

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

COPY

YASER ESAM HAMDI,

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

Petitioners,

v.

Civil Action No. 2:02cv439

DONALD RUMSFELD,
Secretary of Defense,

COMMANDER W.R. PAULETTE,
Norfolk Naval Brig,

Respondents.

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**RESPONDENTS' MOTION FOR CERTIFICATION
OF INTERLOCUTORY APPEAL AND FOR STAY**

Pursuant to 28 U.S.C. § 1292(b), respondents Donald Rumsfeld and Commander W.R. Paulette respectfully move this Court for certification of interlocutory appeal of the Court's August 16, 2002 Order holding that the Mobbs declaration is "insufficient" to warrant dismissal of the habeas petition and requiring respondents to produce national security sensitive information concerning a captured enemy combatant. Order at 2. That Order implicates important questions about the deference owed military determinations about whether an individual captured in the theater of battle is an enemy combatant, and requires the production of sensitive national security information. Certification pursuant to Section 1292(b) is appropriate because the Court's Order involves a controlling question of law as to which there is substantial ground for difference of

opinion, and an immediate appeal from the Order will materially advance the ultimate termination of this litigation. In addition, respondents request the Court to stay its Order to allow orderly review of the Order in the court of appeals.¹

DISCUSSION

I. CERTIFICATION IS PROPER UNDER 28 U.S.C. 1292(b)

Under 28 U.S.C. § 1292(b), the Court may certify an appeal from an interlocutory order, thereby enabling the appellate court to consider and resolve a controlling issue of law. Such an appeal is warranted when the following circumstances are met: (1) The order involves a controlling question of law; (2) there is substantial ground for difference of opinion regarding the question; and (3) an immediate appeal from the order may materially advance the ultimate termination of this litigation. 28 U.S.C. § 1292(b). All three factors are satisfied by the instant Order, and therefore certification by the Court is appropriate.

A. The Order Involves A Controlling Question of Law

The Court's Order presents a controlling question of law concerning the factual basis necessary to justify the military's detention of a captured enemy combatant. In its recent decision in this case, the Fourth Circuit held that "[i]t has long been established that if Hamdi is indeed an

¹ Respondents' request for stay pending appeal does not include that portion of the Court's August 16 Order requiring production of the military's criteria for screening enemy combatants. As respondents indicated in their return (at 3 n.1), although review of the military's screening criteria is not necessary to resolve this case, respondents are, and have been, willing to provide the criteria to the Court in a classified filing submitted ex parte and in camera. Although the Court did not specifically request additional information about the screening criteria in its initial production order or at its August 13 hearing, the Court's August 16 Order requires respondents to submit the screening criteria for the Court's ex parte, in camera review. Accordingly, respondents will file in short order for this Court's ex parte, in camera review sealed copies of the screening criteria referred to in the Court's August 16 Order.

'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." Hamdi v. Rumsfeld, 2002 WL 1483908, at *5 (July 12, 2002) (emphasis added). In addition, in remanding the case for the district court to receive in the first instance the government's return showing that it had a sufficient basis for its determination that Hamdi was, indeed, an enemy combatant, the court of appeals made clear that courts owe great deference "to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle." Id. at *3.

In support of its return and motion to dismiss the habeas petition in this case, respondents submitted the declaration of Michael Mobbs, a Special Advisor to the Under Secretary of Defense for Policy. The Mobbs declaration explains the circumstances surrounding Mr. Hamdi's capture and detention, and the military's determination to detain him as an enemy combatant. As respondents argued in their motion to dismiss, the Mobbs declaration provides a more than adequate factual basis to support the military's determination that "Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan." Hamdi, 2002 WL 1483908, at *5.

In its Order of August 16, 2002, the Court held that the Mobbs declaration is "insufficient" to justify the present detention of Hamdi as an enemy combatant, and ordered respondents to produce certain classified and national security sensitive information concerning Hamdi's capture and detention. Order at 2, 8. The legal question concerning the sufficiency of the Mobbs declaration is controlling in this action, because a finding by the Court that the Mobbs declaration was sufficient to establish that petitioner Hamdi is an enemy combatant would mean that his detention is lawful and the petition should be dismissed. See Hamdi, 2002 WL 1483908, at *5 ("It has long been established that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in

Afghanistan, the government's present detention of him is a lawful one.") (emphasis added). Cf. Day v. Trans World Airline, Inc., 393 F. Supp. 217, 223 (S.D.N.Y. 1975), aff'd, 528 F.2d 31, cert. denied, 429 U.S. 890, reh'g denied, 429 U.S. 1124.

