IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Jose Padilla, **Petitioner** **v.** **Commander C.T. Hanft,** U.S.N. Commander, Consolidated Naval Brig, **Respondent**	**C/A No. 02:04-2221-26AJ** **Response to Motions to Vacate Referral to Magistrate Judge And to Expedite Proceedings**

Pursuant to Local Rule 7.06, this memorandum responds to petitioner's motions to vacate the referral of his habeas corpus petition to Magistrate Judge Carr and to expedite proceedings. For the reasons set forth below, respondent respectfully submits that the motions should be denied.[1]

STATEMENT

One week after al Qaeda's massive attacks against the United States on September 11, 2001, Congress passed a joint resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11 * * * in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." Authorization for Use of Military Force (AUMF), 115 Stat. 224. Consistent with that authority and with the President's constitutional authority as Commander in Chief, the United States military, in the course of the ongoing military campaign, has seized and detained persons fighting for and associated with the enemy.

[1] This response has been filed within the 15-day period prescribed by Local Rule 7.06.

On May 8, 2002, petitioner flew from Pakistan to Chicago and was arrested there pursuant to a material witness warrant issued in the Southern District of New York in connection with grand jury proceedings investigating the September 11 attacks. Petitioner was then transferred to New York and assigned counsel.

On June 9, 2002, the President made a determination that petitioner is "closely associated with al Qaeda"; has "engaged in * * * hostile and war-like acts"; "possesses intelligence" about al Qaeda that "would aid U.S. efforts to prevent attacks by al Qaeda on the United States"; and "represents a continuing, present and grave danger to the national security." *Rumsfeld* v. *Padilla*, 124 S. Ct. 2711, 2715 n.2 (2004) (citation omitted). The President accordingly directed that petitioner be transferred to the custody of the Department of Defense and detained as an enemy combatant. That same day, petitioner was transferred to military control and taken to the Consolidated Naval Brig, Charleston, South Carolina, where he has since been detained.

On June 11, 2002, two days after petitioner had been transferred to military control in South Carolina, petitioner's counsel filed a habeas corpus petition on his behalf in the United States District Court for the Southern District of New York. The government moved to dismiss the petition on the ground that, because petitioner was (and is) being held within this District rather than in the Southern District of New York, jurisdiction over the habeas petition properly lay in this Court rather than the District Court for the Southern District of New York. The district court denied the government's motion. The court then concluded on the merits that the President has legal authority to detain an enemy combatant in the circumstances of this case, and ordered that petitioner be afforded access to counsel to facilitate litigation of the habeas petition. *Padilla ex rel. Newman* v. *Rumsfeld*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

On interlocutory appeal, the United States Court of Appeals for the Second Circuit agreed that the District Court for the Southern District of New York had jurisdiction, *Padilla* v. *Rumsfeld*, 352 F.3d 695, 702-710 (2d Cir. 2003), and held on the merits in a divided opinion that the President lacks authority to detain petitioner as an enemy combatant, *id.* at 710-724 (majority opinion); see *id.* at 726-733 (Wesley, J., dissenting). The court of appeals remanded to the district court "with instructions to issue a writ of habeas corpus directing the Secretary of Defense to release Padilla from military custody within 30 days." *Id.* at 724.

The government filed a petition for a writ of certiorari in the Supreme Court, and the Court granted review of two questions: "First, did Padilla properly file his habeas petition in the Southern District of New York; and second, did the President possess authority to detain Padilla militarily." *Padilla*, 124 S. Ct. at 2715. The Court concluded that the District Court for the Southern District of New York lacked jurisdiction over the habeas petition and that the petition instead should have been filed in this Court. *Id.* at 2717-2727. The Supreme Court therefore reversed the court of appeals' judgment and remanded with instructions to enter an order of dismissal without prejudice. *Id.* at 2727. Having found jurisdiction lacking, the Court did not reach the question whether the President has authority to detain petitioner as an enemy combatant. *Id.* at 2715.

