

IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF ILLINOIS

AT PEORIA

ALI SALEH KAHLAH AL-MARRI,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 03 CV 1220
	)	
GEORGE W. BUSH, President of the United	)	
States of America,	)	
DONALD H. RUMSFELD, United States Secretary	)	
of Defense, and	)	
COMMANDER M.A. MARR, Naval	)	
Consolidated Brig, Charleston, South Carolina,	)	
	)	
Respondents.	)	

**MOTION TO DISMISS OR TRANSFER  
PETITION FOR WRIT OF HABEAS CORPUS**

Respondents hereby move to dismiss or transfer the petition for a writ of habeas corpus for lack of jurisdiction. The petition in this case seeks to interject this Court into the President's conduct of ongoing hostilities in the war on terrorism. Specifically, the petition makes the extraordinary request (Pet. 20-21) that this Court order respondents to release petitioner Ali Saleh Kahlah al-Marri -- who is being held in the Naval Consolidated Brig in Charleston, South Carolina, by the United States military as an enemy combatant -- into the public. The petition, however, contains three independent -- and equally fatal -- defects that require this Court to dismiss the petition or transfer it to South Carolina.

First, the Court lacks jurisdiction because the petition has not been properly brought on

al-Marri's behalf. The habeas statute requires that a detainee himself sign the petition or, if he is unable to do so (as here), that someone with "next friend" standing bring it on his behalf. See 28 U.S.C. § 2242. The current petition, however, is neither signed by the detainee nor brought as a next-friend petition. See Pet. 1-2, 22. Instead, it purports to be a habeas petition filed directly by the detainee, but without his signature, as required by the habeas statute. This is more than a technicality, as the Supreme Court has established principles to ensure that a detainee's rights are not adjudicated based on a petition that neither the detainee nor his next friend has authorized. See Whitmore v. Arkansas, 495 U.S. 149 (1990). Moreover, even if petitioner's counsel, who has signed the petition, had sought to file the petition as al-Marri's next friend, which he did not, it is far from clear that he could satisfy the "significant relationship" and other requirements for next-friend standing set forth in Whitmore. Although al-Marri appears to have family members (see Pet. ¶ 7) that may qualify for next-friend standing, they are not named as parties in, nor have they signed, the petition. The current petition, therefore, does not properly invoke this Court's jurisdiction under the habeas statute.

Second, and in any event, the Court lacks habeas jurisdiction because no proper respondent with custody over al-Marri is present within this Court's territorial jurisdiction. The habeas petition names President Bush, Secretary of Defense Rumsfeld, and Commander M.A. Marr as respondents. Only one -- Commander Marr, the Commanding Officer of the Naval Consolidated Brig in Charleston, South Carolina, where al-Marri is detained -- is a proper respondent. Commander Marr, however, is not within this Court's territorial jurisdiction. This Court therefore lacks habeas jurisdiction over the petition. At a minimum, President Bush and Secretary Rumsfeld should be dismissed as respondents, and the Court should transfer the habeas

action against Commander Marr to the United States District Court for the District of South Carolina, which would have territorial jurisdiction over Commander Marr, and where the Government would then address the merits of any claims that may be raised in an amended, properly filed next-friend petition. See 28 U.S.C. §§ 1406(a), 1631, 2241(b).

Third, venue over this action appropriately lies in South Carolina, where al-Marri is detained, not in this District. The Seventh Circuit has made clear that “the proper venue for [a] habeas corpus proceeding is the district where [the petitioner] is being held.” United States v. Mittelstead, 790 F.2d 39, 41 (7th Cir. 1986). Here, at the time the petition was filed, al-Marri was detained, as he continues to be, in the Naval Consolidated Brig in Charleston, South Carolina. Accordingly, venue over any habeas action filed on his behalf lies in South Carolina, not in Illinois.<sup>1</sup>

### **BACKGROUND**

On September 11, 2001, the al Qaeda terrorist network launched a large-scale attack on the United States, killing approximately 3,000 persons, and specifically targeting the Nation’s financial center and the Headquarters of its Department of Defense. The September 11 attacks inflicted the loss of more American lives than the attack at Pearl Harbor, and were followed by a major military response. Shortly after the attacks, Congress authorized the President to use

---

<sup>1</sup> Some courts have ordered transfer while leaving for the transferee court to resolve more difficult threshold grounds for dismissal, at least where the ground for transfer was clear. See Bolar v. Frank, 938 F.2d 377, 379-80 (2d Cir. 1991) (transferring employment discrimination case from New York to Ohio on venue grounds, and leaving to Ohio court to decide government’s challenge based on failure to exhaust administrative remedies “in the first instance”); Tejeda v. Reno, 2000 WL 1280969, at \*2 & n.7 (S.D.N.Y. Sept. 11, 2000) (transferring habeas claim because New York court lacked jurisdiction over proper custodian without deciding government’s argument that petition should be dismissed for failure to exhaust administrative remedies, noting that “[t]he Government is free, of course, to renew” its claims for dismissal in transferee court).