Moreover, the court of appeals in its August 8 Order recognized that the sufficiency of the Mobbs declaration was an important and potentially controlling legal issue in this case. In that Order, the court of appeals specifically directed the Court to "consider the sufficiency of the Mobbs declaration as an independent matter before proceeding further." Hamdi v. Rumsfeld, August 8, 2002 Order at 2 (4th Cir.) (emphasis added). In light of that Order, this Court's August 16 Order rejecting the sufficiency of the Mobbs declaration is particularly appropriate for certification of interlocutory appeal under Section 1292(b).

Similarly, even if the Mobbs declaration were not sufficient to establish the factual basis necessary to justify Hamdi's detention, the Court's Order raises an important legal question concerning the extent to which a court may require the production of national security sensitive materials in a habeas proceeding such as this, including statements from interviews conducted by the military for intelligence-gathering purposes, and even the raw notes from such interviews. At a minimum, the Court's Order implies that it has determined that the applicable standard of review may allow for substantial further factual development.

B. Substantial Ground Exists For Difference of Opinion Regarding the Question

Respondents described at length, in both their Response to the Habeas Petition and Motion to Dismiss, and in their Motion for Relief from Order of July 31, 2002, the grounds for their contention that the scope of review by the Court is a limited one, in light of the deference owed to the Executive Branch in its conduct of the war. In its prior opinion in this case, the Fourth Circuit

declared that, “[u]pon remand, the district court must consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi’s case and make more intrusive measures unnecessary.” Hamdi, 2002 WL 1483908, at *6; see also August 8, 2002 Order at 1-2 (reiterating that directive and requiring “strict compliance” with it). The court of appeals further emphasized that “[o]ur Constitution’s commitment of the conduct of war to the political branches of American government requires the Court’s respect at every step.” Ibid. Accordingly, “great deference * * * extends to military designations of individuals as enemy combatants in times of active hostilities,” Hamdi, 2002 WL 1483908, at *3. Moreover, the Fourth Circuit emphasized that “[a]ny standard of inquiry must not present a risk of saddling military decision-making with the panoply of encumbrances associated with civil litigation.” Hamdi, 2002 WL 1483908, at *5. Respondents contend that under the guideposts articulated by the court of appeals, the Mobbs declaration is more than sufficient to provide the factual support necessary to justify the military’s detention of Hamdi as an enemy combatant.

This Court noted, on the other hand, that the Fourth Circuit also stated that “meaningful judicial review” by the courts was contemplated in evaluating the sufficiency of the government’s proffer of the reasons for its detention. Order, August 16, 2002, at 1. At a minimum, the question whether the Mobbs declaration is sufficient to permit the “meaningful judicial review” envisioned by the court of appeals is one upon which reasonable grounds for disagreement exists, involving as it must “the delicate balance that must be struck between the Executive’s authority in times of armed conflict and the procedural safeguards that our Constitution provides for American citizens detained in the United States.” Order, August 16, 2002, at 5. Indeed, the Court’s recognition that its August 16 Order rejecting the sufficiency of the Mobbs declaration represents a “delicate balance” between

such vital interests should be sufficient to satisfy this factor for interlocutory appeal. So too the Court seemed to recognize at the recent hearing that an appeal would be appropriate at this juncture. See 8/13 Hearing Tr. at 84 (“I don’t want to stop you from taking up an appeal * * * if I decide [the Mobbs declaration] is insufficient.”). Certification of an interlocutory appeal will permit full and timely consideration of this important legal question. See, e.g., Long Island Lighting Co. v. Transamerica Delaval, Inc., 648 F. Supp. 988, 999 (S.D.N.Y. 1986) (interlocutory appeals should be more freely granted in exceptional, or “big cases”).

