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The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Lieutenant Commander CHARLES SWIFT, a
resident of the State of Washington, as next of
friend for SALIM AHMED HAMDAN,
Military Commission Detainee
Camp Echo,
Guantanamo Bay Naval Base,
Guantanamo Bay, Cuba,

Petitioner,

v.

DONALD H. RUMSFELD, United States
Secretary of Defense; JOHN D.
ALTENBURG, JR., Appointing Authority of
Military Commissions, Department of Defense;
Brigadier General THOMAS L.
HEMINGWAY, Legal Advisor to the
Appointing Authority for Military
Commissions; Brigadier General JAY HOOD,
Commander Joint Task Force, Guantanamo,
Camp Echo, Guantanamo Bay, Cuba; and
GEORGE W. BUSH, President of the United
States,

Respondents.

NO. CV04-0777L

MEMORANDUM OF ARTHUR R.
MILLER AS AMICUS CURIAE IN
OPPOSITION TO RESPONDENTS'
MOTION TO DISMISS OR
TRANSFER

**NOTED ON MOTION
CALENDAR: July 27, 2004**

1 In Coalition of Clergy, Lawyers, and Professors v. Bush, 310 F.3d 1153 (9th Cir. 2002)

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3 (“Coalition of Clergy”), the Ninth Circuit stated the Whitmore test for next-friend standing:

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5 In order to establish next-friend standing, the putative next friend must show: (1)
6 that the petitioner is unable to litigate his own cause due to mental incapacity,
7 lack of access to court, or other similar disability; and (2) the next friend has some
8 significant relationship with, and is truly dedicated to the best interests of, the
9 petitioner.

10
11 Id. at 1159-60 (citing Massie ex rel. Kroll v. Woodford, 244 F.3d 1192, 1194 (9th Cir. 2001) (per
12 curiam)); see Whitmore, 495 U.S. at 163-64. The Whitmore test has also been applied in
13 mandamus proceedings. See Gonzalez, 86 F. Supp. at 1184-86. Petitioner satisfies both prongs
14 of this test.

15
16 Respondents do not dispute that Petitioner satisfies the second prong. They argue,
17 however, that Petitioner has not shown that Hamdan is “unable to litigate his own cause due to
18 mental incapacity, lack of access to court, or other similar disability.” (Resp. Mot. 3.)

19
20 Respondents take too crabbed a view of this requirement. Their view, if accepted in this case,
21 would sacrifice Hamdan’s constitutional rights and defeat the purpose of next-friend standing.

22
23 Respondents argue that Hamdan cannot be shown to lack access to the courts because
24 Petitioner was able to meet with Hamdan before filing the petition and obtained Hamdan’s
25 signature on an affidavit submitted in this action. (Resp. Mem. 4-5.) But access to counsel does
26 not equal access to court. Padilla’s counsel, like Petitioner, had consulted with her client several
27 times before filing her next-friend petition, and she was allowed to proceed as his next friend.

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29 See Padilla v. Rumsfeld, 352 F.3d 695, 700, 703-04 (2d Cir. 2003), rev’d on other grounds, 124
30 S. Ct. 2711 (2004).

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32 Indeed, the Ninth Circuit has indicated that lack of access to counsel might preclude a
33 court from finding the party authorized to proceed as next friend. Speaking of Guantanamo
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1 detainees who lack “a relative, friend, or even a diplomatic delegation able or willing to act on
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3 their behalf,” the Ninth Circuit has stated:

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5 In such an extreme case it is plausible that a person with “some” relationship
6 conveying some modicum of authority or consent, “significant” in comparison to
7 the detainee’s other relationships, could serve as the next friend. . . . The existence
8 of some relationship, whether it be from authorized representation to friendship or
9 alliance to familial, serves as an objective basis for discerning the “intruder” or
10 “uninvited meddler” from the true “next friend.”

11
12 Coalition of Clergy, supra, 310 F.3d at 1162 (emphasis added). Hamdan, by his affidavit,
13 provided Petitioner with such “authority or consent.” Petitioner should not be barred from
14 proceeding as Hamdan’s next friend on the ground that Hamdan authorized him to do so.

