Government." 444 U.S. at 542 (emphasis added). Thus, even if Swift is only a nominal party, Respondents offer no explanation why his convenience and choice of forum must be subordinated to that of the Respondents, who are also only nominal parties. Indeed, in light of the intention of Congress in passing the 1962 Act to place "the convenience of the plaintiff" above that of the Government where venue is concerned, Respondents appear to have it backwards. See also Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986) ("The defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum.").

Respondents also contend that Swift is only *domiciled* in this district; his *residence* is in Virginia. This is entirely wrong. The Government offers not a single case to contradict the well-settled principle in American Conflicts-of-Law that govern residence and domicile of military officers.[24] The general rule is that "[f]or purposes of the venue statutes, residence of an individual is

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[24] Courts have long allowed military personnel to treat their location before enlistment as their residence and domicile for the purpose of instituting legal proceedings. See Dennett v. Dennett, 71 F.2d 975 (D.C. Cir. 1934) (allowing soldier stationed in New Jersey to claim District of Columbia as his "residence" for purpose of instituting a divorce); Harris v. Harris, 215 N.W. 661, 662 (Iowa 1927) ("Therefore a person under such circumstances cannot, in any proper sense of the term, have a residence any where other than the home he has left, since he has no choice as to where he goes, the time he can remain, or when he shall return. To gain either an actual or legal residence there is, of necessity, involved at least the exercise of volition in its selection, and this cannot be affirmed of the residence of either a soldier or sailor in active service."); Annotation, Residence or Domicile, for Purpose of Divorce Actions, of one in Armed Forces, 21 A.L.R. 2d 1163, 1180 (2004) ("Practically all of the authorities are in agreement that a person inducted into the military service retains his domicile or residence in the state from which he entered the military service and may institute an action for divorce there . . . ."); Gambelli v. United States, 904 F. Supp. 494, 496-97 (E.D. Va. 1995); Seegers v. Strzempek, 149 F. Supp. 35, 36 (E.D. Mich. 1957); Furman v. Gen. Dynamics Corp., 377 F. Supp. 37, 45 (S.D.N.Y. 1974) ("The general rule

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equivalent to permanent residence or legal domicile." 17 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 110.03; see also id. § 110.31 (repeating the same proposition for § 1391(e)).[25]

Holmes v. United States Board of Parole, 541 F.2d 1243 (7th Cir. 1976) is illustrative.[26] In that case, a federal prisoner brought a mandamus action in the district where he resided prior to being imprisoned. The Government moved to dismiss, or in the alternative, to transfer to the district of his incarceration—on the precise ground advanced here—that the prisoner's action was in reality a habeas corpus suit that must be brought where he was confined. The Court held that, even assuming that habeas was available, the district judge did not abuse his discretion in granting mandamus relief where the prisoner was challenging his "conditions of confinement." 541 F.2d at 1248. The Court stated that "we think that mandamus is all the more appropriate in this case because Holmes' attack 'is in effect [here] challenging a nationwide policy of the Bureau of Prisons rather than the conditions of confinement in a single penitentiary.'" Id. (citation omitted). With respect to venue, the Court stated: "We see no reason for purposes of venue under section 1391 to ascribe to Holmes the residence of his district of incarceration rather than the district of his ***domicile***. Accordingly, we hold that venue existed in the district court under section 1391(e)(4)." Id. at 1248-49 (emphasis added).[27]

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in New York and elsewhere is that military service in no way affects a person's domicile or permanent residence, in the absence of acts showing an intent to change it."); Turek v. Lane, 317 F. Supp. 349, 350 (E.D. Pa. 1970); Finger v. Masterson, 152 F. Supp. 224, 225 (W.D.S.C. 1957).

