

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Lieutenant Commander CHARLES SWIFT, a
resident of the State of Washington, as next
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 for
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;
GEORGE W. BUSH, President of the United
States,

Respondents.

NO. CV04-0777L

**PETITIONER'S OPPOSITION TO
RESPONDENTS' MOTION TO
DISMISS OR TRANSFER**

CONTENTS

1
2
3
4 I. PRELIMINARY STATEMENT1
5
6 II. ARGUMENT1
7
8 A. Lt. Commander Swift Has Standing as "Next Friend" to Hamdan.....1
9
10 1. Hamdan Lacks Meaningful Access to the Courts.....2
11
12 2. There Are Factual Questions about Hamdan's Mental Competence After
13 His Prolonged Incarceration in Solitary Confinement.....4
14
15 3. The Language Barrier Also Justifies Use of a Next Friend.....5
16
17 4. Concerns about Undue Expansion of the Doctrine Are Not Present Here
186
19
20
21 B. Lt. Commander Swift Also Has Third Party Standing in this Action8
22
23 C. Respondents' Motion to Transfer Venue Should be Denied Because This is
24 Primarily a Mandamus Action11
25
26 1. Mandamus Is Appropriate Here Because the Primary Challenge Will Not
27 Necessarily Affect the Fact or Duration of Confinement11
28
29 2. Habeas Claims Can Be Heard in This District Under the Doctrine of
30 Pendent Venue17
31
32 D. Swift Is a Resident of Washington, Making Venue Proper in This District under
33 the Mandamus and Venue Act.....17
34
35 E. Even in the Absence of Mandamus, Gherebi II Does Not Require Transfer of
36 Venue in This Case24
37
38
39 III. CONCLUSION.....28
40
41
42
43
44
45
46
47
48
49
50
51

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51

I. PRELIMINARY STATEMENT

Respondents' motion to dismiss for lack of standing should be denied because (1) Salim Hamdan has no meaningful access to the Court, and Lt. Commander Swift is truly devoted to his best interests, making Swift a proper "next friend" to bring this action on behalf of Hamdan, and (2) even in the absence of next friend status, Swift has third party standing.

Respondents' motion to transfer venue should be denied because (1) this is primarily a mandamus case, governed by the permissive venue provisions of 28 U.S.C. § 1391(e), (2) Swift is a resident of this District, such that venue in this Court is proper, (3) neither the convenience of the parties nor the interests of justice are served by transfer of this case, given the paramount importance of speedy adjudication and the inevitable delay that will result from transfer, and (4) even if mandamus were not available here (which it is), the recent decisions in Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) and Gherebi v. Bush, No. 03-55785, WL 1534166 (9th Cir. July 8, 2004) ("Gherebi II") do not require transfer.

The only evidence before the Court is that submitted by Petitioner, which goes to issues such as Hamdan's inaccessibility, his mental competence, restrictions on Swift in his efforts to represent Hamdan, Swift's place of residence, the connections of this case to the forum, and the harm resulting from delay. This uncontroverted evidence, and the legal authority discussed below, establish that Swift has standing and that venue is proper in this Court. For these reasons, Respondents' motion should be denied.

II. ARGUMENT

A. Lt. Commander Swift Has Standing as "Next Friend" to Hamdan

The Petition and supporting declarations set forth facts establishing that Swift serves as a proper next friend in this case. Under Whitmore v. Arkansas, 495 U.S. 149 (1990), two criteria must be satisfied for next friend status: (1) "an adequate explanation . . . why the real party in interest cannot appear on his own behalf" and (2) the next friend "must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate." Id. at 163. Respondents dispute only the first of these factors, on the basis of meetings at Guantanamo that the Government has permitted between Swift and