15
16 Moreover, the fact that Hamdan could sign his name to an affidavit (see Resp. Mot. 4)
17 does not mean that he is able “to litigate his own cause.” According to Petitioner, Hamdan does
18 not speak English or understand legal materials. (Pet. Opp. to Resp. Mot. to Dismiss or Transfer
19 4, 7 (“Pet. Opp.”.) In addition, Hamdan had been held in solitary confinement for eight months
20 when the petition was filed, raising questions about his mental competence. Pet. ¶¶ 27-30. Even
21 if Hamdan is deemed not to lack access to court in the literal sense that he is able to sign
22 pleadings, for constitutional purposes the touchstone for next friend standing must be
23 “meaningful” access. See King v. Atiyeh, 814 F.2d 565, 568 (9th Cir. 1987). Holding literal
24 access sufficient would sacrifice the constitutional rights of prisoners and defeat the very purpose
25 of next-friend representation.

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34 **II. Petitioner Has Properly Invoked the Court’s Mandamus Jurisdiction.**

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38 **A. Mandamus Lies to Compel Respondents to Perform Their Constitutional**
39 **Duties.**

40 Under 28 U.S.C. § 1361, mandamus lies to compel federal officials to perform their
41 duties under the Constitution and other applicable law. That is what Petitioner seeks – to compel
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1 Respondents to treat Hamdan as the Constitution, international law, and their own regulations
2 assertedly require. Petitioner claims that the military commission process to which Respondents
3 propose to subject and are subjecting Hamdan is unconstitutional and otherwise contrary to law;
4 and Petitioner seeks Hamdan's release from the solitary confinement to which he has been
5 consigned as part of that assertedly unconstitutional and unlawful process.
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11 Preiser v. Rodriguez, 411 U.S. 495 (1973) (cited at Resp. Mem. 10-11), does not limit
12 Petitioner to asserting such claims or seeking such relief in a habeas action. Preiser held that 22
13 U.S.C. § 2254 ("State Custody") makes habeas the exclusive remedy for state prisoners
14 challenging the fact or duration of their confinement. Hamdan is not a state prisoner, and
15 Petitioner challenges not only the fact but also the military commission process by which
16 Respondents propose to try Hamdan and the conditions of Hamdan's confinement pursuant to
17 that process.
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25 Under Ninth Circuit law, Hamdan may challenge the constitutionality of the military
26 commission system, and seek release from solitary confinement, in a mandamus action. See
27 Workman v. Mitchell, 502 F.2d 1201, 1205-06 (9th Cir. 1974) (federal district court had
28 mandamus jurisdiction to order compliance with due process requirements in federal prison
29 disciplinary proceedings, including jurisdiction to declare due process requirements applicable to
30 such proceedings); Mead v. Parker, 464 F.2d 1108, 1112 (9th Cir. 1972) (district court had
31 mandamus jurisdiction of purported class action filed by federal inmates alleging that prison
32 authorities had refused to provide them access to adequate legal materials).
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41 **B. This Court Is a Proper Venue for This Mandamus Action.**

42 The federal mandamus statute provides that relief in a case such as this may be sought in
43 "any judicial district" in which the petitioner resides. 28 U.S.C. § 1391(e)(3). As an alien,
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1 Hamdan does not reside in any judicial district; but Petitioner's state of residence is Washington.
2
3 In light of the purposes of Section 1391, there is no good reason why Section 1391(e)(3) should
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5 not extend to a next friend in such a circumstance, and no good reason why this Court should not
6
7 decide the important constitutional issues that Petitioner raises.
8

9 In permitting mandamus to be sought in the district where the petitioner resides, Congress
10 intended "to permit an action which is essentially against the United States to be brought locally
11 rather than in the District of Columbia as would normally be required if Washington, D.C., is the
12 official residence of the agency sued." Gilbert v. DaGrossa, 756 F.2d 1455, 1460 (9th Cir. 1985)
13 (citing Stafford v. Briggs, 444 U.S. 527, 539-40 (1980)); see also Jarrett v. Resor, 426 F.2d 213,
14 216 (9th Cir. 1970). Congress made this possible notwithstanding the potential inconvenience to
15 the federal defendants:
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23 Even though the burden of defending multiple suits while in office may be
24 onerous, the United States Attorney in each of the districts and the Department of
25 Justice carry that burden. In a mandamus suit only rarely would the officer
26 himself be obliged to travel to the district in which the case was heard; if so
27 obliged, the travel would be at Government expense. When an official leaves
28 office, his personal involvement in a mandamus suit effectively ends and his
29 successor carries on. No personal cost or inconvenience is incurred, either while
30 in office or later. It was with this understanding that Congress sought to
31 ameliorate the inconvenience and expense to private plaintiffs seeking relief from
32 the action or inaction of their Government.
33