[25] See Kahane, 527 F.2d at 494 ("[R]esidence for the purposes of § 1391 is often interpreted as equivalent to domicile."); Ellingburg v. Connett, 457 F.2d 240 (5th Cir. 1972) (holding that residence for § 1391(e) "means neither more nor less than legal domicile" (citation omitted)); United States ex rel. Harrison v. Pace, 357 F. Supp. 354, 355 (E.D. Pa. 1973) ("For venue purposes [referring to § 1391(e)] the term 'resides' refers to domicile."); Ott v. U.S. Bd. of Parole, 324 F. Supp. 1034, 1037 (W.D. Mo. 1971) ("[I]t is settled that 'resides' for venue purposes under § 1391 refers to domicile."). This is part of a more general equivalency. See Ellingburg, 457 F.2d at 241 (quoting King v. Wall & Beaver St. Corp., 145 F.2d 377, 379 (D.C. Cir. 1945)) ("It is well established that the words 'inhabitant' and 'resident in' as used in Section 51 of the Judicial Code mean neither more nor less than legal domicile.); United States v. Harrison, 357 F. Supp. 354, 356 (1973). ("For venue purposes the term 'resides' refers to domicile . . . .").

[26] Holmes was overruled in part on other issues by Solomon v. Benson, 563 F.2d 339 (7th Cir. 1977).

[27] The Court also rejected the Government's contention that mandamus was not an appropriate vehicle to litigate complex constitutional issues. The Court concluded that "[a] transfer or dismissal by this court without prejudice so that Holmes could file an action under section 2241 [the habeas statute] would serve only to perpetuate a gross injustice in favor of preserving judicially formulated niceties which are neither required nor jurisdictional. We do not countenance such a result." Id. at 1248. "Constitutional obligations as well as statutory duties are included within the perimeters of 28 U.S.C. 1361. In cases charging a violation of constitutional rights, mandamus should be construed liberally." Id. at 1249.

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To the extent courts have ever drawn distinctions between "residence" and "domicile," they have indicated that domicile is the broader term.[28] Thus, while Swift may temporarily reside in Virginia, he still retains a residence in his domicile in Washington. After all, § 1391(e) liberalized venue for the convenience of plaintiffs. If Swift has more than one residence, it is his prerogative—and not the Government's—to decide which one he will use.

The Western District of Washington is also the most appropriate venue because there is no guarantee that Swift satisfies the requirements for an alternative residence elsewhere. For example, when a petitioner is involuntarily incarcerated or stationed somewhere against his will, courts often *require* him to file in the district of his domicile.[29] It is therefore, quite common—and at times required—for prisoners to file mandamus petitions from their domicile.[30] Indeed, the only case the Government cites that discusses the venue statutes (rather than defining "residence" and "domicile" more generally) acknowledges that it adopts a minority position contrary to the position of, for example, the Ninth Circuit. See In re Pope, 580 F.2d 620, 622 (D.C. Cir. 1978) (per curiam) ("There is

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Likewise, in order to further § 1391's goal of liberalizing venue options, other courts have employed a flexible and functional analysis. In Kahane, for example, the Second Circuit allowed an orthodox rabbi who was convicted and sentenced to prison in the Eastern District of New York to seek a writ of mandamus in the Eastern District challenging his prison conditions, even though during his probation he had moved to Israel. The Second Circuit reasoned that even though Kahane may have technically relocated to Israel, his "long-time residence in the Eastern District combined with his probation obligations to the court of that district" created proper venue for his petition for mandamus. Kahane, 527 F. 2d, at 494.

[28] "Residence is physical, whereas domicile is generally a compound of physical presence plus an intention to make a certain definite place one's permanent abode . . . ." Weible v. United States, 244 F.2d 158, 163 (9th Cir. 1957). As the Government itself concedes, Swift "may have several residences, but only one domicile." United States v. Namey, 364 F.3d 843, 845 (6th Cir. 2004) (quotations omitted).