“force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, 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, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001). In authorizing such force, Congress emphasized the “unusual and extraordinary threat to the national security and foreign policy of the United States” posed by the forces responsible for the September 11 attacks, and that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.” Id., preamble, 115 Stat. at 224.

The President, acting pursuant to his authority as Commander in Chief and with express congressional support, dispatched the armed forces of the United States to Afghanistan to seek out and subdue the al Qaeda terrorist network and the Taliban regime that had supported and protected it. The ongoing military operations in Afghanistan and elsewhere -- which are being conducted not only by thousands of men and women of the United States armed forces but also by coalition forces sent by our international allies -- have, inter alia, resulted in the destruction of al Qaeda training camps, removal of the Taliban regime that supported al Qaeda, and gathering of vital intelligence concerning the plans, operations, and workings of al Qaeda and its supporters. Numerous members of the military forces have lost their lives, and many others have suffered casualties as part of the campaign, which remains active and ongoing. See generally [www.army.mil/operations/oef](http://www.army.mil/operations/oef). While the military campaign is ongoing, the al Qaeda network and those who support it remain a serious threat, as does the risk of future terrorist attacks on United States citizens and interests carried out, as were the attacks of September 11, through

covert infiltration of the United States by enemy belligerents. As explained below, al-Marri is currently being held, consistent with the laws and customs of war, in the control of the military as an enemy combatant in this ongoing armed conflict.

Al-Marri, a citizen of Qatar, was arrested by the Federal Bureau of Investigation (FBI) in Peoria, Illinois, as a material witness in the government's investigation of the terrorist attacks of September 11, 2001. On February 6, 2002, al-Marri was charged in the Southern District of New York in a one-count indictment with possession of 15 or more unauthorized or counterfeit access devices, with intent to defraud, in violation of 18 U.S.C. § 1029(a)(3). On January 22, 2003, he was charged in the Southern District of New York in a second, six-count indictment with making false statements to the FBI, in violation of 18 U.S.C. § 1001; making false statements in a bank application, in violation of 18 U.S.C. § 1014; and using a means of identification of another person for the purpose of influencing the action of a federally insured financial institution, in violation of 18 U.S.C. § 1028(a)(7). Al-Marri initially waived any objection to venue in the Southern District of New York, but then withdrew his waiver after obtaining new counsel. On May 12, 2003, without objection from the government, the United States District Court for the Southern District of New York dismissed the indictments for lack of venue. See Pet. ¶¶ 1, 8, 11, 14, 23.

On May 13, 2003, al-Marri was presented in the Southern District of New York on a new criminal complaint that had been filed under seal in the Central District of Illinois on May 1, 2003. Approximately one week later, he was transferred from New York to the Peoria County Jail in Illinois. On May 22, 2003, a grand jury sitting in the Central District of Illinois returned a new indictment against al-Marri charging him with the same seven counts contained in the two

indictments filed in the Southern District of New York. See Pet. ¶¶ 24-25, 27.

On June 23, 2003, the President determined that al-Marri was and remains an enemy combatant and should be transferred to the control of the United States military. Thereafter, the Department of Justice requested that this Court dismiss the criminal indictment against al-Marri. This Court dismissed the indictment on June 23, 2003, and al-Marri was transferred to the exclusive control of the United States military and transported to the Naval Consolidated Brig in Charleston, South Carolina, for detention and questioning as an enemy combatant. The petition for a writ of habeas corpus was filed on July 8, 2003, after this Court had dismissed the indictment and after the military had transferred al-Marri to South Carolina. See Pet. ¶¶ 37-38, 40.

## ARGUMENT

### **I. THE PETITION DOES NOT PROPERLY INVOKE THIS COURT'S JURISDICTION UNDER THE HABEAS STATUTE**

This Court lacks jurisdiction over this petition because it has neither been signed by al-Marri nor brought on his behalf by an individual with next-friend standing to represent him, as required by the habeas corpus statute.

Congress has been explicit about the requirements for invoking a court's habeas jurisdiction. It requires that an "[a]pplication for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf." 28 U.S.C. § 2242. As the Supreme Court has explained, those last words -- providing for the signature of "someone acting in [the detainee's] behalf" -- were intended to confer "next friend" standing on an appropriate third party where a detained prisoner is unable ("usually

because of mental incompetence or inaccessibility”) to seek relief himself. Whitmore v. Arkansas, 495 U.S. 149, 162-63 (1990). Thus, the statute requires that a petition be signed and verified by either the detainee himself or a proper “next friend” with standing to bring the petition on his behalf. See Coalition of Clergy v. Bush, 310 F.3d 1153, 1157-60 (9th Cir. 2002), cert. denied, 123 S. Ct. 2073 (2003); Hamdi v. Rumsfeld (Hamdi I), 294 F.3d 598, 602-04 (4th Cir. 2002).