1 Hamdan, and on Swift's success in obtaining a signed affidavit from Hamdan. The Government
2 authorized the meetings only for the purpose of assisting Hamdan in the negotiation of a plea
3 agreement, and they have occurred at the Government's sufferance, not as a matter of right recognized
4 by the Government. At the time the affidavit was signed and the Petition filed, there was a grave risk
5 that Swift would never see Hamdan again, and that Hamdan would have no ability to communicate
6 again with the Court. To pretend that Hamdan has unimpeded access to the Court because he has a
7 military lawyer who is under orders from the President *not* to bring a federal lawsuit on Hamdan's
8 behalf is to ignore the realities of this situation.
9

16 **1. Hamdan Lacks Meaningful Access to the Courts**

17 There is considerable irony, not to mention audacity, in the Government's assertion that
18 Hamdan has access to the courts and could bring this Petition in his own name. The primary reason for
19 holding prisoners at Guantanamo in the first place was to deny them access to the federal courts. Now
20 that the Supreme Court has refused to countenance that tactic, Respondents seek dismissal of this case
21 based on the alleged access that Hamdan has, and presumably had all along. This claim is, of course,
22 in notable tension with the fact that the Government has refused to move Hamdan even 100 yards to
23 Camp Delta, let alone to the mainland where he might have been able to file a verified Petition in his
24 own name. In any event, case law makes clear that the constitutional standard for access to the courts
25 is not close to being met in this case.
26

27 It is telling that the Government can find not even one case, despite the 326 *years* of next-friend
28 petitions, in which next friend status has been denied because of a signed affidavit or meetings with
29 Lawyers. Indeed, such an equation would reduce the meaning of "access" to virtually nothing. As the
30 Court has indicated in the context of prisoners' rights, "[m]eaningful access to the courts is the
31 touchstone." Bounds v. Smith, 430 U.S. 817, 823 (1977) (emphasis added and internal quotation
32 marks omitted).
33

34 It is well settled that meaningful access to the courts is necessarily dependent on conditions that
35 are wholly absent in this case:
36

37 [A]ccess to courts entails not only freedom to file pleadings but also freedom to
38 employ, without retaliation or harassment, those accessories without which legal
39

1 claims cannot be effectively asserted: a law library containing basic legal
2 materials; legal assistance both from lawyers and from other inmates; and the
3 ability to communicate with courts, attorneys, and public officials.¹
4

5 Indeed, with respect to Guantanamo detainees (and not even those who, like Hamdan, have
6 been held in solitary confinement for eight months), the Ninth Circuit recently observed:
7

8 [I]t is evident that the detainees are being held in a secure facility in an isolated
9 area of the world, on a United States Naval Base in a foreign country, to which
10 United States citizens are severely restricted from traveling. The detainees are
11 not able to meet with lawyers, and have been denied access to file petitions in
12 United States courts on their own behalf. As stated by the district court, and
13 conceded by the Government at argument, "*from a practical point of view the*
14 *detainees cannot be said to have unimpeded or free access to court.*"²
15

16 In this case, the undisputed facts establish that Hamdan lacks meaningful access to the courts.
17
18 Unable to leave his cell, confer with other inmates, contact his family, consult or understand legal
19 materials, speak or read English, Hamdan has no means by which to communicate with anyone outside
20 the Naval Base other than through his infrequent and irregular exchanges with Swift. While the two
21 have managed to confer on several occasions, such contact occurs only at the sufferance of the
22 Government, requiring translators, security clearances, and daunting logistical arrangements that the
23 Government can either make available, or decline to make available, at its whim. Swift serves at the
24
25
26
27
28
29
30
31

32
33
34 ¹ Ruiz v. Estelle, 679 F.2d 1115, 1153-54 (5th Cir. 1982) (affirming the lower court's finding of a pattern of
35 unjustifiable obstruction of a prisoners' access to the court) (footnote omitted), modified on other grounds, 688 F.2d 266
36 (5th Cir. 1982); accord Bounds, 430 U.S. at 828; Cornett v. Donovan, 51 F.3d 894, 897 (9th Cir. 1995) (recognizing the
37 affirmative obligations that states have to ensure meaningful access to inmates).
38