34 Stafford, 444 U.S. at 544 (citing H.R. Rep. No. 536, 87th Cong., 2d Sess. 3 (1962); S. Rep. No.
35 1992, 87th Cong., 2d Sess. 3 (1962)).
36
37

38 Respondents contend that a treatise co-authored by Amicus supports their position that
39 venue in this Court is not to be decided on the basis of Petitioner's residence (Resp. Mem. 13),
40 but the cited portion of the treatise does not answer the question. It states:
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44 In any action in which a guardian ad litem or next friend sues or defends on behalf
45 of an infant or incompetent, the representative is a nominal party only; the action

1 must be brought in the name of the real party in interest – the infant or
2 incompetent – and his citizenship generally is considered determinative for
3 diversity of citizenship and venue purposes. Although general guardians and
4 other more permanent fiduciaries may sue in their own name as authorized by
5 Rule 17(a), a 1988 amendment to the diversity statute now makes the citizenship
6 of the ward controlling.
7

8 6A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1570, at 505 (1990) (“W,
9 M & K”). Clearly this passage is not advertent to a situation such as this. Hamdan is an alien
10 and therefore not a citizen of any state. Accordingly, the principle stated in Rule 17(a) for next-
11 friend cases provides no guidance in determining venue under Section 1391(e) in a mandamus
12 action brought under Section 1361.¹
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18 In the absence of a governing inconsistent statute, Section 1391(e)(3) should apply. The
19 default should not be the district in which the defendant resides: First, such a default would write
20 Section 1391(e)(3) out of the Mandamus and Venue Statute in any next-friend action brought on
21 behalf of an alien, contrary to the “fundamental canon of statutory construction that a statute
22 should not be construed so as to render any of its provisions mere surplusage. See, e.g., United
23 States v. Wenner, 351 F.3d 969, 975 (9th Cir. 2003). Second, such a default would be
24 inconsistent with the policy of the Mandamus and Venue Statute to make it easier for parties to
25 bring mandamus actions outside the District of Columbia and to avoid the concentration of
26 actions in a single district. Third, such a default also would provide the United States with an
27 incentive to move prisoners to locations where there are no federal courts in order to force
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¹ Under 28 U.S.C. § 1391(d), an alien may be sued in any district in which he can be served. As the treatise states, Section 1391 “is properly regarded, not as a venue restriction at all, but rather as a declaration of the long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and special.” 15 W, M & C § 3810 (citing Brunette Mach. Works Ltd. v. Kockum Indus., Inc., 406 U.S. 706, 713 (1962)). Because no statute speaks to the case in which an alien is the plaintiff, if an alien is the plaintiff, then – except as some special venue statute may be applicable – suit must be brought in the district in which all defendants reside or, since 1966, the district in which the claim arose. See id. The “special statute” here is Section 1391(e)(3).

1 mandamus actions into the District of Columbia – a forum-shopping tactic that risks overloading
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3 the docket of the district court of the District of Columbia.
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5 Congress and the Supreme Court have acknowledged the importance of avoiding a
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7 concentration of cases in only a few districts. With regard to statutory habeas provisions, for
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9 example, Congress was “not motivated solely by a desire to insure that the disputes could be
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11 resolved in the most convenient forum. It was also a critical part of the congressional purpose to
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13 avoid the vastly disproportionate burden of handling habeas corpus petitions which had fallen,
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15 prior to the amendments, on those districts in which large numbers of prisoners are confined.”
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17 Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 498 n.13 (1973). See also
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19 Strait, 406 U.S. at 435 (rejecting an interpretation of 28 U.S.C. § 2241 that would result in a
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21 “concentration of similar cases” in one district). The interests of the district courts generally, as
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23 well as the detainees seeking a timely review of their petitions, are served by a dispersal of
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25 mandamus and habeas cases. See Armentero v. INS, 340 F.3d 1058, 1069-70 (9th Cir. 2003).
26