[29] "The fact that one lives in a state under military compulsion, in the absence of any act showing an intention to establish a residence there, has been held not to satisfy the factual requirements of a residence or domicile of choice for the purposes of a divorce suit." 21 A.L.R. 1163L; see also Ellingburg v. Connett, 457 F.3d 240 (5th Cir. 1972); Nobuo Hiramatsu v. Phillips, 50 F. Supp. 167, 168 (S.D. Cal. 1943) (preventing Japanese Americans who were forcibly removed from California and placed in an Arizona "relocation center" during WWII from using their Arizona residence to claim diversity jurisdiction and sue the California citizens who imprisoned them).

[30] Billiteri v. United States Bd. of Parole, 385 F. Supp. 1217 (W.D.N.Y. 1974) (prisoner's district of residence may be where he resided before incarceration); Stone v. Bd. of Parole, 360 F. Supp. 22 (D. Md. 1973) (venue present in district of prisoner's residence before incarceration); United States ex rel. Harrison v. Pace, 357 F. Supp. 354 (E.D. Pa. 1973) (granting prisoner's petition for mandamus filed in prisoner's domicile before incarceration); Ott v. U.S. Bd. of Parole, 324 F. Supp. 1034 (W.D. Mo. 1971) (preventing prisoner from claiming district of his incarceration as his residence).

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considerable support for the notion that one does not change his residence to the prison by virtue of being incarcerated there. The law in this Circuit, however, is otherwise." (citations omitted)); Cohen v. United States, 297 F.2d 760, 774 (9th Cir. 1962) ("One does not change his residence to the prison by virtue of being incarcerated there").[31] And Pope relied on Starnes, a case that dramatically undermines this motion. See *supra* p. 28 n.21.

Finally, Respondents' argument fails to recognize that Hamdan has a very significant connection to the Western District of Washington through counsel at Perkins Coie, who are located here. Indeed, Perkins Coie attorneys and staff in this district have invested hundreds of hours in litigating this case. (Schneider Decl. ¶ 2.) Courts have held that the location of counsel is relevant to the venue determination. See, e.g., Padilla ex rel. Newman v. Bush, 233 F. Supp. 2d 564, 587 (S.D.N.Y. 2002) (subsequent history omitted) (noting that Padilla's lawyers were in the district and denying Government's motion to transfer). Likewise, this Court has already devoted valuable and scarce judicial resources to the matter, which goes to speed of adjudication and the overall "interests of justice" factor in venue determinations. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 279 (9th Cir. 1979) (affirming district court's denial of motion to transfer venue based in part on the court's familiarity with the case, and the prospect that transfer would likely lead to delay); see also Intranexus, Inc. v. Siemens Medical Solutions Health Servs. Corp., 227 F. Supp.2d 581, 585 (E.D.Va. 2002) (court's speedier resolution of cases favored retaining venue).[32]

In any event, Respondents' argument concerning connection to the forum is properly part of an analysis of venue under either 28 U.S.C. § 1406(a), or 28 U.S.C. § 1404(a). However, Respondents

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[31] That many of these cases concern prisoner suits does not materially distinguish them from this petition. Swift's actual physical residence at any particular time is involuntary, it is determined by assignments from his military superiors, and more likely to reflect the Government's convenience than his own. See Manley v. Engram, 755 F.2d 1463 (11th Cir. 1985) (declaring that although defendant was stationed in Georgia and lived there with his family, his permanent home in Florida is his residence for purposes of venue); United States v. Scott, 472 F. Supp. 1073, 1076 (N.D. Ill. 1979), aff'd, 618 F.2d 109 (7th Cir. 1980).

[32] The Government's assertion that it is not convenient for Swift and his attorney to come to Seattle rings hollow. It neglects the fact that the majority of his legal team is based in Seattle, and has logged hundreds of hours on this case. The Government, holding Hamdan in a place that is virtually inaccessible in an attempt to evade the review of any court, has little credibility when it comes to addressing the "convenience" of Swift or his legal team.