39 ² Coalition of Clergy v. Bush, 310 F.3d 1153, 1161 (9th Cir. 2002) (quoting the district court, 189 F. Supp. 2d
40 1036, 1042 (C.D. Ca. 2002)) (emphasis added). Of course, Hamdan's situation is somewhat different because Swift has
41 been assigned to represent him. However, Hamdan is worse off in that he is in solitary confinement, and Swift's access to
42 Hamdan can be cut off at the whim of the Government. See Declaration of Lieutenant Commander Charles Swift ("Swift
43 Decl.") at ¶ 9, filed herewith. In any event, the numerous other barriers, logistical and practical, make it exceptionally
44 difficult to meet Coalition of Clergy's standard of "unimpeded or free access to court." Indeed, even when the Government
45 provides resources to a prisoner to pursue his legal rights, a court must consider the totality of the circumstances before it
46 can find that individual has meaningful access to the courts. See, e.g., Twyman v. Crisp, 584 F.2d 352, 357 (10th Cir.
47 1978); King v. Atiyeh, 814 F.2d 565, 568 (9th Cir. 1987) ("There is no established minimum requirement that a state must
48 meet in order to provide indigent inmates with adequate access to the courts. Instead, a reviewing court should focus on
49 whether the individual plaintiff before it has been denied meaningful access."). An individual lacks access to the court if
50 practical impediments preclude him from using necessary resources. See, e.g., Lindquist v. Idaho State Bd. of Corrections,
51 776 F.2d 851, 858 (9th Cir. 1985) ("The existence of an adequate law library does not provide for meaningful access to the
courts if the inmates are not allowed a reasonable amount of time to use the library.").

1 pleasure of his commanding officers, and can be re-assigned from this case at any moment, completely
2 foreclosing access to Hamdan.³ On top of all this, the Government claims that information that
3 Hamdan would bring to this Court's attention is "classified" or "protected."⁴ Collectively, these
4 conditions gravely impair his ability to bring this case on his own behalf, and certainly constitute an
5 adequate explanation for why a next friend is appropriate.
6
7
8
9

10 **2. There Are Factual Questions about Hamdan's Mental Competence After** 11 **His Prolonged Incarceration in Solitary Confinement**

12 In addition, next friend status is independently justified because of questions about Hamdan's
13 mental competence following eight months of solitary confinement. See Declaration of Dr. Daryl
14 Matthews dated March 31, 2004 ("Matthews Decl.") at ¶¶ 8-15. Mental incompetence on the part of a
15 detainee is a recognized basis for approving next friend standing. Whitmore, 495 U.S. at 162-63.
16
17
18
19
20

21 Solitary confinement is an "infamous punishment." In re Medley, 134 U.S. 160, 168-69
22 (1890). Long-term solitary confinement qualifies as oppressive pretrial incarceration, and has put
23 Hamdan at risk of severe and possibly long-term psychological injury.⁵ Symptoms of such distress
24 have already been observed. See Matthews Decl. at ¶¶ 11, 13. Swift's request to military authorities
25
26
27
28
29
30

31 ³ See Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1500 (C.D. Cal. 1988) (recognizing the "prejudice" to a
32 detainee's case when the Government "prevent[s] attorneys from meeting with and preparing their client's cases"); cf. Ali v.
33 Ashcroft, 346 F.3d 873, 890 n.8 (9th Cir. 2003) ("The district court further reasoned that Petitioners had made a strong
34 showing of next friend standing because the putative class members may not have access to the court due to frequent
35 transfer and lack of access to counsel . . .") (internal quotation marks omitted).
36

37 ⁴ There is no way to envision Mr. Hamdan as having "access" to the Court when the evidence for and against the
38 Government's claim that Mr. Hamdan is properly before a military commission is evidence that Mr. Hamdan cannot see.
39 One function of a counsel with a security clearance is to make sure that the "access" enjoyed to the court is viable.
40