27 **III. Habeas Venue in This Court Is Also Proper.**

28 **A. Habeas Venue Is Proper Under the Doctrine of Pendent Venue.**

29 Under the doctrine of pendent venue, where venue is proper for a plaintiff’s principal
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31 cause of action, additional claims may be added for which venue would not individually be
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33 proper. See Burnett v. Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86, 98 (D.D.C. 2003); 15
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35 W, M & C § 3808 (discussing pendent venue). The doctrine is often applied where, as here,
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37 venue over one claim is already established under a specialized venue statute. See Rodriguez v.
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39 Chandler, 641 F. Supp. 1292, 1302 (S.D.N.Y. 1986). Courts will apply the doctrine where the
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41 claims originate from a common nucleus of operative fact and there are common issues of proof
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43 or witnesses. See, e.g., Reuber v. United States, 750 F.2d 1039, 1048 (D.C. Cir. 1984); see
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1 Beattie, 756 F.2d at 103; Rodriguez, 641 F. Supp. at 1302. This instant action clearly calls for
2 application of the doctrine.
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5 **B. Habeas Venue Is Proper Because the Instant Action Is Not a “Core Habeas”**
6 **Action.**
7

8 In Padilla, the Supreme Court held that “core habeas” proceedings – i.e., those seeking
9 release from custody – must name the petitioner’s immediate physical custodian as respondent
10 and be brought in the district of confinement. Rumsfeld v. Padilla, 124 S. Ct. 2711, 159 L. Ed.
11 2d 513, 535 (2004). But “the immediate physical custodian rule . . . does not apply when a
12 habeas petitioner challenges something other than his present physical confinement.” Id. at 529;
13 see Braden, 410 U.S. at 488 – 89; Strait, 406 U.S. at 344. Here, Hamdan challenges the military
14 commission process to which Respondents propose to subject him and the solitary confinement
15 in which he has been placed as part of that process. The immediate-custodian rule does not
16 apply.
17

18 Respondents themselves have acknowledged that Hamdan’s detention and trial by a
19 military commission raise “two completely different questions,” thus making clear their view
20 that a successful challenge to the military commission process would not necessarily result in
21 Hamdan’s release or reduce the duration of his Hamdan’s confinement.²
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37 ² A background briefing held on the day that Hamdan was certified to be tried by a military
38 commission included the following exchange between a reporter and a “senior defense official”:

39 Q: So is it possible then that somebody could go through a commission, be found not
40 guilty, and then have them say well, congratulations, you're not guilty but you're still an
41 enemy combatant so back into wherever we're holding you?
42

43 Senior Defense Official: As a legal matter, they're two completely different
44 questions. They're not being held because of any criminal activity or any charges. They're
45 being held because they're enemy combatants in an ongoing armed conflict.

(footnote cont'd)

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3 Here, moreover, Hamdan's immediate custodian is not located in any judicial district.
4
5 Hamdan, like Braden, therefore "may name as respondent the entity or person who exercises
6
7 legal control with respect to the challenged 'custody.'" Padilla, 124 S. Ct. 2711, 159 L. Ed. 2d at
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9 529 (emphasis added); see also Strait, 406 U.S. at 345-46; cf. Armentero v. INS, 340 F.3d 1058,
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11 1070 (9th Cir. 2003) (endorsing, in immigration detention cases, "a different concept of
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13 'custodian,' one based more on the legal reality of control than the technicalities of who
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15 administers on a day-to-day basis the facility in which an individual is detained"). As the sole
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17 authorities with power to relieve Hamdan from trial before a military commission, President
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19 Bush, Secretary Rumsfeld, and Deputy Secretary Wolfowitz are proper respondents³; and "[s]o
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21 long as . . . [they] can be reached by service of process, the court can issue a writ 'within its
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23 jurisdiction' requiring that the prisoner be brought before the court for a hearing on his claim, . .
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25 . even if the prisoner himself is confined outside the court's territorial jurisdiction," Braden, 410
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27 U.S. at 452-53; see also Rasul v. Bush, 124 S. Ct. 2686, 159 L. Ed. 2d 548, 559 (2004).