On July 2, 2004, petitioner filed a habeas petition in this Court, claiming, *inter alia*, that his military detention violates the Fourth, Fifth, Sixth and Eighth Amendments to the United States Constitution, the Suspension Clause of Article I, the Treason Clause of Article III, and 18 U.S.C. 4001(a). On July 6, this Court referred the petition to Magistrate Judge Carr pursuant to Local Rule 73.02(B)(2)(c), and established a schedule for filing of the government's answer. On August 3, 2004, petitioner moved this Court to vacate the referral to Judge Carr and to expedite the

proceedings.

ARGUMENT

Both the motion to vacate the referral to Magistrate Judge Carr and the motion to expedite proceedings should be denied.

A. No "extraordinary circumstances" justify a departure from this Court's standard practice of referring pretrial proceedings in habeas actions to a magistrate judge.

District courts may assign habeas proceedings to magistrate judges under 28 U.S.C. 636(b), and this Court automatically refers habeas petitions to a magistrate judge under Local Rule 73.02(B)(2)(c). Although this Court retains authority to vacate a referral, see Local Rule 73.02(D), the statute provides for vacatur only "under extraordinary circumstances shown by any party," 28 U.S.C. 636(c)(4). The grounds on which petitioner seeks vacatur do not meet that standard.[2]

While it is true as an abstract matter that the parties have "repeatedly briefed and argued" (Mot. to Vacate 2) the question whether petitioner's detention as an enemy combatant is lawful, that issue must now be considered anew in light of the Supreme Court's supervening decision in *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004). The opinions in that case discuss at length the President's authority to detain enemy combatants in a time of war. The implications of *Hamdi* for this case have not been briefed or argued by the parties, and will be presented for the first time in this Court.

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[2] The statute expressly provides for vacatur only in connection with consensual referrals to a magistrate for the conduct of trial and entry of a final, appealable judgment. 28 U.S.C. 636(c)(4). Because this case involves a referral for pretrial proceedings alone and Judge Carr's proposed findings or recommendations would be reviewed by this Court, see 28 U.S.C. 636(b), petitioner must show, at the very least, the "extraordinary circumstances" that would be required to justify vacatur in the context of a referral to conduct trial and enter a final judgment. See *Gonzalez* v. *Rakkas*, 846 F. Supp. 229, 233 (E.D.N.Y. 1994) (noting that "extraordinary circumstances" test has been applied to "references made to magistrates under 28 U.S.C. § 636(b)" (citations omitted)).

Indeed, petitioner repeatedly relies on *Hamdi* in his habeas petition as affording him grounds for relief, Pet. 4-6, ¶¶ 22, 27, 29, 31, and those arguments have not been presented to (or considered by) any court.

Consequently, there is no merit to petitioner's argument that there is "an adequate body of legal analysis for this Court to detour from its ordinary practice of referring a habeas petition to a Magistrate." Mot. to Vacate 3. The now-reversed opinions of the Second Circuit and the District Court for the Southern District of New York are a legal nullity, and those opinions in any event afford no grounds for short-circuiting the ordinary course of proceedings. The opinions were issued before the Supreme Court's decision in *Hamdi*, which this Court must now consider in the first instance. Indeed, the controlling opinion in *Hamdi* observes that the "permissible bounds of the category [of enemy combatants] will be defined by the lower courts [in] subsequent cases" like this one.[3] *Hamdi*, 124 S. Ct. at 2642 n.1 (plurality opinion).

In addition, the new habeas petition filed in this Court raises claims for relief that were not before the District Court for the Southern District of New York, the Second Circuit, or the Supreme Court. For instance, petitioner, for the first time, seeks relief on the basis of the Treason Clause, Pet. 4, ¶ 21, and the Eighth Amendment, Pet. 6, ¶ 32, and the petition also raises a distinct claim concerning interrogation which has not been considered by any court. Pet. 6, ¶¶ 30-32.

