

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, ESAM FOUAD HAMDI,
As Next Friend of Yaser Esam Hamdi,

Petitioners,

v.

DONALD RUMSFELD,
et al.,

Respondents.

No. 2:02cv439

**RESPONDENTS' MEMORANDUM IN SUPPORT OF
MOTION FOR RELIEF FROM THIS COURT'S ORDER
DATED JULY 18, 2002, REQUIRING THE GOVERNMENT
TO FILE FEDERAL RULE OF CIVIL PROCEDURE 26(a)(1)
INITIAL DISCLOSURES**

Respondents, by and through undersigned counsel, respectfully move this Court for relief from its July 18, 2002 Order directing them to submit initial disclosures in accordance with Rule 26(a)(1) of the Federal Rules of Civil Procedure. As we explain below, that order is contrary to the language of Rule 26(a)(1)(E)(i) and (ii), which exempts this proceeding from Rule 26(a)(1)'s scope. It also runs counter to Supreme Court case law, to Rule 81(a)(2) of the Federal Rules of Civil Procedure, to the federal rules that govern habeas proceedings, and to the Court of Appeals' decision in this very case. See Hamdi v. Rumsfeld, 2002

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WL 1483908 (4th Cir. July 12, 2002). Those authorities all make clear that normal civil discovery rules do not apply in habeas cases, and that discovery is available only in limited circumstances, not automatically upon the filing of a petition.¹

I. Rule 26(a)(1)(E)(ii) Exempts From Initial Disclosures Proceedings Such As This One Involving “A Petition For Habeas Corpus.”

¹As noted in Respondents’ Rule 26 Statement, initial disclosures under Rule 26(a)(1) are inappropriate for the additional reason that the mandate has not issued, that all proceedings before this Court are stayed by order of the Fourth Circuit, and this Court therefore lacks jurisdiction to order the disclosures. The Fourth Circuit unambiguously stayed all proceedings before this Court in its June 14 Order, which provides: “The Court further stays all proceedings before the district court in connection with this detainee until resolution of this appeal and appeal No. 02-6827. All stays shall remain in effect pending further order of this Court. Order, Hamdi v. Runsfeld, No. 02-6895 (June 14, 2002) (emphasis added). Petitioner attempts to dismiss the stay issued by the appellate court as “dissolved automatically upon issuance of the court’s judgment.” Petitioner’s Rule 26 Response, at 4. But that argument ignores both the plain language of the Fourth Circuit’s stay order and the Local Rule 8 of the Fourth Circuit, which provides that, “[a]n order granting a stay or injunction pending appeal remains in effect until issuance of the mandate or further order of the Court.” Local Rule 8. The appeals court has neither issued a mandate in appeal No. 02-6827 or appeal 02-6895, nor issued any further order dissolving the stay of all proceedings before the district court in connection with this detainee. Moreover, petitioner relies on a number of cases noting that a stay pending appeal does not survive resolution of the appeal. But the holdings of those cases do not address this issue directly, see Federal Trade Commission v. Food Town Stores, Inc., 547 F.2d 247 (4th Cir. 1977) (holding that a stay pending appeal need not be vacated because it lacks res judicata effect), and the statements in those cases only reinforce this Court’s lack of jurisdiction because an appeal is not resolved until the mandate issues. See, e.g., Fourth Circuit Internal Operating Procedure 41.1 (“On the date of issuance of the mandate, the Clerk of Court will issue written notice to the parties and the clerk of the lower court that the judgment of the Court of Appeals takes effect that day.”).

This Court erred in ruling that the government must file initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1) in this habeas corpus proceeding. As noted in Respondents' initial Rule 26 Statement, while Rule 26(a)(1) provides for automatic disclosure of certain categories of detailed information, it specifically exempts from its scope those parties involved in "proceedings specified in Rule 26(a)(1)(E)."² The exempted proceedings include "a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence." Rule 26(a)(1)(E)(ii).