31 What we're talking about with military commissions is a criminal process so in that
32 regard they're two distinct issues.

33 Background Briefing on Military Commissions, July 3, 2003, available at
34 <http://www.defenselink.mil/transcripts/2003/tr20030703-0323.html>.

35
36 ³ According to the Defense Department, before an individual is designated for trial before a military
37 commission, "the [P]resident [first has] to determine [that] someone is subject to his order," and "an appointing
38 authority . . . will then refer charges to the commission." See Defense Department Background Briefing Re:
39 Release of Military Commission Instructions, Fed. News Serv. , May 2, 2003 (acknowledging that "the [S]ecretary
40 [and] the [P]resident . . . are the people [who] deem[] the individual to be worthy of trial" before the
41 commission). Secretary Rumsfeld, the so-called "appointing authority," delegated control over the commissions to
42 Deputy Secretary of Defense Paul Wolfowitz. See id. (noting that "[t]he appointing authority, as of now, is the
43 [S]ecretary of Defense, and he may delegate that responsibility, if he decides to do that"); see also Neil A. Lewis,
44 Threats and Responses: The Tribunals, N.Y. Times, July 4, 2003, at A1 (reporting that "the [P]resident . . .
45 designat[es] any captives eligible for trial by military commission" and that Deputy Secretary Wolfowitz, "who was
given authority over the commissions by Defense Secretary Donald H. Rumsfeld," "decides which of [the
detainees] will be charged with crimes").

1 **C. This Case Is Governed by Rasul**

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3 As the Ninth Circuit has recognized, “the [Rasul] Court noted an exception to the
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5 immediate custodian and district of confinement rules ‘where an American citizen is detained
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7 outside the territorial jurisdiction of any district court,” Gherebi v. Bush, No. 03-55785, slip op.
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9 at 31-32 (9th Cir. July 8, 2004) (quoting Padilla, 124 S. Ct. 2711, 159 L. Ed. 2d at 528 n.9 (citing
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11 Braden, 410 U.S. at 498)), and this “exception applies to alien detainees at Guantanamo Bay,”
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13 Id. at 32 (citing Rasul, 124 S. Ct. 2686, 159 L. Ed. 2d at 554; and Padilla, 124 S. Ct. 2711, 159 L.
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15 Ed. 2d at 538 (Kennedy, J., concurring)). The Supreme Court noted that “[i]n such cases, [it has]
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17 allowed the petitioner to name as respondent a supervisory official.” Padilla, 124 S. Ct. 2711,
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19 159 L. Ed. 2d at 535 n.16 (citing Burns v. Wilson, 346 U.S. 137, 137 (1953); and United States
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21 ex rel. Toth v. Quarles, 350 U.S. 11, 11 (1955)). In this case, the only appropriate “supervisory
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23 official[s]” in the United States are the named respondents.

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25 Rasul also confirms that the Western District is a proper venue for this action. As the
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27 Court observed in Braden and reaffirmed in Rasul, “a district court acts ‘within [its] respective
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29 jurisdiction’ . . . as long as ‘the custodian can be reached by service of process.’” Rasul, 124 S.
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31 Ct. 2686, 159 L. Ed. 2d at 559 (alteration in the original) (quoting Braden, 410 U.S. at 494-95);
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33 see also Ex parte Endo, 323 U.S. 283, 306 (1944) (“[T]he court may act if there is a respondent
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35 within reach of its process who has custody of the petitioner.”); cf. Rasul, 124 S. Ct. 2686, 159
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37 L. Ed. 2d at 576 (Scalia, J., dissenting) (recognizing that under Rasul “Guantanamo Bay
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39 detainees can petition in any of the 94 federal judicial districts”).