41 ⁵ American courts have long recognized the severe impacts of solitary confinement upon mental health. See, e.g.,
42 id. at 168 ("[E]xperience demonstrated that there were serious objections to [solitary confinement]. A considerable number
43 of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to
44 arouse them, and others became violently insane; others still committed suicide . . ."); Bono v. Saxbe, 450 F. Supp. 934,
45 946-47 (D.C. Ill. 1978) (reviewing the "debilitating mental effect" on inmates imposed by the "odious" punishment of
46 solitary confinement, and equating them with "medieval tortures such as the rack and screw."). The likelihood that
47 Mr. Hamdan has and will continue to suffer prolonged psychological damage as a result of his solitary confinement has
48 already "substantially affect[ed] his capacity" to "appreciate his position and [to] make a rational choice with respect to
49 continuing or abandoning further litigation." Rees v. Peyton, 384 U.S. 312, 314 (1966). This permits next friend status.
50 See Rohan ex rel. Gates v. Woodford, 334 F.3d 803, 817 (9th Cir. 2003) ("Requiring counsel to identify with particularity
51 what petitioner would tell them were he competent, rather than merely the general areas where he could potentially assist,
sets an unrealistically high bar under the circumstances.")

1 that they permit an independent psychological evaluation of Hamdan has been denied. Under these
2 circumstances, where genuine questions exist concerning Hamdan's mental competence, the Ninth
3 Circuit's previous case law on competence all but require the assistance of a next friend. Where, as
4 here, the "record discloses a genuine basis for concern," there "is a threshold showing of mental
5 incompetency" sufficient for the purposes of collateral review. See Rohan, 334 F.3d at 814 (granting a
6 stay in habeas proceedings based on concerns about a petitioner's mental competence); Calderon v.
7 U.S. District Court (Kelly V), 163 F.3d 350 (9th Cir. 1998) (en banc) (equitably tolling AEDPA's one-
8 year statute of limitations for filing habeas petitions based on concerns about a petitioner's mental
9 competence), overruled in unrelated part by Woodford v. Garceau, 538 U.S. 202 (2003). In this case,
10 the concerns about Hamdan's mental competence are the direct result of actions taken by Respondents.
11 The case law, and the interests of justice, require that the Court approve Swift's next-friend status.⁶
12
13
14
15
16
17
18
19
20
21

22 **3. The Language Barrier Also Justifies Use of a Next Friend**

23 There is yet another disability plaguing Hamdan that independently justifies Swift's service as
24 his next friend. In clarifying the "many instances and circumstances under which it may not be
25 possible nor feasible that the detained person shall sign and verify" a habeas complaint, the courts have
26 confirmed that one "proper use of the 'next friend' application" comes when a prisoner cannot
27 "understand the English language or the situation, particularly in the case of aliens" Weber v.
28 Garza, 570 F.2d 511, 514 n.4 (5th Cir. 1978). Hamdan falls squarely within this category.⁷ See
29 Declaration of Lieutenant Commander Charles Swift ("Swift Decl.") at ¶ 3, filed herewith. This is not
30 a situation where, through the good offices of friends, family, or others, a translator can be hired to
31 assist Hamdan to overcome this disability. Here, with Hamdan in solitary confinement on a military
32
33
34
35
36
37
38
39
40
41

42
43 ⁶ In Rohan, the court noted that "next friends and guardians who could act on an incompetent's behalf were
44 familiar at common law." 334 F.3d at 808 (citing 1 WILLIAM BLACKSTONE COMMENTARIES *448-54). Whitmore notes
45 that the general concept of next-friend standing "has long been an accepted basis for jurisdiction in certain circumstances."
46 495 U.S. at 162. Respondents do not contest this, and any reading that would limit such standing to the habeas context is
47 further undermined by the Court's discussion of next-friend standing "outside the habeas corpus context on behalf of
48 infants, other minors, and adult mental incompetents." Id. at 163, n. 4.
49

50 ⁷ While it might be feared that this rule would make next-friend standing available in immigration cases,
51 immigrants have made a voluntary decision to come to America and could be held to a standard of constructive knowledge
of the language and procedures of the United States. No such argument can be advanced for Mr. Hamdan.