This exemption by its plain terms applies to this proceeding, which is undisputedly a "petition for habeas corpus." This Court nevertheless ruled the exemption inapplicable because it viewed the exemption as limited to "proceeding[s] to challenge a criminal conviction or sentence." July 22, 2002

² Fed. R. Civ. P. 26(a)(1) permits exceptions to the initial disclosure obligation by providing that "in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must" make initial disclosures. Petitioner seizes on this language to contend (Petitioner's Response To Respondents' Refusal To File Rule 26 Disclosures at 4) that the Court may override the exemptions set forth in Rule 26(a)(1)(E) and require additional initial disclosures. That gets it backwards. The language petitioner relies on authorizes a court to create additional exemptions from the initial disclosure obligation on a case-by-case basis, not to require additional initial disclosure obligation in cases expressly exempted by rule.

Order at 1. In so holding, this Court apparently concluded that the phrase “to challenge a criminal conviction or sentence” modified not only “other proceeding,” but also “a petition for habeas corpus.” But that conclusion cannot be reconciled with the plain language of the statute, as the Supreme Court held this past term with respect to a similar disjunctive “or” formulation.

In Department of Housing and Urban Development v. Rucker, 122 S. Ct. 1230 (2002), the Supreme Court adjudicated a challenge to the Anti-Drug Abuse Act, which provides that each public housing agency shall utilize leases which allow the agency to terminate the lease of any tenant in the event of, inter alia, “any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.” 42 U.S.C. 1437d(1)(6) (Supp. V 1994). The Supreme Court rejected the public housing tenants’ contention, embraced by the en banc Ninth Circuit Court of Appeals, that the phrase “under the tenant’s control” modified not only “other person,” but also “member of the tenant’s household” and “guest.” The Supreme Court explained that “this interpretation runs counter to basic rules of grammar[,]” because “[t]he disjunctive ‘or’ means that the qualification applies only to ‘other person.’” 122 S. Ct. at 1234.

By the same token, the disjunctive “or” in Rule 26(a)(1)(E)(ii) means that the qualification, “to challenge a criminal conviction or sentence,” applies only to “other proceeding.” The phrase “petitions for habeas corpus” is unmodified, so that all habeas petitions are exempted from Rule 26(a)(1)’s initial disclosure requirement. That reading is not only the grammatically correct one according to the Supreme Court, but is the one that makes the most sense of the Rule. There is no apparent reason that initial disclosures would apply to all habeas petitions except those that challenge a criminal conviction or sentence. Indeed, because habeas petitions outside the criminal context are relatively rare and often involve challenges to executive action where deference is appropriate, for example, in immigration or selective service cases, a contrary reading of the Rule would presumptively require initial disclosures in the category of cases in which such disclosures are least likely to be useful. On the other hand, because all habeas proceedings have long been treated as not subject to the normal rules of civil discovery, see infra, the exemption of all habeas petitions from Rule 26(a)(1)’s initial disclosure requirement makes sense. The most plausible explanation for the Rule drafter’s inclusion of the phrase “or other proceeding to challenge a criminal conviction or sentence” was not to limit the scope of the exemption to a subset of habeas petitions, but rather, to make clear that the exemption applied to all habeas

petitions and to functionally similar proceedings used to challenge criminal convictions and sentences, such as motions under 28 U.S.C. 2255, which are not technically petitions for habeas corpus. See Rules Governing Section 2255 Cases.

II. Supreme Court Decisions, Fed.R.Civ.P. 81(a)(2), and the Rules Governing Habeas Proceedings Reinforce The Plain Language Reading of Rule 26(a)(1)(E)(ii)'s Habeas Petition Exemption.

This Court's holding that the initial disclosure rules apply to this habeas proceeding cannot be reconciled with the principle – set forth in Supreme Court cases and embodied in the Section 2254 and 2255 Rules – that discovery is subject to “significant restriction[s],” In re Pruett, 133 F.3d 275, 281 (4th Cir. 1997), in habeas cases. As the Supreme Court has explained in rejecting the application of a specific federal civil discovery rule to habeas proceedings, “it is clear that there was no intention [by the drafters of the Federal Rules of Civil Procedure] to extend to habeas corpus, as a matter of right, the broad discovery provisions which, even in ordinary civil litigation, were one of the most significant innovations of the new rules.” Harris v. Nelson, 394 U.S. 286, 295 (1969) (internal quotation marks omitted). The Harris case involved Rule 81(a)(2) of the Federal Rules of Civil Procedure, which provided that the Civil Rules were not applicable to habeas cases “except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law

