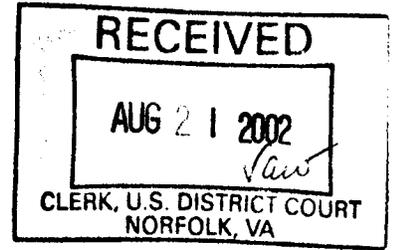


IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION



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

Petitioners,

v.

CASE NO. 2:02CV439

DONALD RUMSFELD
Secretary of Defense

COMMANDER W.R. PAULETTE,
Norfolk Naval Brig

Respondents.

**PETITIONER'S RESPONSE TO RESPONDENTS' MOTION FOR
CERTIFICATION OF INTERLOCUTORY APPEAL AND FOR STAY**

Respondents' Motion for Certification reflects a scorched-earth attempt to appeal almost every Order issued by this Court, thereby prolonging the indefinite detention of Petitioner Hamdi by indefinitely protracting this litigation. Respondents seek to appeal this Court's August 16, 2002, Order, which held that a two-page declaration by Michael H. Mobbs¹ provided an insufficient basis upon which to engage in meaningful judicial review of Respondents' determination that Petitioner Hamdi is an "enemy combatant." (Aug. 16, 2002, Order at 14.)

¹ Mr. Mobbs, an attorney, is purportedly a "special advisor" to the Under Secretary of Defense for Policy. Respondents' Response To, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus, Ex. 1 (hereinafter "Mobbs Declaration").

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In effect, Respondents are seeking to pretermite three critical questions that must be decided before this case can be resolved: (1) whether the international armed conflict that purportedly justified Petitioner Hamdi's imprisonment is over; (2) whether 18 U.S.C. § 4001(a) requires Petitioner Hamdi either to be charged with a federal crime or released; and (3) whether the Due Process Clause requires that an American citizen, named as an enemy combatant by a "special advisor" to the Under Secretary of Defense for Policy, must be afforded the opportunity to respond to that allegation. In order for appellate review of this Court's evaluation of the Mobbs Declaration to advance this litigation in any way, the answer to these three questions must be "no."

The premise of Respondents' Motion, of course, is that if the Mobbs Declaration is sufficient to establish that Petitioner Hamdi is an enemy combatant for the purpose of these proceedings, then his indefinite detention is lawful. And this Court ultimately may agree that regardless of the termination of the international armed conflict with the Taliban, or the plain language of 18 U.S.C. § 4001(a), or Petitioner Hamdi's response to Respondents' characterization of his activities in Afghanistan, Respondents are permitted to incarcerate American citizens based only on a few words by a "special advisor" to the Under Secretary of Defense for Policy. At the very least, however, this Court should have the opportunity to speak to these issues—to rule on the premise of Respondents' Motion—before this case makes another visit to the United States Court of Appeals for the Fourth Circuit. In other words, this Court must be allowed the opportunity "to address the many serious questions raised by Hamdi's case," *Hamdi v. Rumsfeld*, No. 02-6895, 2002 WL 1483908, at *3 (4th Cir. July 12, 2002), so that the record upon which appellate review is made will be a complete one.

Because Respondents have failed to satisfy the considerable requirements to obtain certification for interlocutory review under 28 U.S.C. § 1292(b), the Court should deny Respondents' Motion for Certification. Nonetheless, should the Court believe, as it indicated during the August 20, 2002, teleconference between it and counsel, that certification of its August 16, 2002, Order is appropriate, Petitioner Hamdi respectfully requests that the Court take Respondents' Motion for Certification under

advisement—and stay the portion of the August 16, 2002, Order that requires Respondents to provide additional information—until the Court has had an opportunity to rule on the three issues outlined above. Petitioner Hamdi respectfully suggests that this procedure will ensure that both this Court and the appellate courts will have an opportunity to fully address Respondents’ argument that the Mobbs Declaration is a sufficient basis upon which to justify the indefinite solitary imprisonment of an American citizen.