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[3] Petitioner's assertion that "four Supreme Court [justices] * * * have already spoken to the merits of the single threshold issue now before this Court" (Mot. to Vacate 3) is a substantial overstatement. In his *dissenting* opinion, which otherwise spoke solely to the jurisdictional holding of the majority, Justice Stevens observed, in a one-sentence footnote, that in his view, the "protracted, incommunicado detention of American citizens arrested in the United States" would be unlawful. *Padilla*, 124 S. Ct. at 2735 n.8. Justice Stevens did not elaborate on that observation or specifically apply it to the current circumstances of petitioner's detention as they are presented to this Court. And the majority explicitly declined to address the merits. *Id.* at 2715.

Moreover, the petition "disputes the factual allegations underlying the Government's designation of [petitioner] as an 'enemy combatant' " and requests a "hearing on those allegations." Pet. 5-6, ¶ 28; see Pet. 7, ¶ 2. No court has yet had occasion to make any factual determinations concerning the evidentiary basis for petitioner's detention as an enemy combatant, and factual inquiries and determinations of that sort lie at the core of the functions regularly referred to magistrate judges to conduct in the first instance. See 28 U.S.C. 636(b)(1)(B); Rule 8(b), Rules Governing Section 2254 Cases (2254 Rules). Affording a magistrate judge an initial opportunity to address factual and evidentiary issues is particularly warranted in this case because the unique procedures and standards for factfinding that apply in this context, see *Hamdi*, 124 S. Ct. at 2643-2652 (plurality opinion), have yet to be applied by any court.

This case therefore presents no exception to the recognition that "[t]he Report and Recommendation of a Magistrate ordinarily provides this Court with valuable additional insight into habeas cases." Mot. to Vacate 3. Petitioner also errs in suggesting that vacatur is warranted on the ground that the case is of "wide precedential importance." Mot. to Vacate 4 (citation and internal quotation marks omitted). Because the referral will afford the Court the benefit of Judge Carr's proposed findings and recommendations, the significance of the issues raised by this case counsel in favor of -- not against -- referral.[4] Compare *Paddington Partners* v. *Bouchard*, 950 F. Supp. 87,

[4] Petitioner's argument relies on a statement in a Senate Report that has no application here. The Senate Report observes -- in the context of 1979 amendments to the Magistrate Act permitting consensual referrals for the conduct of trial and entry of a final judgment -- that vacatur may be warranted if it is "appropriate to have the trial before an Article III judicial officer because of the extraordinary questions of law at issue and judicial decision making is likely to have wide precedential importance." S. Rep. No. 96-74, 1st Sess., at 14 (1979). The Report refers to the potential desirability of "trial before an Article III judicial officer" where "judicial decision making is likely to have wide precedential importance" because, in the case of a consensual referral to a magistrate judge for trial and entry of judgment, the entire proceedings, through the entry of a final

90 (S.D.N.Y. 1996) (magistrate judge's retirement was "extraordinary circumstance" justifying vacatur); *Ouimette* v. *Moran*, 730 F. Supp. 473, 480 (D.R.I. 1990) (evidence of magistrate judge's bias may constitute "extraordinary circumstances"); *Miami Valley Carpenters Dist. Council Pension Fund* v. *Scheckelhoff*, 123 F.R.D. 263, 265-267 (S.D. Ohio. 1988) (suggesting the same).[5]

B. Departure from this Court's customary scheduling practice in habeas cases is not warranted.

As petitioner correctly points out (Mot. to Expedite 4 n.3), this Court retains broad discretion to tailor the procedures and schedule in this case as needs may dictate. See Rule 1(b), 2254 Rules; Rule 4, 2254 Rules. Petitioner asks the Court to establish an expedited schedule for filing of the government's answer, as well as to establish a schedule for briefing "on the threshold merits question of Presidential authority." Motion to Expedite 4. Those requests should be denied.

With respect to the time for filing the government's answer, granting petitioner's motion would have limited practical significance. Under this Court's order of July 6, 2004, the government's answer is due 50 days from the date of service of that order, or on August 26, 2004 (per the Court's docket). Petitioner asks the Court to direct the government to file its answer within

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appealable judgment, would take place before a magistrate judge. In this case, by contrast, Judge Carr's proposed findings and recommendations will be reviewed by this Court, assuring that "an Article III judicial officer" renders the ultimate decision.