The courts, in cases like Whitmore, have developed well-settled principles for determining who is a proper next friend. Those principles cannot be circumvented by the simple expedient of filing a petition for an inaccessible detainee without denominating it a next-friend petition or obtaining the detainee’s express consent through his signature. Here, however, the petition satisfies neither requirement. It is not signed by al-Marri, but by his counsel. Nor is it brought as a next-friend petition on al-Marri’s behalf. Instead, it purports to be a habeas petition filed directly by al-Marri, but without his signature. The petition, therefore, fails to satisfy either of the filing requirements necessary to invoke this Court’s jurisdiction.

This is not just a technical detail. The next-friend requirement ensures that the party litigating on behalf of a detainee has the detainee’s best interests at heart. This is critical, as concessions made in the context of next-friend litigation are binding on the real party in interest. Here, if al-Marri’s lawyers had attempted to bring this petition as al-Marri’s next friends, it is far from clear that they would be able to satisfy the strict requirements for next-friend standing set forth by the Supreme Court in Whitmore.

In Whitmore, the Court recognized that in very specific and limited circumstances, a non-injured person may bring an action as a detainee’s “next friend.” 495 U.S. at 162-63. The Court

cautioned, however, that “‘next friend’ standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another.” Id. at 163. In order to assert next-friend standing, a person must establish, not only that the detainee cannot himself sign the habeas petition, but also that the “next friend” has a “significant relationship” with the detainee, and is “truly dedicated” to his best interests. Id. at 163-64; see T.W. v. Brophy, 124 F.3d 893, 897 (7th Cir. 1997). “The burden is on the ‘next friend’ clearly to establish the propriety of his status and thereby justify the jurisdiction of the court.” Whitmore, 495 U.S. at 164; see Brewer v. Lewis, 989 F.2d 1021, 1026 (9th Cir. 1993) (petitioners claiming next-friend status must present “clear” and “meaningful evidence” satisfying Whitmore requirements). Especially in situations, like this, where close family members may be available to serve as next friends (see Pet. ¶ 7, 31), courts should not lightly grant next-friend status to an attorney. See Hamdi I, 294 F.3d at 606 (lawyer’s absence of significant relationship stood “in stark contrast to the close familial connection [of detainee’s father] that was right around the corner”).

The fact that al-Marri’s counsel represented him for a number of months in a now-dismissed criminal case does not, without more, mean that he has established the kind of “significant relationship” with al-Marri necessary for next-friend standing. Next-friend standing is typically reserved for those who have a close, personal relationship with a detainee -- like a parent, spouse, sibling, or child. See, e.g., In re Heidnik, 112 F.3d 105, 106 n.1 (3d Cir. 1997) (daughter); Smith ex rel. Missouri Pub. Defender Comm’n v. Armontrout, 812 F.2d 1050, 1052 (8th Cir.) (brother), cert. denied, 483 U.S. 1033 (1987); Goode v. Wainwright, 731 F.2d 1482, 1483 (11th Cir. 1984) (father); In re Ferrens, 8 F. Cas. 1158, 1159 (S.D.N.Y. 1869) (wife). As the Seventh Circuit explained in T.W. v. Brophy, “the next friend must be an appropriate alter ego

for a plaintiff,” and “ordinarily th[ose] eligible[] will be confined to the plaintiff’s parents, older siblings . . . , or a conservator or other guardian, akin to a trustee.” 124 F.3d at 897; see Hamdi I, 294 F.3d at 606 (contrasting public defender’s relationship with detainee with that of “close familial connection” of detainee’s father). But cf. Ford v. Haley, 195 F.3d 603, 624 (11th Cir. 1999) (“[i]n certain circumstances, attorneys . . . who have a long history of representing a client with mental disorders may appear as ‘next friend’”) (emphasis added).<sup>2</sup>

In any event, the relevant consideration at this point is not whether petitioner’s attorneys could satisfy the Whitmore test, but that the petition they filed does not comply with the requirements of the habeas statute for invoking a court’s habeas jurisdiction. The current petition is not signed by al-Marri, and it is not styled as a next-friend petition, identifies only al-Marri as the petitioner, and does not claim, much less demonstrate, that any individual has standing to sue on al-Marri’s behalf. Because the petition was not presented as a next-friend petition, we do not presently know who might be designated as next friend or what might be the basis for any such designation. Petitioner’s attorneys may be able to demonstrate a sufficient relationship or they may choose to file a petition on behalf of a more traditional next friend. The petition indicates that al-Marri does have close family members -- in particular, a wife (see Pet. ¶¶ 7, 31) -- who presumably could serve as an appropriate next friend.<sup>3</sup> But whatever the ultimate propriety of

---

<sup>2</sup> In Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2003), the district court found that counsel appointed to represent the detainee in material witness proceedings had next-friend standing to file a habeas petition on his behalf challenging his detention as an enemy combatant. Id. at 576-78. While the government disagrees with that holding and is seeking review of it before the Second Circuit, it is significant that even Padilla’s counsel recognized the requirements of the habeas statute and amended a petition originally filed as a direct petition to style it as a next-friend petition. See id. at 569, 571.