I. The Court Should Not Certify an Interlocutory Appeal Because the Sufficiency of the Mobbs Declaration is Neither “Controlling” Nor Solely a Question of Law, and an Appeal Would Not Materially Advance this Litigation

Respondents’ Motion for Certification reflects their view that Mr. Mobbs’ classification of Petitioner Hamdi as an enemy combatant is “the first and final word” on the issue. *Hamdi*, 2002 WL 1483908, at *4. The Court’s ruling on whether the Mobbs Declaration sufficiently describes the basis upon which Respondents named Petitioner Hamdi as an enemy combatant, however, is not a “controlling” issue in this case. Nor is it solely a question of law. Most importantly, another interlocutory appeal in this case would not materially advance this litigation. Accordingly, the Court’s August 16, 2002, Order is ineligible for certification pursuant to 28 U.S.C. § 1292(b).

28 U.S.C. § 1292(b) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b). This statutory language requires the Court to determine: (1) whether the Court’s August 16, 2002, Order involved a “controlling question of law”; (2) whether there is “substantial ground

for difference of opinion” with respect to the applicable legal principles; and (3) whether an immediate appeal would “materially advance the ultimate termination of the litigation.” *See President and Directors of Georgetown v. Madden*, 660 F.2d 91, 96-97 (4th Cir. 1981).

Whether to certify an order for interlocutory appeal is an issue that is committed to the discretion of this Court. Nonetheless, the exercise of the Court’s discretion is circumscribed by “the congressional policy against piecemeal appeals.” *See Switzerland Cheese Ass’n v. Horne’s Market, Inc.*, 385 U.S. 23, 25 (1966). As the Fourth Circuit has explained, “piecemeal review of decisions that are but steps toward final judgments of the merits are to be avoided, because they can be effectively and more efficiently reviewed together in one appeal from the final judgments.” *James v. Jacobson*, 6 F.3d 233, 237 (4th Cir. 1993). Appeals pursuant to § 1292(b) therefore are “to be confined to exceptional cases ‘where a decision of the appeal may avoid protracted and expensive litigation, as in antitrust and similar protracted cases.’” *Medomsley Steam Shipping Co. v. Elizabeth River Terminals, Inc.*, 317 F.2d 741, 743 (4th Cir. 1963). As such, the Fourth Circuit has observed that “§ 1292(b) should be used sparingly and . . . its requirements must be strictly construed.” *Myles v. Laffitte*, 881 F.2d 125, 127 (4th Cir. 1989).

A. The Issue Presented Is Neither “Controlling” Nor a Question of Law

The Court should refuse to certify the August 16, 2002, Order because the Court’s holding that the Mobbs Declaration did not provide a “sufficient factual basis to provide this Court with information adequate to dismiss the writ of habeas corpus,” (Aug. 16, 2002, Order at 1-2), is not a “controlling” issue for purposes of § 1292(b). An issue plainly is “controlling” if its resolution would be dispositive of the litigation. In contrast, an issue would not be “controlling” if the litigation must proceed notwithstanding the resolution of that issue. *See Xoom, Inc. v. Imageline, Inc.*, No. 3:98CV542, 1999 U.S. Dist. LEXIS 21978, at *4 n.2 (E.D. Va. Sept. 3, 1999). “The mere fact that its resolution at this time *may* save pre-trial and trial effort and expense is not determinative; that of course can be said of any interlocutory appeal.”

Fannin v. CSX Transp., Inc., 873 F.2d 1438, 1989 WL 42583, at *5 (4th Cir. Apr. 26, 1989) (unpublished).

In its August 16, 2002, Order, the Court found that the Mobbs Declaration failed to provide sufficient information upon which this Court could engage in meaningful judicial review of Respondents' classification of Petitioner Hamdi as an enemy combatant. (Aug. 16, 2002, Order at 9.) Regardless of the appellate court's view of this issue, this litigation would not be resolved by a contrary conclusion. This Court still would have to determine whether Petitioner Hamdi will be allowed to contest Mr. Mobbs' thin allegations, and whether the armed conflict with the Taliban regime has concluded. Additionally, regardless of the sufficiency of the Mobbs Declaration for purposes of the detention of enemy combatants overseas, the Court will have to address whether Respondents can imprison American citizens within the United States upon such an Executive branch determination in direct violation of the plain language of 18 U.S.C. § 4001(a). This Court's ruling as to the adequacy of the Mobbs Declaration, therefore, is not "controlling" for purposes of 28 U.S.C. § 1292(b).