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have completely failed to provide an adequate analysis under either statute. Instead of submitting evidence concerning the relevant factors that the Court should consider on such venue motions, Respondents offer nothing more than the conclusory assertion that "cases challenging the detention of enemy combatants in Guantanamo Bay have no connection with the Ninth Circuit and can best be dealt with in a single forum with a more obvious connection to the controversy." (Resp.'s Motion at 12.) That assertion, aside from misstating the nature of this case and lacking any evidentiary support for the "obvious connection" of this case to the District of Columbia, disregards the delay attendant upon transfer, which militates against transfer.

E. Even in the Absence of Mandamus, Gherebi II Does Not Require Transfer of Venue in This Case

In addition, even if mandamus were deemed to be unavailable here, the circumstances of this case differ from Gherebi II and Padilla such that a transfer of venue would be improper. Nothing in either of those cases forces ***all*** habeas actions from detainees abroad to lodge in the District of Columbia. To begin with, the Government far overreads the language in a footnote in Padilla, where the Court observed that, in two cases where American citizens detained overseas (and thus outside the territory of any district court) filed habeas petitions, "we *have allowed* the petitioner to name as respondent a supervisory official and file the petition in the district where the respondent resides." Padilla, 124 S. Ct. at 2725 n.16 (emphasis added). This retrospective *description* of prior cases does not erect some sort of prospective mandatory barrier to habeas actions being brought in other places.[33] Thus, these cases stand only for the proposition that detainees held outside the territory of any district court *may* sue national military leaders in the District of Columbia. Those cases, as well as Padilla itself, leave open the question of whether such suits *must* be heard in the District of Columbia.[34]

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[33] The two cases to which Padilla referred were Burns v. Wilson, 346 U.S. 137 (153) and United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955). In Burns, court-martial convicts detained in Guam sued the Secretary of Defense in the District of Columbia, and in Toth, a court martial convict held in Korea sued the Secretary of the Air Force in the District of Columbia. In neither case did the Court suggest that petitioners could file suit only in the District of Columbia.

[34] Instead, the Government overreads the Padilla footnote and yokes its misreading to a view espoused by only two justices in the Rasul case. Yet even in that concurrence, Justice Kennedy, joined only by Justice O'Connor, never announced the iron-clad rule the Government tries to put forth here. To the contrary, the language that the Government cites is preceded by Justice Kennedy's observation that "This does not mean that habeas petitions are governed by venue

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Indeed, Justice Scalia understood the recent decisions in Padilla and Rasul to jointly imply that detainees held overseas could bring habeas actions in any federal district: "Under today's strange holding Guantanamo Bay detainees can petition in ***any*** of the 94 federal judicial districts." Rasul, 124 S. Ct. 2686, 2711 (Scalia, J., dissenting) (emphasis added).

Gherebi II is no different. The Ninth Circuit's panel decision, without oral argument, briefing, or the opportunity for others such as *amici* to be heard, provided no rule of decision or rationale that would bind future cases. It merely said that "it *appears* to us that the proper venue for *this proceeding* is in the District of Columbia." This language can hardly be converted into a mandatory venue-transfer rule. For venue is the quintessential fact-specific inquiry that must be decided on a case-by-case basis, which explains why the Gherebi II panel carefully used the words it did, and also why the Padilla decision itself erected no bar to venue outside of the District of Columbia when challenges are brought from outside the United States. After all, the relationship of the next friend to the forum may differ, contacts between Respondents and the forum may differ, the swiftness of justice may differ, and the claims may be inapposite.[35]

There are strong reasons to believe that each of these differences is significant here. Swift's connections to the forum are significant and many, and there is no doubt that Respondents likewise have significant contacts.[36] There is no other forum in the country in which so much work has been

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rules and venue considerations that apply to other sorts of civil lawsuits"—underscoring that *other* civil actions (such as those for mandamus) are not subject to the legal rule he is trying to propose. And not once does Justice Kennedy's concurrence suggest that his proposed venue rule would govern non-core habeas challenges. It also says that, even for habeas, the general question "where the action must be filed need not be resolved with finality in this case." Padilla, 124 S. Ct. at 2728 (Kennedy, J., concurring)

[35] The Government provides a Central District of California case in another Gherebi action for Bivens damages, but that case merely confirms that pendent jurisdiction is appropriate and that one forum should hear the related claims. Furthermore, that transfer order in the Central District case is the subject of ongoing proceedings in the Ninth Circuit. We do not believe that either Gherebi decision provides guidance to the Court about what to do in this mandamus, non-core-habeas action.