<sup>3</sup> Although the government believes that al-Marri’s wife no longer resides in the United States, it knows of no reason she would be precluded from serving as next friend. See Rasul v. Bush,

any designated next friend, the current petition plainly does not satisfy the pleading requirements of 28 U.S.C. § 2242. Petitioner, therefore, has failed to carry his burden to “justify the jurisdiction of the court.” Whitmore, 495 U.S. at 164.

## **II. THIS COURT LACKS HABEAS JURISDICTION BECAUSE IT LACKS TERRITORIAL JURISDICTION OVER AL-MARRI’S PROPER CUSTODIAN**

Although an amended petition might remedy the next-friend issue addressed above, the petition clearly has been filed in the wrong judicial district. No amendment to the petition can remedy the fact that this petition should have been filed in South Carolina, where al-Marri is currently detained by his custodian. There is only one proper respondent for a habeas corpus petition filed to challenge al-Marri’s detention, and that is the Commanding Officer of the Naval Consolidated Brig in Charleston, South Carolina, where al-Marri is being held, Commander Melanie A. Marr, United States Navy. Because Commander Marr is not present in this District, this Court lacks jurisdiction to hear the petition. Accordingly, the Court should dismiss the petition or, in the alternative, transfer this action to the United States District Court for the District of South Carolina -- the only district court with territorial jurisdiction over Commander Marr.

### **A. President Bush And Secretary Rumsfeld Are Not Proper Respondents**

The habeas statutes have long specified that the writ "shall be directed to the person having custody of the person detained." 28 U.S.C. § 2243 (emphasis added); see Act of Feb. 5, 1867, ch. 28 § 1, 14 Stat. 385, 386 ("writ shall be directed to the person in whose custody the

---

215 F. Supp. 2d 55, 57-58 (D.D.C. 2002), aff'd, 321 F.3d 1134 (D.C. Cir. 2003) (petitions brought on enemy combatant detainees’ behalf by parents and other family members as next friends); Hamdi v. Rumsfeld, 296 F.3d 278, 280-281 (4th Cir. 2002) (next-friend petition brought by father of enemy combatant detained at Naval brig in Norfolk, Virginia).

party is detained") (emphasis added). The focus of the habeas laws on the person with immediate control over the detainee is reinforced by the requirements that the petitioner "allege . . . the name of the person who has custody over him," 28 U.S.C. § 2242 (emphasis added), and that "the person to whom the writ is directed" must "produce at the hearing the body of the person detained," 28 U.S.C. § 2243 (emphasis added). See Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 494-95 (1973) (explaining that writ acts "upon the person who holds [the detainee] in what is alleged to be unlawful custody," i.e., the "jailer") (internal quotation marks omitted).

The Supreme Court has long made clear that the proper respondent to a habeas petition is the detainee's immediate custodian. See Wales v. Whitney, 114 U.S. 564, 574 (1885). After reviewing and quoting the terms of the habeas statutes, including the requirement that the writ be directed to "the person" with custody over the detainee and that the custodian bring the body of the detainee before the court issuing the writ, the Court explained: "All these provisions contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary." Id. (emphasis added); see Jones v. Biddle, 131 F.2d 853, 854 (8th Cir. 1942) (citing Wales as establishing that proper respondent has actual "physical custody" over petitioner), cert. denied, 318 U.S. 784 (1943).

Thus, it is well settled that the proper habeas respondent is a prisoner's immediate, not ultimate, custodian. President Bush and Secretary of Defense Rumsfeld are therefore not proper respondents in this case. Rather, in cases (like this one) involving a detained petitioner, the only proper respondent to a habeas petition is the warden of the facility in which the petitioner is being held. See Hogan v. Hanks, 97 F.3d 189, 190 (7th Cir. 1996) (holding that "[i]f the

petitioner is in prison, the warden is the right respondent” and dismissing state Attorney General as respondent), cert. denied, 520 U.S. 1171 (1997); Hanahan v. Luther, 760 F.2d 148, 151 (7th Cir. 1985) (holding that “proper respondent” in habeas action by incarcerated petitioner was warden of facility in which he was held); see also Vasquez v. Reno, 233 F.3d 688, 693 (1st Cir. 2000) (“case law establishes that the warden of the penitentiary not the Attorney General is the person who holds a prisoner in custody for habeas purposes”), cert. denied, 534 U.S. 816 (2001); In re Hanserd, 123 F.3d 922, 925 n.2 (6th Cir. 1997) (prison warden, not executive with ultimate authority over prisoner, is proper habeas respondent); Yi v. Maugans, 24 F.3d 500, 507 (3d Cir. 1994) (same; dismissing notion that Attorney General rather than warden could be proper habeas custodian); Guerra v. Meese, 786 F.2d 414, 416 (D.C. Cir. 1986) (wardens at individual detention facilities, not Parole Commission, were proper custodians even though Commission had power to grant releases; otherwise, custodian could be “any person or entity possessing some sort of power to release” prisoner); Sanders v. Bennett, 148 F.2d 19, 20 (D.C. Cir. 1945) (“proper person to be served [in habeas action] is the warden of the penitentiary . . . rather than an official in Washington, D.C., who supervises the warden”).