C. An Immediate Appeal Will Materially Advance the Ultimate Termination of the Litigation

As the court of appeals has made clear both in its prior opinions in this case emphasizing the need for deference to the Executive’s determinations regarding the conduct of the ongoing war and in its August 8 Order requiring this Court to consider the sufficiency of the Mobbs declaration as an independent matter before proceeding further, this case presents an important legal question regarding the proper role for courts in reviewing the Executive’s determinations of enemy-combatant status during wartime that must be properly resolved before the Court can rule on the petition for habeas relief. That question regarding the degree of deference due the Executive’s determinations in this area is squarely presented by this Court’s August 16 Order. Immediate review and resolution of that question by the court of appeals is therefore appropriate, consistent with the court of appeals’ prior rulings regarding Mr. Hamdi, and will materially advance the ultimate resolution of this case.

Indeed, it is precisely the question presented by this Court’s Order that the court of appeals had in mind when it required that the Court “consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi’s case and make more

intrusive measures unnecessary.” 2002 WL 1483908, at *6 (emphasis added). If the appellate court agrees with respondents that, given the deference owed by the Judiciary to the Executive, and the attendant standard of review properly employed by the Court, the Mobbs declaration provides a sufficient basis for the Court to engage in a meaningful judicial review, the litigation will be terminated. As the Fourth Circuit concluded, “if Hamdi is indeed an ‘enemy combatant’ who was captured during hostilities in Afghanistan, the government’s present detention of him is a lawful one.” Hamdi, 2002 WL 1483908, at *5. Inasmuch as respondents contend that the Mobbs declaration establishes petitioner Hamdi’s enemy-combatant status, the Fourth Circuit’s agreement on this issue would necessarily result in the granting of respondents’ motion to dismiss. Moreover, even if the court of appeals determined that the Mobbs declaration were not sufficient to warrant dismissing the petition at this stage, the court’s further discussion of the appropriate standard for reviewing the military’s determination will only facilitate any future proceedings that may be necessary on remand. In particular, the Fourth Circuit could well clarify the relevant standard of review for the military’s determination and specify which items, if any, addressed in the Court’s Order are consistent with the deferential standard of review applicable in this context. Such determinations would materially advance the ultimate resolution of the dispute.

II. A STAY OF THIS COURT’S ORDER WILL PERMIT AN ORDERLY AND TIMELY RESOLUTION OF THIS CONTROLLING LEGAL QUESTION IN THE COURT OF APPEALS

Respondents also seek a stay from this Court’s Order -- with the exception of that portion of the Order requiring production of the military’s screening criteria, which respondents will file with the Court in short order -- to permit respondents to seek review by the court of appeals of this important and controlling legal question. Since the Court has ordered the production of substantial

materials for in camera review, final resolution of the question of whether the Court has sufficient information now to conduct a meaningful judicial review is necessary before the Court can proceed. The Court has ordered respondents to produce copies of all statements made by a captured enemy combatant (including statements in interviews conducted solely for intelligence purposes) and the notes taken from any interviews with the combatant; the names and addresses of anyone who has interrogated the combatant; copies of any statements made by the Northern Alliance forces with respect to the combatant; a chronology of the combatant's whereabouts while under military control; and a listing of the names of government officials who made certain determinations. Those categories of materials implicate sensitive national security matters concerning the conduct of an ongoing war, potential intelligence in the possession of a captured enemy combatant, and decision-making with respect to the appropriate facilities for detaining captured enemy combatants. This Court, however, should not require production of such sensitive information until the court of appeals has resolved the controlling legal question concerning the sufficiency of the Mobbs declaration. Accordingly, a stay is appropriate to permit this case to proceed in an orderly and timely fashion without unduly interfering with the military's performance of important national security functions.

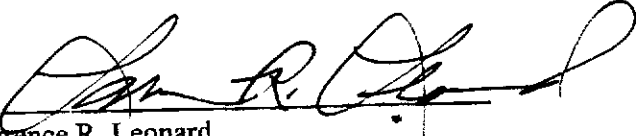
CONCLUSION


Accordingly, for the foregoing reasons, respondents respectfully request the Court to certify an interlocutory appeal of its August 16 Order, with the exception of that portion of the Order requiring production of the military's screening criteria, and concomitantly to stay all proceedings in this Court to permit orderly review by the court of appeals.

Respectfully submitted,

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Dated: August 19, 2002

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Respondents' Motion for Certification of Interlocutory Appeal and For Stay was served, this 19th day of August, 2002, by hand delivery addressed to:

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Supervisory Assistant Federal Public Defender
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A handwritten signature in black ink, appearing to read "Lawrence R. Leonard", written over a horizontal line.

Lawrence R. Leonard
Managing Assistant United States Attorney