Repeatedly quoting dicta from the Fourth Circuit's July 12, 2002, opinion, Respondents assert that if Petitioner Hamdi is an enemy combatant, then his imprisonment is lawful. (Resp. Mot. Certification at 2-3, 3-4, 7.) For this reason, Respondents argue, a contrary ruling as to the sufficiency of the Mobbs Declaration would resolve this case. The Fourth Circuit could not have meant, however, that events occurring after the issuance of its opinion could have no effect on the legality of Petitioner Hamdi's detention. *See* Proclamation 7577 of July 17, 2002, 67 Fed. Reg. 47677 (July 19, 2002) (acknowledging change of regimes in Afghanistan). Nor did the Fourth Circuit address whether Petitioner Hamdi could have a say regarding Respondents' designation of him as an enemy combatant, particularly in light of Respondents' refusal to provide more than the barest justification for his imprisonment. In fact, the Fourth Circuit expressly declined to "blueprint" the procedures that should govern this proceeding, much less address the merits of the case. *Hamdi*, 2002 WL 1483908, at *5. Finally, the Fourth Circuit did not mention 18 U.S.C. § 4001(a), a statute that raises significant doubt as to the legality of Petitioner Hamdi's

imprisonment in Norfolk, Virginia, regardless of the reliability of his classification as an enemy combatant.² The Fourth Circuit failed to address these issues because the merits of this case were not before it when it reviewed this Court's June 11, 2002, Order. Respondents' repeated citation to dicta from the Fourth Circuit's July 12, 2002, opinion therefore should not allow them to duck issues related to the merits of this case for which they have no answers.

The Court's ruling as to the sufficiency of the Mobbs Declaration for purposes of meaningful judicial review also is not one that is strictly a question of law. At best, "it is a question of law heavily freighted with the necessity for factual assessment." *See Fannin*, 1989 WL 42583, at *5. As the Court outlined in its August 16, 2002, Order, the sufficiency of the Mobbs Declaration turns at least in part on whether it provides an adequate record upon which the Court can engage in meaningful judicial review of Respondents' enemy combatant determination. (Aug. 16, 2002, Order at 9). The Court's assessment of this question—whether there is a sufficient record upon which to engage in meaningful judicial review—requires a factual inquiry that is ill-suited to interlocutory appellate review. As the Fourth Circuit explained in the context of determinations regarding the existence of genuine issues of material fact, "it seems better to keep courts of appeals aloof from interlocutory embroilment in such factual details." *Fannin*, 1989 WL 42583, at *5.

Furthermore, the legal principle that guided this Court's August 16, 2002, Order, that the classification of Petitioner Hamdi as an enemy combatant must be subject to meaningful judicial review, is not subject to dispute. Accordingly, Respondents have failed to identify a question of law upon which there is substantial room for disagreement. The Court should refuse to certify the August 16, 2002, Order for interlocutory review.

² On June 24, 2002, counsel for Petitioner Hamdi identified the statute in a letter filed with the Fourth Circuit pursuant to Federal Rule of Appellate Procedure 28(j), and also raised the statute during oral argument before that court. In addition, the parties have filed papers with this Court—Respondents' Response to the Petition for Writ of Habeas Corpus and Petitioner's Traverse—that fully address the applicability of 18 U.S.C. § 4001(a) to Petitioner Hamdi.