The D.C. Circuit’s decision in Monk v. Secretary of the Navy, 793 F.2d 364 (D.C. Cir. 1986), is instructive. There, a corporal in the Marine Corps brought a habeas action challenging his court-martial conviction, and named the Secretary of the Navy as the respondent. Id. at 365-66. He argued that the Secretary, as his “ultimate custodian,” was a proper habeas respondent. Id. at 369. The court of appeals flatly rejected the claim, and held that the “immediate” custodian (the local commandant of the facility in which Monk was incarcerated) was the proper respondent, not the Secretary. Id.

Further, as the First Circuit has explained, the very text of Section 2243, which provides that “[t]he writ . . . shall be directed to the person having custody of the person detained” (emphasis added), indicates that there is only one proper respondent to a habeas petition -- the immediate custodian:

Section 2243 does not indicate that a petitioner may choose from among an array of colorable custodians, and there is nothing about the nature of habeas practice that would justify a court in stretching the statute’s singular language to encompass so mischievous an interpretation.

Vasquez, 233 F.3d at 693.<sup>4</sup>

As the Seventh Circuit has recently explained, “[t]he custodian, in most cases, ‘is the person having a day-to-day control’ over the petitioner, because he ‘is the only one who can produce “the body” of the petitioner.’” Samirah v. O’Connell, \_\_ F.3d \_\_, 2003 WL 21507968, at \*5 (July 2, 2003) (quoting Guerra, 786 F.2d at 416). The only potential exception the Seventh Circuit recognized to the immediate custodian rule was “the limited circumstance[] in which the United States holds a prisoner abroad (and there is thus no domestic forum where the custodian is present) [and] in which a petitioner may [therefore] be allowed to file a habeas action in a district

---

<sup>4</sup> Strait v. Laird, 406 U.S. 341 (1972), in no way alters this analysis. Strait addressed the factually unique context of an unattached, inactive Army reservist who lived in California, and whose “only meaningful contact” with the Army had been in California, but whose “nominal custodian” was the commander of the Army’s recordkeeping center, located in Indiana, who had always “enlisted the aid and directed the activities of armed forces personnel in California in his dealings” with the petitioner. Id. at 343-44. The Court concluded that the commander of records was “present” in California for habeas purposes based on his reliance on the California officers in virtually all of his dealings with the petitioner. Id. at 345. Strait has no application here, because neither al-Marri nor those responsible for his detention are present in this District. Moreover, the Court in Strait recognized the unique facts before it and explicitly rejected any suggestion that it was abandoning the settled rule that “presence of the ‘custodian’ within the territorial jurisdiction of the District Court was a sine qua non.” Id. at 343; see also Vasquez, 233 F.3d at 695-96 (Strait “cannot plausibly be read . . . to consign to the scrap heap the substantial body of well-reasoned authority holding that a detainee must name his immediate custodian as the respondent to a habeas petition”).

where someone with control over his body is located.” Id. The Seventh Circuit based this limited exception on Justice Douglas’s in-chambers opinion in Ex Parte Hayes, 414 U.S. 1327 (1973), where the immediate custodian was not within the territorial jurisdiction of any district court, because the petitioner (a service member) and his commanding officer were stationed in Germany. As a result, Justice Douglas transferred the habeas petition to the District Court for the District of Columbia, reasoning that other respondents in the chain of command were within that court’s territorial reach. Id. at 1328-29; cf. Demjanjuk v. Meese, 784 F.2d 1114, 1115-16 (D.C. Cir. 1986) (Bork, J., in chambers) (Attorney General held proper respondent in the “very limited and special circumstances” where petitioner was being held at an undisclosed location). Ex parte Hayes, however, provides no basis for avoiding the immediate custodian rule where, as here, the immediate custodian is within the territorial jurisdiction of a district court.

In this case, there is no basis or need for an exception to the immediate custodian rule. There is a clear, immediate custodian, and her location and the petitioner’s location are both known and within the territorial jurisdiction of a district court. Commander Marr is the Commanding Officer of the Naval Consolidated Brig in Charleston, South Carolina, where al-Marri is being held. She is al-Marri’s immediate custodian and is within the territorial jurisdiction of the District Court for the District of South Carolina. As such, Commander Marr is the only proper respondent in a habeas action on al-Marri’s behalf.