[5] Petitioner suggests that, because he has not been convicted of a crime, the referral may fall outside the authority conferred by 28 U.S.C. 636(b)(1)(B). That suggestion is largely beside the point because a separate provision, 28 U.S.C. 636(b)(3), contains a broad residual grant of authority providing that district courts may assign magistrate judges "such additional duties as are not inconsistent with the Constitution and laws of the United States." See 12 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 3066, at 309 (2d ed. 1997) (Section 636(b)(1)(B) was not meant to be "an exhaustive list"; rather, "Congress intended that district courts would experiment with the assignment of additional duties, to suit the needs of the individual districts."). Petitioner does not argue that the referral in this case is unconstitutional or otherwise unlawful.

seven days from the granting of petitioner's motion. Even if the Court were to grant petitioner's motion on the same day that this response is filed, the government's answer would be due on August 25, 2004, only one day before the filing date already established by this Court.

With respect to petitioner's request that the Court now establish a schedule for briefing and oral argument "on the threshold merits question of Presidential authority" (Mot. to Expedite 4), petitioner's request is premature. There is no warrant for deviating from the ordinary course of habeas proceedings and establishing such a schedule at this time, before the government's answer and petitioner's traverse are filed. The government's answer will describe the legal basis for petitioner's detention as an enemy combatant; and the government intends to file contemporaneously with the answer a declaration setting forth the factual basis for petitioner's detention, taking into account relevant information currently in the government's possession. In response to the government's submissions, petitioner presumably will file a traverse (see Mot. to Expedite 4) and also determine whether amendment of the petition is warranted.

Depending on the legal and factual issues raised by the answer and traverse, this Court, consistent with the normal course of habeas proceedings, would determine after reviewing those filings whether to conduct an evidentiary inquiry of some sort or to direct briefing and argument on legal issues, as well as the schedule for any such proceedings. The Court may conclude after reviewing the answer and traverse that the briefing contemplated by petitioner's motion is not necessary to resolve the petition. The Court may instead determine that proceedings of a different form are warranted and can fashion an appropriate schedule for such proceedings.

Moreover, any ultimate determination of the legality of petitioner's detention as an enemy combatant is likely to turn in significant part on the facts concerning petitioner's actions and

associations with al Qaeda. In that regard, the petition specifically seeks an evidentiary hearing to address petitioner's factual challenges to the government's submission. Pet. 5-6, ¶ 28; Pet. 7, ¶ 2. Petitioner evidently contemplates, however, that before making any factual determinations, this Court should first consider the abstract legal "question of Presidential authority to detain an American citizen seized on American soil." Mot. to Expedite 4. Rather than decide at this preliminary stage to proceed in the piecemeal fashion contemplated by petitioner's motion, the Court may wish to review the answer and traverse before determining the nature of (and schedule for) any proceedings that may be necessary to resolve the petition, including whether to conduct an evidentiary inquiry or make factual determinations before deciding the legality of petitioner's detention.[6]

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[6] Petitioner submits (Mot. to Expedite 3-4) that his motion to expedite proceedings should be granted because the Supreme Court, on the government's motion, expedited its review of the Second Circuit's opinion. That argument lacks merit. Petitioner's request, to establish a schedule for briefing and argument on the merits before the answer and traverse have been filed, is premature. By contrast, at the time that the government sought Supreme Court review of the Second Circuit's decision, the Second Circuit had issued a final judgment ordering petitioner's release from military custody. The government sought expedited review in the Supreme Court in principal part to ensure that the Court could consider the case contemporaneously with *Hamdi*, which presented related issues and in which review had already been granted. No comparable concerns justify departing from the standard course of review in this case. To the contrary, another habeas petition raising related issues is currently pending in this Court, *al-Marri* v. *Hanft* (C/A No. 02:04-2257), and that case is presently proceeding on a similar schedule to this one.

CONCLUSION

Petitioner's motions to vacate the referral of his habeas corpus petition to Magistrate Judge Carr and to expedite proceedings should be denied.

Respectfully submitted,

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