



**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)
 Secretary of Defense)
)
 COMMANDER W.R. PAULETTE,)
 Norfolk Naval Brig)
)
 Respondents.)

CASE NO. 2:02CV439

**JOINT MOTION TO SUBSTITUTE AMENDED EXHIBIT A TO MOTION
AND MEMORANDUM FOR LEAVE TO AMEND HABEAS CORPUS PETITION**

COMES NOW Petitioner Yaser Esam Hamdi ("Petitioner Hamdi"), by counsel, and Respondents Rumsfeld and Commander C.T. Hanft, by counsel, and file this joint motion to substitute, as the First Amended Petition for Writ of Habeas Corpus, Exhibit A to this motion (hereafter "Revised Exhibit A") for the Exhibit A attached to the previously filed Motion and Memorandum For Leave to Amend Habeas Corpus Petition (hereafter "Original Exhibit A").

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The Court has advised that Respondents must respond to Petitioner's motion for leave to amend the habeas corpus petition by August 25, 2004. The parties represent that with the changes to the Original Exhibit A filed with that motion which are incorporated in the Revised Exhibit A attached hereto, Respondents have no objection to the Petitioner's motion for leave to amend his habeas petition. Accordingly, Petitioner seeks to withdraw the Original Exhibit A attached to the Motion and Memorandum For Leave to Amend Habeas Corpus Petition and substitute the Revised Exhibit A attached hereto. With that substitution, the First Amended Petition For Writ of Habeas Corpus, attached to this joint motion as Exhibit A, may be filed without objection.

Respectfully submitted,

UNITED STATES OF AMERICA

YASER ESAM HAMDI

By:

By counsel



DAVID B. SALMONS
ASSISTANT TO THE SOLICITOR
GENERAL



FRANK W. DUNHAM, JR.
FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF VIRGINIA

LAWRENCE R. LEONARD
VA BAR # 37995
MANAGING ASSISTANT
UNITED STATES ATTORNEY

LARRY W. SHELTON
VA BAR # 15205
SUPERVISORY ASSISTANT
FEDERAL PUBLIC DEFENDER

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

YASER ESAM HAMDI,

Petitioner,

v.

DONALD RUMSFELD

Secretary of Defense

The Pentagon

Arlington, Va.,

COMMANDER C.T. HANFT,

Commander, Consolidated Naval Brig

1050 Remount Road

Charleston, South Carolina,

Respondents.

CASE NO. 2:02CV439

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

1. Petitioner Yaser Esam Hamdi ("Petitioner Hamdi"), a citizen of the United States of America, is being held unlawfully as an "enemy combatant" in violation of his rights under the laws and Constitution of the United States of America. He requests that the Court issue a writ of habeas corpus directing Respondents to release Petitioner Hamdi from custody.

PARTIES

2. Petitioner Hamdi is an American citizen. He is presently incarcerated and unlawfully held by Respondents at the Consolidated Naval Brig in Charleston, South Carolina, where he has been incarcerated since on or about August 2003 in solitary confinement.
3. Petitioner Hamdi was born in Baton Rouge, Louisiana, on September 26, 1980. See Exhibit A to Petition filed on June 11, 2002.

EXH. A

4. Respondent C.T. Hanft is a Commander in the United States Navy and is in command of the Consolidated Naval Brig in Charleston, South Carolina. Respondent Hanft is the custodian immediately responsible for the detention of Petitioner Hamdi.
5. Respondent Rumsfeld is the United States Secretary of Defense and Respondent Hanft's superior.

JURISDICTION

6. Petitioner Hamdi brings this action under 28 U.S.C. §§ 2241 and 2242, and invokes this Court's jurisdiction under 28 U.S.C. §§ 1331, 1350, 1651, 2201, and 2202; as well as under the Fifth and Fourteenth Amendments to the United States Constitution.
7. This Court is empowered under 28 U.S.C. § 2241 to grant the Writ of Habeas Corpus.
8. When the initial Petition was filed in this case on June 11, 2002, Petitioner Hamdi was held at the Norfolk Naval Brig located within the Eastern District of Virginia. Respondents subsequently moved Petitioner Hamdi to the Consolidated Naval Brig in Charleston, South Carolina before final judgment in this case. Accordingly, "the District Court retains jurisdiction and may direct the writ to any respondent within its jurisdiction who has legal authority to effectuate" Mr. Hamdi's release. *Rumsfeld v. Padilla*, 542 U.S. ___, ___, slip op. at 12-13 (2004).

VENUE

9. Venue is proper in the United States District Court for the Eastern District of Virginia because Petitioner Hamdi was held in this district when the initial Petition was filed and a Respondent who has legal authority to obtain Petitioner Hamdi's release remains in this district. 28 U.S.C. §§1391(b); 1391(e); *Ex parte Endo*, 323 U.S. 283, 307 (1944).

STATEMENT OF FACTS

On information and belief, Petitioner Hamdi alleges and avers as follows:

10. At all times material herein, Petitioner Hamdi was and is a citizen of the United States of America. When seized by the United States Government, Petitioner Hamdi, formerly a resident of Saudi Arabia, resided in Afghanistan.