In contrast, neither President Bush nor Secretary Rumsfeld is a proper respondent in this action. Neither serves as al-Marri’s “immediate custodian.” See Hogan, 97 F.3d at 190.<sup>5</sup>

---

<sup>5</sup> President Bush is not an appropriate custodian for the additional reason that a court of the United States “has no jurisdiction . . . to enjoin the President in the performance of his official duties” or otherwise to compel the President to perform any official act. Franklin v. Massachusetts,

Although Secretary Rumsfeld may be among those who exercise some degree of control over al-Marri, like the state Attorney General the Seventh Circuit dismissed as a respondent from the habeas action in Hogan and the Secretary of the Navy in Monk, he is not al-Marri's immediate custodian, and, hence, is not a proper respondent here.<sup>6</sup>

In sum, the President and Secretary Rumsfeld are not proper respondents in this habeas petition, and at the very least, they should be dismissed as respondents. Only Commander Marr could properly be named as a respondent in a habeas action, like this one, brought while al-Marri is held in the Naval Consolidated Brig in Charleston, South Carolina. But for the reasons set forth below, this Court lacks territorial jurisdiction over any habeas petition brought against Commander Marr.

#### **B. The Only Proper Respondent Is Outside This Court's Territorial Jurisdiction**

---

505 U.S. 788, 803 (1992) (plurality opinion) (internal quotation marks omitted); accord id. at 826 (Scalia, concurring in part and concurring in the judgment); see Padilla, 233 F. Supp. 2d at 582-83 (dismissing President as respondent in habeas action filed on behalf of detained enemy combatant). Although the Supreme Court has left open the question whether the President may be ordered to perform a purely "ministerial" duty, 505 U.S. at 802, the relief petitioner seeks -- primarily, his release from custody -- is far from "ministerial." See Mississippi v. Johnson, 71 U.S. 475, 499 (1866) ("duties [that] must necessarily be performed under the supervision of the President as commander-in-chief" are "in no just sense ministerial," but are "purely executive and political").

<sup>6</sup> In Padilla, the district court, relying on dicta in the Second Circuit's decisions in Billiteri v. United States Bd. of Parole, 541 F.2d 938 (2d Cir. 1976), and Henderson v. INS, 157 F.3d 106 (2d Cir. 1998), applied "a more flexible approach" to the proper custodian rule, 233 F. Supp. 2d at 579, and held that, given the Secretary of Defense's involvement in the decision to detain Padilla as an enemy combatant, the Secretary was a proper habeas respondent, id. at 581-82. Padilla misreads the Second Circuit cases upon which it relies, and is inconsistent with the long line of authority holding that the "jailer" or "immediate custodian" is the only proper respondent to a habeas petition. The decision is currently under appeal. See Padilla v. Rumsfeld, 256 F. Supp. 2d 218 (S.D.N.Y. 2003) (granting respondents' motion to certify appeal). In any event, the Seventh Circuit cases discussed above make clear that only Commander Marr, the Commanding Officer of the Naval Consolidated Brig in Charleston, South Carolina, where al-Marri is being detained, is the proper respondent in this action.

The Court lacks habeas jurisdiction because Commander Marr, the only proper respondent in this case, is not within this Court’s territorial jurisdiction. As the Supreme Court has made clear, “the absence of [the] custodian is fatal to . . . jurisdiction.” Schlanger v. Seamans, 401 U.S. 487, 491 (1971).<sup>7</sup>

The federal habeas corpus statute contains an express territorial limitation that restricts the jurisdiction of district courts to granting the writ only “within their respective jurisdictions.” 28 U.S.C. § 2241(a) (emphasis added). Congress wrote the limitation into the habeas statute for several “obvious” reasons:

it was thought inconvenient, potentially embarrassing, certainly expensive and on the whole quite unnecessary to provide every judge anywhere with authority to issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat.

Carbo v. United States, 364 U.S. 611, 617 (1961). Thus, when the Supreme Court considered whether a custodian “must be in the territorial jurisdiction of the District Court,” Schlanger, 401 U.S. at 489, it unequivocally answered “yes,” see id. at 491; see also Malone v. Calderon, 165 F.3d 1234, 1237 (9th Cir. 1999) (dismissing petition against out-of-state custodian because “habeas corpus jurisdiction does not extend to officials outside the court’s territorial limits”); Guerra, 786 F.2d at 417 (same); Wright v. United States Bd. of Parole, 557 F.2d 74, 77 (6th Cir. 1977) (same); Sholars v. Matter, 491 F.2d 279, 281 (9th Cir.) (district court’s power to issue writ is “legislatively limited to its territorial jurisdiction”), cert. denied, 419 U.S. 970 (1974); Winck

---

<sup>7</sup> Nor is Secretary Rumsfeld within this Court’s territorial jurisdiction. For purposes of habeas jurisdiction, Secretary Rumsfeld is “present” only at his official post in Virginia (at the Pentagon). See Monk, 793 F.2d at 369 & n.1 (rejecting claim that Secretary of Navy is proper habeas respondent but noting that Pentagon officials, in any event, are located in Eastern District of Virginia). Thus, even if the Court were to find, contrary to settled precedent, that Secretary Rumsfeld is al-Marri’s habeas custodian, the Court would still lack territorial jurisdiction.

v. Danzig, 147 F. Supp. 2d 1278, 1283 (M.D. Ala. 2001) (dismissing serviceman’s habeas petition because custodian was not within court’s territorial jurisdiction). Accordingly, al-Marri’s petition challenging his detention by Commander Marr in Charleston, South Carolina, is properly filed only in South Carolina.