or suits in equity.”³ The Court held that Rule 81(a)(2) precluded application of Rule 33 (governing interrogatories) to habeas cases. The Court reasoned that “it is difficult to believe that the draftsmen of the [Civil] Rules or Congress would have applied the discovery rules without modification to habeas corpus proceedings because their specific provisions are ill-suited to the special problems and character of such proceedings,” 394 U.S. at 296, and because there was no indication that “habeas corpus practice” with respect to the “development of evidence” had conformed to the practice in actions at law or in equity, *id.* at 294. The Supreme Court nevertheless held that a district court could authorize some discovery procedures, including interrogatories, but only “in appropriate circumstances,” when “confronted by a petition for habeas corpus which establishes a prima facie case for relief.” *Id.* at 290 (emphasis added).

Consistent with the Harris holding that discovery is available in habeas cases in limited circumstances only, see Bracy v. Gramley, 520 U.S. 899, 904 (1997) (“A

³ By the time of the Court’s decision, Rule 81(a)(2) had been changed to its current version, which provides that the civil rules “are applicable to proceedings for * * * habeas corpus * * * to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions.” The Court determined that this change in language was not relevant to the question whether the civil discovery rules were intended to apply to habeas corpus proceedings. Harris, 394 U.S. at 293 n.3.

habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course.”), the Supreme Court proposed and Congress enacted Rules governing Section 2254 and 2255 cases that permit civil discovery only “for good cause shown.” Rule 6(a), Section 2254 Rules; Rule 6(a), Section 2255 Rules. See Bracy, 520 U.S. at 909 (“Habeas Corpus Rule 6 is meant to be ‘consistent’ with Harris.”); Stanford v. Parker, 266 F.3d 442, 460 (6th Cir. 2001) (“Habeas petitioners have no right to automatic discovery.”); Barnabei v. Angelone, 214 F.3d 463, 474 (4th Cir. 2000) (discovery available in Section 2254 cases only on “good cause shown”). In this Circuit, “Good cause is shown if the petitioner makes a specific allegation that shows reason to believe that the petitioner may be able to demonstrate that he is entitled to relief.” Quisenberry v. Taylor, 162 F.3d 273, 279 (4th Cir. 1998). As Harris, Bracy, and Federal Rule of Civil Procedure 81(a)(2) indicate, this “good cause” standard for habeas cases precludes operation of Rule 26(a)(1)'s automatic discovery provisions.⁴ Cf.

⁴ Although by its terms, “Habeas Corpus Rule 6” applies only to Section 2244 and 2245 cases, Federal Rule of Civil Procedure 81(a)(2) still would bar application of the automatic disclosure rules to this habeas proceeding because, as the Supreme Court concluded in Harris, the draftsmen of Rule 81(a)(2) “did not contemplate that the discovery provisions of the [civil] rules would be applicable to habeas corpus proceedings,” 394 U.S. at 295-296, for there was no “general discovery practice in habeas corpus proceedings prior to adoption of the Federal Rules of Civil Procedure,” id. at 295; see also id. at 294 (no indication that habeas

Browder v. Director, Department of Corrections, 434 U.S. 257, 269 & n.14 (1978)

(“The procedure for responding to the application for a writ of habeas corpus * * * is set forth in the habeas corpus statutes and, under Rule 81(a)(2), takes precedence over the Federal Rules.”); Pitchess v. Davis, 421 U.S. 482, 489 (1975) (exhaustion requirement for federal habeas corpus relief renders inoperative federal civil rule providing for relief from judgment).

In this case, petitioner has not established “good cause” to conduct any discovery, and such a determination could not be made in any case until the government files its return.⁵ The petition clearly does not “establish[] a prima facie case for relief.” Harris, 394 U.S. at 290. Indeed, it simply raises two legal

discovery practice had conformed to civil practice) . See Rule 81(a)(2) (Federal Rules of Civil Procedure will apply to habeas proceedings only when the habeas practice had previously conformed to the practice in civil actions).