Petitioner's Presence in Afghanistan

11. On or about July 22, 2001, Petitioner Hamdi traveled to Afghanistan from his home in Saudi Arabia.
12. At the time Hamdi went to Afghanistan, the Taliban was the recognized government of that country and the United States was not engaged in military action against that government. At that same time, the Northern Alliance was a loosely-knit coalition of warlords leading paramilitary groups, drug dealers, and guerillas in armed opposition to the Taliban Government.
13. Within days after the September 11, 2001, terrorist attacks on the United States, Petitioner Hamdi sought to leave Afghanistan and return home, but he was unable to leave because the Northern Alliance was holding parts of Afghanistan under siege and preventing free travel of persons residing in or visiting Afghanistan who were not a member of or affiliated with the Northern Alliance.

Petitioner's Seizure By The United States

14. On September 18, 2001, a Joint Resolution of Congress authorized the President to use force against the "nations, organizations, or persons" that "planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or [that] harbored such organizations or persons." Joint Resolution 23, Authorization for Use of Military Force, Public Law 107-40, 115 Stat. 224 (Sept. 18, 2001) ("the Resolution"). Acting on the Resolution, the United States initiated military action against the Taliban government of Afghanistan for harboring members of Al-Qaeda, the organization responsible for the September 11 attacks.

15. In the course of the military campaign, and as part of their effort to overthrow the Taliban, the United States provided military assistance to the Northern Alliance.
16. An "enemy combatant" is one who was "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who [was] engaged in an armed conflict against the United States there." *Hamdi v. Rumsfeld*, 542 U.S. ___, ___, slip op. at 8-9 (June 28, 2004).
17. Petitioner Hamdi is not and has never been a member of, been a part of, or provided support for any Taliban military unit or military unit of any kind hostile to the United States or its coalition partners. Petitioner Hamdi was never engaged in, nor did he intend to engage in, an armed conflict against the United States in Afghanistan or anywhere else. Petitioner Hamdi is and has always been a civilian unaffiliated with any military force.
18. On or about December 1, 2001, Petitioner Hamdi was unlawfully detained by the Northern Alliance in violation of international law. On information and belief, no U.S. personnel were present at the time of Petitioner Hamdi's apprehension by the Northern Alliance.
19. In the course of its assistance to the Northern Alliance, the United States obtained access to individuals held by various factions of the Northern Alliance.
20. On information and belief, the United States paid substantial sums of money to members of the Northern Alliance for access to individuals held by the Northern Alliance, particularly if they were not natives of Afghanistan.
21. On or about December 10, 2001, the Northern Alliance transferred Petitioner Hamdi into the custody of United States military forces.
22. For the next several weeks following December 10, 2001, Petitioner Hamdi was interrogated by United States forces at facilities located in Shorberghan and Mazar-e-Sharif, Afghanistan. Petitioner Hamdi was then transported to a U.S. facility in Kandahar, Afghanistan. At all times thereafter until he was permitted to meet with counsel in February 2004, Petitioner was

held incommunicado with the exception of infrequent and censored communication by mail with his family through the International Red Cross.

Guantanamo Bay Naval Station

23. On or about January 11, 2002, the United States military began transporting prisoners from Afghanistan to Camp X-Ray at the United States Naval Base in Guantanamo Bay, Cuba. Approximately 7,000 military and civilian people reside in Guantanamo Bay under the complete jurisdiction and control of the United States.
24. On or about January 11, 2002, the precise date unknown to Petitioner Hamdi, but known to Respondents, the United States military transferred Petitioner Hamdi to Camp X-Ray, Guantanamo Bay, where it intended to detain him indefinitely. Petitioner Hamdi was held at Camp X-Ray until April 2002.
25. The United States held Petitioner Hamdi in Guantanamo under punitive conditions although he was accused of committing no crime. It provided him no process whatever to assert a claim that he was not a combatant or other detainable person.
26. On information and belief, the United States held Petitioner Hamdi without any reason to believe that he had violated the laws of war, was a member of al Qaeda, or a terrorist.
27. On information and belief, the United States' sole factual basis for transferring Petitioner Hamdi to Guantanamo for indefinite detention instead of releasing him in Afghanistan was that he was not a native of Afghanistan and was received from the Northern Alliance. The principal purpose of this detention was to obtain intelligence information from Petitioner Hamdi.