Neither the Southern District of New York’s decision in Padilla v. Bush nor the Second Circuit’s decision in Henderson upon which it relies, see 233 F. Supp. 2d at 584-85, counsels against this understanding of a district court’s habeas jurisdiction. In Henderson, the court assumed, without deciding, that a district court would have jurisdiction over a habeas respondent if the state long-arm statute could reach him. See 157 F.3d at 123. This assumption was based on a statement in Braden, 410 U.S. at 495, that a custodian could “be reached by service of process.” See Henderson, 157 F.3d at 122 (quoting Braden). Braden’s reference to service, however, cannot be read to have altered the rule of Schlanger (requiring territorial jurisdiction over the custodian) -- and to tacitly allow state long-arm statutes to trump the territorial limitations in the federal habeas statute. To the contrary, Braden overruled a portion of Ahrens v. Clark, 335 U.S. 188 (1948), which had held that both the detainee and his custodian had to be within the district court’s territorial jurisdiction. Id. at 189-93. While the Court in Braden held that a detainee need not be present in a court’s territorial jurisdiction, it did not alter the settled requirement that the custodian be physically present in the district. Indeed, citing Schlanger, it found that the lower court had jurisdiction because the respondent was “properly served in that district.” Braden, 410 at 500 (emphasis added).<sup>8</sup> Thus, Braden did not question, much less

---

<sup>8</sup> The Court in Braden also embraced the dissenting opinion of Justice Rutledge in Ahrens. See 410 U.S. at 495. There, Justice Rutledge reviewed the history of the habeas statute, and, particularly, the words “within their respective jurisdictions.” He concluded that, with this

eliminate, the well-established principle (reaffirmed only two years earlier in Schlanger) that a habeas court must have territorial jurisdiction over a petitioner's custodian.<sup>9</sup>

The Supreme Court has also explicitly rejected the suggestion that 28 U.S.C. § 1391(e) -- which permits nationwide service of process on government officers in civil cases -- applies in habeas cases. See Schlanger, 401 U.S. at 490 n.4 (Section 1391(e) cannot serve to “exten[d] habeas corpus jurisdiction”); see also Dunne v. Henman, 875 F.2d 244, 248 (9th Cir. 1989) (section 1391(e) “does not extend habeas corpus jurisdiction to persons outside the territorial limits of the district court”). If a federal statute permitting nationwide service on federal officers does not trump the territorial limit on habeas jurisdiction, then a state long-arm statute cannot either.<sup>10</sup>

---

limitation, Congress meant to foreclose district judges from “issu[ing] process against jailers in remote districts” and also to ensure that “process does not run beyond the territorial jurisdiction of the issuing court.” 335 U.S. at 204; see also id. at 205 (limitation intended to prevent district courts from “issu[ing] process to run through the country . . . and thus to bring before them jailers without regard to distance”).

<sup>9</sup> The district court's reliance in Padilla on Strait v. Laird is similarly mistaken. See 233 F. Supp. 2d at 585-86. As described in more detail in footnote 3, supra, Strait provided a unique factual context in which the petitioner's “nominal custodian” in Indiana had no meaningful contact with the petitioner, let alone responsibility for day-to-day control over him. See 406 U.S. at 345 (“Quite unlike a commanding officer who is responsible for the day to day control of his subordinates, the commanding officer of the Center is the head of a basically administrative organization that merely keeps the records of unattached reservists.” (quoting and adopting reasoning of Arlen v. Laird, 451 F.2d 684, 687 (2d Cir. 1971))). Rather, the petitioner's only meaningful contacts with superiors within the Army were in California, where he filed his petition. Id. at 343. As the court in Vasquez noted, the Indiana custodian was, effectively, a “fiction.” 233 F.3d at 695; see Strait, 406 U.S. at 344 (requiring filing in Indiana given particular facts “would be to exalt fiction over reality”). In contrast, Commander Marr is unquestionably al-Marri's real, immediate day-to-day custodian.

<sup>10</sup> Indeed, a state long-arm statute is invoked by a federal court via Fed. R. Civ. P. 4(e)(1), and the federal rules make clear that they “shall not be construed to extend or limit the jurisdiction of the United States district courts.” Fed. R. Civ. P. 82; see also Fed. R. Civ. P. 81(a)(2) (Federal Rules of Civil Procedure inapplicable in habeas cases to the extent they would conflict with habeas statute).