⁵ In “Petitioner’s Response To Respondents’ Refusal To File Rule 26 Disclosures,” petitioner claims (pp. 4-5) that Rule 6(a) governing Section 2254 and 2255 cases, as well as the Bracy decision, support this Court’s initial disclosure order because those authorities confer “discretion” upon the district court to impose discovery obligations in habeas cases. But petitioner never mentions that, under the very authorities upon which he relies, such “discretion” is unavailable in the absence of a showing of “good cause.” Indeed, in Bracy, the Court permitted discovery only upon a solid showing of “good cause,” 520 U.S. at 908, which included “specific allegations,” and specific evidence, that supported petitioner’s claim that his trial judge was biased, id. at 909. See Murphy v. Johnson, 205 F.3d 809, 814 (5th Cir. 2000).

challenges to the next friend's detention. The government's return, which is not due to be filed until July 25, 2002, will establish that petitioner's legal challenges are without merit, that the detainee is being lawfully detained, and that the petition should be dismissed without the need for any factual development or discovery. In particular, the return will demonstrate that the United States has a valid basis for detaining Yaser Hamdi as an enemy combatant. In light of the deference owed to the Executive Branch regarding that determination, see Hamdi v. Rumsfeld, 2002 WL 1483908, at *3 (4th Cir. July 12, 2002), the petition does not provide any basis to obtain discovery. See, e.g. United States v. Tubwell, 37 F.3d 175, 179 (5th Cir. 1994) ("An evidentiary hearing is not required if the record is complete or the petitioner raises only legal claims that can be resolved without the presentation of additional evidence."); see Petitioner's Response To Respondents' Refusal To File Rule 26 Disclosures at 5 (citing only legal reasons for relief).

III. Rule 26(a)(1)(E)(i) Exempts From Initial Disclosures Proceedings Involving "An Action For Review On An Administrative Record."

Rule 26(a)(1)'s initial disclosure rules do not apply for the additional reason that this proceeding is akin to "an action for review on an administrative record." Rule 26(a)(1)(E)(i). Indeed, the major difference between this case and the more typical administrative review action is that the level of deference is greater, and the

scope of judicial review is correspondingly more limited.

Petitioner is challenging a detention, which is the product of the Department of Defense's determination that the detainee is an "enemy combatant." The Fourth Circuit has already made clear that the Defense Department's determination is entitled to substantial deference. See Hamdi, 2002 WL 1483908, at * 3 ("This [great] deference extends to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle."). In these circumstances, "[t]he role of the court is not to conduct its own investigation and substitute its own judgment for the administrative agency's decision." Preserve Endangered Areas of Cobb's History, Inc. v. United States Army Corps of Engineers, 87 F.3d 1242, 1246 (11th Cir. 1996). To the contrary, the "task of the reviewing court is to apply the appropriate * * * standard of review * * * to the agency decision based on the record the agency presents to the reviewing court." Ibid. (quoting Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-744 (1985)) (emphasis added). Rule 26(a)(1)(E)(i) exempts such proceedings from Rule 26(a)(1)'s initial disclosure requirement because review is necessarily limited to the administrative record and additional discovery is not appropriate. Those principles apply, a fortiori, in this context. Here, as the return will make clear, judicial review, at most, ensures that the armed forces had some

evidence on which to base their decision. Review is limited to the proffered basis for the detention, and additional discovery is neither necessary nor appropriate.

In its July 22, 2002 Order, this Court noted that the Fourth Circuit had observed that respondents offered to support their decision with a declaration that is “factual in nature,” and which should therefore “come first before the district court.” Order at 2 (quoting Hamdi, 2002 WL 1483908, at *5 (4th Cir. July 12, 2002)). However, there is no tension between this observation and the fact that discovery is unnecessary because review is limited to the proffered basis for detention put forth by the armed forces. The administrative record generally is full of material that is “factual in nature.” Rule 26(a)(1)(E)(i) exempts administrative review cases from the initial disclosure requirement not because administrative review cases involve no facts, but because the court’s review is limited to the administrative record and discovery outside the record is inappropriate. The same principles make clear that discovery, and the Rule 26(a)(1) initial disclosures that lay the groundwork for such discovery, are not appropriate here, even though the government’s return will rely on a declaration that is factual in nature.