B. An Appeal Would Not Materially Advance This Litigation

Finally, an interlocutory appeal of this Court’s August 16, 2002, Order would not materially advance the ultimate termination of this litigation. The premise of Respondents’ argument is that if the Mobbs Declaration sufficiently establishes that Petitioner Hamdi is an enemy combatant, this litigation is over. Neither this Court nor the Fourth Circuit, however, have squarely addressed this issue. Until this Court determines that (1) the termination of the armed conflict with the Taliban, (2) 18 U.S.C. § 4001(a), and (3) Petitioner Hamdi’s account of his activities in Afghanistan, do not affect the legality of Petitioner Hamdi’s detention, the sufficiency of the Mobbs Declaration for purposes of judicial review will have little bearing on the legality of Petitioner Hamdi’s imprisonment. The Court thus should refuse to certify its August 16, 2002, Order for interlocutory review. *See New York City Health and Hospitals Corp. v. Blum*, 678 F.2d 392, 397 (2d Cir. 1982) (“[T]he certified question is based on an assumed conflict . . . , and the district judge has not decided whether the conflict in fact exists. Appellant is therefore apparently asking us for an advisory decision based on a premise that may be destroyed. This we should not do.”).

Moreover, notwithstanding Respondents’ effort to appeal only a portion of this Court’s August 16, 2002, Order, “appellate jurisdiction [under § 1292(b)] applies to the order certified to the court of appeals, and is not tied to the particular question formulated by the district court.” *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996). In other words, neither the Court nor the parties can limit the interlocutory appeal to specific issues within the Court’s Order.

In sum, Respondents cannot satisfy the standards required to obtain certification of this Court’s August 16, 2002, Order for interlocutory review. Petitioner Hamdi therefore respectfully requests that this Court deny Respondents’ Motion for Certification.

II. Should this Court Seek to Certify an Interlocutory Appeal, It Should Do So in a Manner That Preserves Meaningful Judicial Review of Respondents’ Conduct

During the August 20, 2002, teleconference between the Court and counsel, the Court indicated that it was inclined to grant Respondents’ request for certification of the August 16, 2002, Order for

interlocutory review by the appellate court. (Aug. 20, 2002, Tr. at 11, 13, 14, 19, 20, 21, 23.) If the Court believes that certification of this Court’s August 16 Order would be appropriate, Petitioner Hamdi respectfully requests that the Court take Respondents’ Motion for Certification under advisement and stay its Order requiring that Respondents submit additional information until the Court has had an opportunity to rule on the following three questions:

1. whether the international armed conflict that purportedly justified Petitioner Hamdi’s imprisonment is over;
2. whether 18 U.S.C. § 4001(a) requires Petitioner Hamdi either to be charged with a federal crime or released; and
3. whether the Due Process Clause requires that an American citizen, determined to be an enemy combatant by a “special advisor” to the Under Secretary of Defense for Policy, must be afforded the opportunity to respond to that allegation.

These issues are integral to Respondents’ argument that the Mobbs Declaration is sufficient to justify the indefinite detention of an American citizen in the United States. Unless this Court has an opportunity to speak to these issues, however, the record will not contain this Court’s opinions on questions that go to the very heart of Respondents’ argument that the Mobbs Declaration adequately justifies the indefinite solitary imprisonment of Petitioner Hamdi. For this reason, if the Court is inclined to grant Respondents’ Motion for Certification, Petitioner Hamdi respectfully requests that the Court stay its Order requiring Respondents to submit additional material and hold Respondents’ Motion for Certification in abeyance until after it has reached these important issues.

III. Conclusion

Wherefore, Petitioner Hamdi respectfully requests that the Court deny Respondents' Motion for Certification of Interlocutory Appeal. In the alternative, Petitioner Hamdi requests that the Court hold Respondents' Motion in abeyance and stay its Order requiring Respondents to submit additional information until after the Court has had an opportunity to address the three issues identified in this Response memorandum.

Respectfully submitted,

FRANK W. DUNHAM
Federal Public Defender

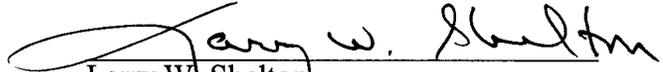
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CERTIFICATE OF SERVICE

I certify that on this 21st day of August, 2002, a copy of the foregoing was hand-delivered to Lawrence R. Leonard, Managing Assistant United States Attorney, at the Office of the United States Attorney, Eastern District of Virginia, Norfolk Division, World Trade Center, 101 W. Main, Suite 8000, Norfolk, VA 23510.


Larry W. Shelton
Supervisory Assistant Federal Public Defender