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41 In Padilla, the Court noted that extra-territorial habeas claims are often filed in the district
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43 where the respondent resides, but the Court did not intimate that a petitioner may seek relief only
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45 in the respondent’s district of residence. See Padilla, 124 S. Ct. 2711, 159 L. Ed. 2d at 531. In

1 the two cases cited in Padilla as support for the extra-territorial exception, the Court focused on
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3 whether servicemen federal district courts had habeas jurisdiction of extra-territorial court-
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5 martials. The Court did not consider which specific federal court should have jurisdiction over
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7 such habeas claims. See Burns, 346 U.S. at 137 (allowing, without discussion of proper venue,
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9 court-martial convicts held in Guam to sue the Secretary of Defense in the District of Columbia);
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11 Quarles, 350 U.S. at 11 (allowing, without discussion of venue, a court-martial convict held in
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13 Korea to sue the Secretary of the Air Force in the District of Columbia). In Rasul-type habeas
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15 challenges, traditional venue considerations apply. Cf. Armentero, 340 F.3d at *1070 (citing
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17 Braden, 410 U.S. at 493-94, and Henderson v. I.N.S., 157 F.3d 106, 128 (1998)) (“District courts
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19 may use traditional venue considerations to control where detainees bring habeas petitions.”)
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21 Because Hamdan’s petition falls under the Braden and Rasul exceptions to the immediate
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23 custodian and district of confinement rules, the petition can be entertained by any court that has
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25 personal jurisdiction over his custodians. See Padilla, 124 S. Ct. 2711, 159 L. Ed. 2d at 538
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27 (Kennedy, J., concurring) (citing Braden, 410 U.S. at 493; and Moore v. Olson, 368 F.3d 757,
28
29 759-60 (7th Cir. 2004) (observing that “the question of the proper location for a habeas petition
30
31 is best understood as a question of personal jurisdiction or venue). Respondents here have the
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33 requisite “minimum contacts,” Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), to
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35 satisfy Washington state’s long-arm statute, see Wash. Rev. Code Ann. § 4.28.185 (West 2004),
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37 which “extends jurisdiction to the limits of due process,” Ali v. Ashcroft, 346 F.3d 873, 889 (9th
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39 Cir. 2003) (quoting Chan v. Soc’y Expeditions, Inc., 39 F.3d 1398, 1405 (9th Cir. 1994))
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41 (internal quotation marks omitted) (noting, as an example, that the Attorney General is subject to
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43 service of process in Washington state). Indeed, the activities of Respondents are substantial and
44
45 systematic throughout Washington: for example, the state is the site of a number of military

1 installations and facilities, see Office of the Deputy Under Sec'y of Def., Dep't of Def., Base
2
3 Structure Report: Fiscal Year 2003 Baseline 15 (2003), available at <http://www.defenselink.mil/>
4
5 pubs/almanac/almanac/Graphics/BSR_03.pdf.⁴
6

7 **CONCLUSION**

8
9 For the foregoing reasons, Respondents' Motion to Dismiss or Transfer should be denied.
10

11 David H. Remes
12 **COVINGTON & BURLING**
13 1201 Pennsylvania Ave., N.W.
14 Washington, D.C. 20004
15 202-662-5212
16

17 **GORDON MURRAY TILDEN LLP**
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19
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21 By 

22 James R. Murray, WSBA #25263
23 Attorneys for Amicus Curiae Arthur R. Miller
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32 ⁴ In addition, Petitioner contends that this Court can exercise personal jurisdiction over Hamdan's
33 immediate custodian pursuant to Rule 4(k)(2), which provides:
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35 If the exercise of jurisdiction is consistent with the Constitution and laws of the United
36 States, servicing a summons or filing a waiver of service is also effective, with respect to
37 claims arising under federal law, to establish personal jurisdiction over the person of any
38 defendant who is not subject to the jurisdiction of the courts of general jurisdiction of
39 any state.

40 Fed. R. Civ. P. 4(k)(2). Under this rule, the appropriate constitutional inquiry is whether the defendant
41 has sufficient contacts with the United States under the Fifth Amendment Due Process Clause, not
42 whether the defendant has sufficient contacts with any particular State under the Fourteenth Amendment
43 Due Process Clause. See 4 W & M § 1068.1 and 4B W & M §§ 1124, 1125; Advisory Committee Notes,
44 1993 Amendments. See also Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d
45 1114, 1126-27 (9th Cir. 2002) (analyzing the defendant's 'national contacts' under Rule 4(k)(2)).

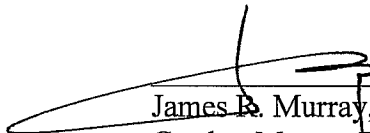
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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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