Norfolk Naval Brig

28. On information and belief, on or about April 6, 2002, the United States, having determined that Petitioner Hamdi was a United States citizen, transported Petitioner Hamdi from Guantanamo to the United States, initially to Northern Virginia (Dulles Airport). The United

- States then transported him to a military jail at the Norfolk Naval Station in Norfolk, Virginia, where he was incarcerated in solitary confinement until on or about August 2003.
29. From on or about December 10, 2001, until May 14, 2002, Petitioner Hamdi was without counsel. Although counsel was appointed on May 14, 2002, Petitioner was not allowed to communicate with counsel until February 2004.
30. The sole justification of the United States for the prolonged, indefinite detention of Petitioner Hamdi is set forth in a July 24, 2002 Declaration of Micheal H. Mobbs ("Mobbs", and "Mobbs Declaration"), Special advisor to the Undersecretary of Defense for Policy. Mobbs does not claim to have any first hand knowledge of the facts in his Declaration surrounding Hamdi's initial capture and detention in Afghanistan. Mobbs contends in his Declaration that Petitioner Hamdi is being held as an enemy combatant. Nonetheless, the Mobbs Declaration makes no explicit claim that Petitioner was part of or supporting forces hostile to the United States, nor does it assert that Petitioner engaged in armed conflict against the United States. Furthermore, Petitioner disputes material portions of that declaration.
31. To date, Petitioner Hamdi has not been charged with an offense, nor has he been notified of any pending or contemplated charges. Petitioner Hamdi was advised during the course of his detention by his custodians that he was not going to be charged with any crime or violation of the laws of war. Petitioner Hamdi has made no appearance before either a military or civilian tribunal of any sort. Yet his incarceration in solitary confinement has continued to the present day.
32. Since Petitioner has been in custody by the United States, the Taliban government of Afghanistan has been overthrown and a new government has taken power with the assistance of the United States. United States military personnel remain in Afghanistan to assist the government of Afghanistan in peacekeeping and law enforcement operations.

CLAIMS AS TO THE UNLAWFULNESS OF PETITIONER'S DETENTION

FIRST CLAIM FOR RELIEF
(DUE PROCESS - FIFTH AND FOURTEENTH AMENDMENTS
TO THE UNITED STATES CONSTITUTION)

33. Petitioner incorporates paragraphs 1-32 by reference.
34. By the actions described above, Respondents, acting under color of law, have violated and continue to violate the Fifth and Fourteenth Amendments to the United States Constitution by refusing to provide adequate "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker," *Hamdi*, 542 U.S. at ____, slip op. at 26, with the assistance of counsel.

SECOND CLAIM FOR RELIEF
(SUSPENSION OF THE WRIT; 28 U.S.C. § 2241 *et seq.*)

35. Petitioner incorporates paragraphs 1-34 by reference.
36. Congress has not suspended the writ of habeas corpus or the procedures for enforcing it. Therefore, the refusal to afford Petitioner Hamdi a fair opportunity to challenge the allegations against him violates the Suspension Clause of the Constitution and the statutes designed to implement the Great Writ.

THIRD CLAIM FOR RELIEF
(UNLAWFUL DETENTION)

37. Petitioner incorporates paragraphs 1-36 by reference.
38. Petitioner is a civilian, not a combatant, and therefore must be released. Petitioner disputes any allegation that he is an enemy combatant or otherwise is lawfully detained by the U.S. military.

FOURTH CLAIM FOR RELIEF
(DUE PROCESS -- FAILURE TO COMPLY WITH
U.S. MILITARY REGULATIONS AND INTERNATIONAL
HUMANITARIAN LAW)

39. Petitioner incorporates paragraphs 1-38 by reference.
40. By the actions described above, Respondents, acting under color of law, have violated and continue to violate the rights accorded to persons seized by the United States military in

times of armed conflict as established by the regulations of the United States Military, Articles 4 and 5 of the Geneva Convention III, Geneva Convention IV, and customary international law.

**FIFTH CLAIM FOR RELIEF
(SUBSTANTIVE DUE PROCESS, INTERNATIONAL HUMANITARIAN LAW)**

41. Petitioner incorporates paragraphs 1-40 by reference.
42. By the actions described above, Respondents, acting under color of law, have violated and continue to violate the Constitution and international humanitarian law by engaging in conduct that constitutes torture and otherwise violates substantive due process.

**SIXTH CLAIM FOR RELIEF
(CESSATION OF ACTIVE HOSTILITIES)**

43. Petitioner incorporates paragraphs 1-42 by reference.
44. By the actions described above, Respondents have exceeded any authority that otherwise might exist to detain Petitioner as an enemy combatant because Petitioner has no relation at all to any current hostilities that may be ongoing in Afghanistan. In other words, the active hostilities that led to Petitioner's custody by the United States have ceased.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays for relief as follows:

1. Order and declare that Petitioner Hamdi is being held in violation of the Fifth and Fourteenth Amendments to the United States Constitution;
2. Order that Petitioner Hamdi not be held in solitary confinement and that he be afforded the treatment required to be given to prisoners of war;
3. To the extent Respondents contest any material factual allegations in this Petition, schedule an evidentiary hearing, at which Petitioner Hamdi may adduce proof in support of his allegations;
4. Order that Petitioner Hamdi be released from Respondents' unlawful custody;

And order such other relief as the Court may deem necessary and appropriate to protect
Petitioner Hamdi's rights under the United States Constitution.

Dated: July 15, 2004

Respectfully submitted,

Yaser Esam Hamdi