In any event, the proper custodian in this case, Commander Marr, is not reachable by Illinois' long-arm statute. Far from having "purposefully established 'minimum contacts,'" Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985), she has had no personal contact with this District and at all relevant times has been located at her duty station in Charleston, South Carolina. Thus, the only place where a habeas petition could be filed on al-Marri's behalf is South Carolina, not Illinois.

### **III. VENUE LIES IN THE DISTRICT OF SOUTH CAROLINA, WHERE AL-MARRI IS DETAINED, NOT IN THIS DISTRICT**

Although distinct from jurisdiction, venue in this action also lies in South Carolina, not in Illinois. The unique requirement that a habeas petition be filed in the district with territorial jurisdiction over the proper custodian can also be viewed in terms of venue. As the Seventh Circuit observed in United States v. Mittelstead, 790 F.2d 39 (7th Cir. 1986), "the proper venue for [a] habeas corpus proceeding is the district where [the petitioner] is being held." Id. at 41 (citing Braden, 410 U.S. at 500); accord Mikolon v. United States, 844 F.2d 456, 461 (7th Cir. 1988); United States v. Draiman, 640 F.Supp. 1322, 1324-25 (N.D. Ill. 1986); see also Thompson v. Missouri Bd. of Parole, 929 F.2d 396, 398 (8th Cir. 1991) ("Proper venue lies in the District of Minnesota, as that court has jurisdiction over [petitioner's] present custodian."). Mittelstead's rule that venue in habeas cases lies in the district where the petitioner is detained provides an independent ground for transferring this action to the District of South Carolina, even if this Court were to somehow find that it had jurisdiction over al-Marri's custodian. Cf. Phillips v. Seiter, 173 F.3d 609, 610-611 (7th Cir. 1999) (noting that even where district court lacks territorial jurisdiction, court still has limited authority to consider whether petition is of

sufficient merit to warrant transfer under 28 U.S.C. § 1631 to court with jurisdiction over proper respondent).

Petitioner mistakenly relies on Ex Parte Endo, 323 U.S. 283, 304-06 (1944), in support of his claim that venue lies in this District. See Pet. ¶ 6. As an initial matter, Endo is a case about territorial jurisdiction, not venue. If anything, however, Endo confirms that both jurisdiction and venue in this case lie in South Carolina, not in this District. There, a Japanese American detained in a California internment camp filed a habeas petition in a California district court. 323 U.S. at 284-85. The Court permitted her to maintain her California habeas action notwithstanding that the government later moved her to Utah, explaining that the California court properly had jurisdiction over the petition when it was filed and that there remained custodians with control over her detention within the California court's territorial jurisdiction. Id. at 305-07.

Endo is of no assistance to petitioner for the straightforward reason that there, the detainee filed her habeas petition in the jurisdiction in which she was then being held, which, as discussed above, is precisely what the immediate custodian rule requires and precisely what petitioner has failed to do here. Under Endo, the relevant time for determining territorial jurisdiction is the time of the filing of the habeas petition. See United States ex rel. Circella v. Sahli, 216 F.2d 33, 37 (7th Cir. 1954) (“[a]t the time the petition for habeas corpus was filed,” petitioner “was still in the territorial jurisdiction” of Illinois district court; hence, under Endo, “[h]is subsequent removal . . . to Indiana did not rob the Illinois court of jurisdiction”), cert. denied, 348 U.S. 964 (1955). The same would appear to be true of determining venue, which as Mittelstead holds, lies in “the district where [the petitioner] is being held.” 790 F.2d at 41. And it is undisputed that at the time the petition in this case was filed, petitioner was in the custody of Commander Marr at the Naval Consolidated Brig in Charleston, South Carolina. See Pet. ¶¶ 1, 40.

## CONCLUSION

This Court lacks jurisdiction over this habeas petition because it is neither signed by the detainee nor brought as a next-friend petition by someone with a significant relationship with the detainee. In addition, the Court lacks habeas jurisdiction over this petition because the only proper respondent, Commander Marr, is outside this Court's territorial jurisdiction. Venue over any habeas action filed on al-Marri's behalf also lies only in the United States District Court for the District of South Carolina, where al-Marri is detained, not in this District. Accordingly, the Court should dismiss the petition as to President Bush and Secretary Rumsfeld, who are not proper respondents in this action, and either dismiss the petition as to Commander Marr or transfer the habeas action to South Carolina, the only district court with jurisdiction and venue. See 28 U.S.C. §§ 1406(a), 1631, 2241(b).

Dated: July 16, 2003

Respectfully submitted,

---

JAN PAUL MILLER  
United States Attorney  
Central District of Illinois

PAUL D. CLEMENT  
Deputy Solicitor General

DAVID B. SALMONS  
DAN HIMMELFARB  
Assistants to the Solicitor General

Attorneys for Respondents  
GEORGE W. BUSH, et al.