[36] Approximately 53,000 men and women are stationed in Washington State. See http://www.ofm.wa.gov/pop/poptrends/poptrends_03.pdf, p. 42, 45). Respondent President Bush traveled to Spokane on June 17 to raise money for Senate Republican candidate George Nethercutt. He stayed overnight in Washington State and addressed military personnel at Fort Lewis on June 18, 2004. (http://www.whitehouse.gov/news/releases/2004/06/20040618-1.html. Respondent Secretary Rumsfeld has also visited Washington State as Secretary of Defense. See http://www.defenselink.mil/today/2002/to20020419.html.

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done on behalf of Hamdan. Unlike Gherebi II, where the Ninth Circuit was selecting between two districts that had not advanced the case beyond threshold issues, or even set a briefing schedule, here a transfer of venue would work hardship and cause delay. In the interim, Hamdan would continue to languish in solitary confinement, jeopardizing his ability to defend himself in these proceedings and in a military commission. No such adverse consequence could be shown to necessarily arise from the transfer in Gherebi.

Finally, the claims in this case are different from those at issue in Padilla and Gherebi. While Padilla articulated a strong district-of-confinement rule governing venue for habeas petitions, it limited that rule to "core habeas petitions challenging present physical confinement." Padilla, 124 S. Ct. at 2722. By contrast, when, as here, a habeas petitioner challenges adjudicatory procedures and conditions of confinement, and not necessarily the underlying factual basis for his detention, his venue options are not restricted to the district in which his custodian is located. Indeed, in this respect, the claims in this case more closely resemble those at issue in Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973), which the Supreme Court in Padilla acknowledged amounted to a challenge to "something other than…present physical confinement." 124 S. Ct. at 2720.

Because Hamdan, like Braden, does not primarily challenge the fact or duration of confinement, his habeas petition falls into a long line of cases allowing—and sometimes *requiring*—habeas petitioners to bring suit against federal officials outside of the District of Columbia. For example, the Supreme Court has long held that army reservists—who, like Hamdan, fall under the Braden exception, see id. at 2720 —may challenge their active-duty status in whichever district they have had primary contacts with army personnel. See Strait v. Laird, 406 U.S. 341 (1972). Strait found that it would "exalt fiction over reality" to require an army reservist to bring suit against his "nominal custodian" in Indiana when Strait had had no "meaningful contact" with Indiana. 406 U.S. at 344-46; see also Padilla, 124 S. Ct. at 2724. In an analogous case applying Strait, the D.C. Circuit declared that when army reservists sue the Army Secretary or other cabinet officers, they *must* file in the district with which they have had the most significant contacts and *may not* file in the District of Columbia. Eisel v. Secretary of the Army, 477 F.2d 1251 (D.C. Cir. 1973).

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Similar to the reservists in both Strait and Eisel, Hamdan has had no "meaningful contact" with *any* judicial district except this Court's, where his next friend has brought this Petition. Within this Court's district, however, Hamdan's contacts through Swift have been many and substantial. All the litigation of Hamdan's Petition has occurred in Washington.