IV. Initial Disclosures Are Not Appropriate In The Circumstances Of This Action.

Even if (contrary to the discussion above) this proceeding were not among

the proceedings expressly exempted from initial disclosures as a categorical matter under Rule 26(a)(1)(E), Rule 26(a) permits case-by-case exemptions based on “the circumstances of the action.” Fed. R. Civ. P. 26(a)(1)(E); see also Fed. R. Civ. P. 26(a)(1) (authorizing court to exempt by order proceedings in addition to the categorical exemptions set forth in Rule 26(a)(1)(E)). This proceeding presents the most compelling possible case for exemption from the rule. The Court of Appeals made clear that courts should not “saddl[e] military decision-making with the panoply of encumbrances associated with civil litigation,” Hamdi, 2002 WL 1483908, at * 5, but that is what this Court’s July 18, 2002 Order to submit initial disclosures does. Moreover, because this petition can be resolved without the need for discovery, this case presents a clear instance of a proceeding in which initial disclosures under Rule 26(a)(1) would serve no purpose. Providing a list of witnesses and describing in detail the nature and location of documents and other items on which the military might rely in proving petitioner’s “enemy combatant” status is a burdensome requirement that is not appropriate under the separation of powers for this Court to impose. As the court of appeals pointedly explained, “allowing alleged combatants to call American commanders to account in federal courtrooms would stand the warmaking powers of Articles I and II on their heads.” Id. at * 6. Yet the required disclosures have no purpose other than to facilitate the

very kind of proceeding the court of appeals concluded would be unconstitutional.

The initial disclosure order should therefore be rescinded.

* * * * *

In sum, respondents believe that for a variety of reasons, Rule 26 initial disclosures are not appropriate in this case, and respondents respectfully request relief from this Court's Order requiring such disclosures. Respondents believe these objections are consistent with the Fourth Circuit's emphasis on employing "the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." Hamdi, 2002 WL 1483908 at *6. Although the initial disclosures themselves may not be terribly intrusive, they necessarily envision further discovery. Such discovery is precisely the kind of intrusive measure that is inappropriate and unnecessary.

On the other hand, respondents do not wish to withhold the factual and legal bases for its lawful detention of Yaser Hamdi. Accordingly, respondents have furnished the attached letter to the currently-appointed counsel for Hamdi's next friend, which makes clear that respondents will rely in their return on a declaration from Michael Mobbs, a Special Assistant to the Undersecretary of Defense for Policy. That respondents plan to rely on such a declaration does not make

discovery or initial disclosures under Rule 26 appropriate, but it does indicate the factual materials on which respondents plan to rely.

CONCLUSION

For the reasons stated above, Respondents respectfully request this Court relieve them from its July 18, 2002 Order requiring them to submit Rule 26 disclosures.

Respectfully submitted,

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Dated: July 24, 2002

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was hand delivered this 24th day
of July, 2002, to:

Larry W. Shelton
Jeremy C. Kamens
Office of the Public Defender
150 Boush St., Suite 403
Norfolk, VA 23510

A handwritten signature in cursive script, reading "Susan L. Stott", is written over a solid horizontal line.



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July 24, 2002

Via Hand Delivery

Larry W. Shelton
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Re: *Yaser Esam Hamdi, et al. v. Donald Rumsfeld, et al.*
Civil Action 2:02cv439

Dear Mr. Shelton and Mr. Kamens:

Without waiving their objections to the Court's order that they make initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1), respondents make the following disclosures:

Rule 26(a)(1)(A) Individuals:

Michael Mobbs
Special Assistant to the Undersecretary
of Defense for Policy
Department of Defense

Declaration

Rule 26(a)(1)(B) Documents, Data Compilations and Tangible Things:

Declaration of Michael Mobbs

Documents or tangible things submitted in Civil Actions 2:02cv348, 2:02cv382 and 2:02cv439

Al Qaida Training Manual, available at www.usdoj.gov:80/ag/trainingmanual.htm.

Other documents or tangible things that may be identified or developed during the course of this litigation.

Rule 26(a)(1)(C) Computation of Damages Claimed by Disclosing Party:

Not applicable

Rule 26(a)(1)(D) Insurance Agreements:

Not applicable

Sincerely,

Paul J. McNulty
United States Attorney

By: 
Lawrence R. Leonard
Managing Assistant United States Attorney