This case thus presents the "limited circumstances" under which a custodian such as Secretary Rumsfeld can be held "present . . . through the actions of his agents." Padilla, 124 S. Ct. at 2724. There can be no doubt that Secretary Rumsfeld is "present" in the Western District of Washington for these purposes.[37] Several practical considerations also militate strongly in favor of finding venue regarding habeas. The Eisel court was particularly concerned with a flood of habeas petitions overloading the District of Columbia courts: "In short, appellants' relationship to the military located in the District of Columbia, including the various civilian Secretaries, is no different from that of any other member of the military. Thus, if we were to permit Gelber and Eisel to proceed in the District, we would be compelled to permit any inactive reservist, and perhaps any member of the military, the same privilege." Eisel, 477 F.2d at 1255 (footnote omitted).[38] Even if courts outside of the District of Columbia might be unconcerned about the potential flood of habeas petitions landing in another circuit, Eisel makes clear *that* court's concern that "such an influx could seriously overburden an already busy court system." Eisel, 477 F.2d at 1256. The extraordinary number of habeas petitions authorized by Rasul v. Bush, 124 S. Ct. 2686, 2690 (2004) (estimating that 640 prisoners are currently detained in Guantanamo, and authorizing all of them to challenge their individual detentions through

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[37] Federal courts have routinely found national officials "present" for habeas purposes throughout the entire country, and not only in the District of Columbia. See, e.g., Arlen v. Laird, 451 F.2d 684, 687 (2d Cir. 1971) ("To give the commanding officer of the Center "custody" of the thousands of the reservists throughout the United States and to hold at the same time that the commanding officer is present for habeas corpus purposes only within one small geographical area is to ignore reality."); Tartt v. Secretary of Army, 841 F. Supp. 236, 240 (N.D. Ill. 1993); Jones v. Watkins, 422 F. Supp. 1268, 1273 (D. Ga. 1976). ("the Chief of Naval Personnel, was present in this district for the very limited purpose of habeas corpus jurisdiction over the claims of these inactive reservists.").

[38] Other courts have raised similar concerns that the Government "could seriously undermine the remedy of habeas corpus by detaining illegally a large group of persons in one facility so that the resulting 'torrent of habeas corpus petitions' would overwhelm the district and magistrate judges of the local United States District Court." Nwankwo v. Reno, 828 F. Supp. 171, 174 (E.D.N.Y. 1993); see also Henderson v. INS, 157 F.3d 106, 126-28 (2d Cir. 1998) (rejecting interpretation of venue that would concentrate immigration habeas cases in District of Columbia).

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petition for habeas corpus), argues strongly against requiring a single court to hear those and this *sui generis* challenge to commissions.[39]

The fact that non-core habeas challenges are not directly governed by Padilla is made explicit in the decision itself. In footnote 8, the Supreme Court expressly declined to resolve whether habeas challenges to deportation orders are governed by the analysis it used for Padilla's core challenge. Indeed, the decision expressly left untouched the Ninth Circuit's opinion in Armentero v. I.N.S., 340 F. 3d 1058 (9th Cir. 2003), which found the Attorney General a proper respondent and suggested venue in California was appropriate. Armentero is being re-considered at this moment by the Ninth Circuit, further underscoring the point that non-core habeas challenges cannot be said to be directly governed by Padilla itself.

III. CONCLUSION

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

Respectfully submitted this 23rd day of July, 2004.

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By /s/

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[39] See Braden, 410 U.S. at 498 n.13 (stating that 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."); Strait, 406 U.S. at 435 (stating that habeas corpus statute should not be interpreted so as to create a "concentration of similar cases" in one judicial district); Armentero, 340 F.3d at 1069-70 (espousing a similar anti-concentration principle).

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IV. CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this 23rd day of July, 2004, I caused to be served a true and correct copy of **Petitioner's Opposition to Respondents' Motion to Dismiss or Transfer** 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 __ __ __ X	Via hand delivery Via Certified Mail, Return Receipt Requested Via Overnight Delivery Via Facsimile Via E-filing
Jonathan L. Marcus Appellate Section, Criminal Division U.S. Department of Justice 601 D Street, N.W., Suite 6206 Washington, D.C. 20530	__ __ X __ __	Via hand delivery Via Certified Mail, Return Receipt Requested Via Overnight Delivery Via Facsimile Via E-filing

DATED at Seattle, Washington, this 23rd day of July, 2004.

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