1 base remote from his home and family, where security clearances are required, and where civilians
2 cannot travel except with Government permission, the language barrier is insuperable in the absence of
3 next friend assistance. The Court should not close its eyes to these realities, nor enter the
4 Government's Kafkaesque world whereby something as bare as a signature on a piece of paper
5 "conclusively establishes" that Hamdan has access to the courts in his own name.
6
7
8
9

10 **4. Concerns about Undue Expansion of the Doctrine Are Not Present Here**

11 Whitmore merely requires that a 'next friend' must provide *an adequate explanation*—such as
12 inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear
13 on his own behalf to prosecute the action." 495 U.S. at 163 (emphasis added). The Supreme Court
14 grounded its holding in a policy concern that is inapplicable in this case:
15
16
17
18
19

20 These limitations on the "next friend" doctrine are driven by the recognition that
21 '[i]t was not intended that the writ of habeas corpus should be availed of, as
22 matter of course, by intruders or uninvited meddlers, styling themselves next
23 friends.' . . . Indeed, if there were no restriction on 'next friend' standing in
24 federal courts, the litigant asserting only a generalized interest in constitutional
25 governance could circumvent the jurisdictional limits of Art. III simply by
26 assuming the mantle of 'next friend.'
27
28

29 Id. at 164 (internal citations omitted). Such concerns are absent here, where Hamdan has specifically
30 authorized Swift to serve as his next friend.
31

32 It is equally groundless to suppose that Swift is merely a litigant with some ax to grind (i.e., has
33 only a "generalized interest in constitutional governance"), because here Swift's service as next friend
34 is for his client, and to vindicate his own interests. See, e.g., Warren v. Cardwell, 621 F.2d 319, 321
35 n.1 (9th Cir. 1980).⁸
36
37
38
39

40 Properly read, Whitmore confirms that where the next friend is not an intruder or uninvited
41 meddler, the "practice of a next friend applying for a writ is ancient and fully accepted." Weber, 570
42 F.2d at 514 n.4. Indeed, the Government's argument is precluded by Toth v. Quarles, 350 U.S. 11
43
44
45

46
47
48 ⁸ The facts of Whitmore similarly confirm its inapplicability to the present case. In Whitmore, the prisoner had, in
49 a prior evidentiary hearing in court, given a "knowing, intelligent, and voluntary waiver of his right to proceed;" the state
50 had held a competency hearing which in turn affirmed the trial court's finding; and the prisoner's access to court was
51 "unimpeded." 495 U.S. at 165. Indeed, the prisoner had only waived his right to appeal after being convicted on the basis
of a full trial on the merits.

1 (1955), a case that is central to Whitmore, 495 U.S., at 162. In Toth, next friend standing was
2 permitted because the serviceman was in Korea, despite the fact that he had two JAG defense lawyers
3 and civilian counsel representing him, any of whom could have filed a signed petition from Toth.⁹
4
5 Nevertheless, the Supreme Court not only heard the case (a case that, on the Government's theory in
6
7 Swift it lacked subject-matter jurisdiction to hear), it also invoked the venerable principle that "[t]here
8
9 are dangers lurking in military trials which are sought to be avoided by the Bill of Rights and
10
11 Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to
12
13 the narrowed jurisdiction deemed absolutely essential. . . ." 350 U.S. at 22. Likewise, in Padilla, the
14
15 Supreme Court did not question the next friend standing of the attorney assigned to represent Padilla,
16
17 even though this attorney had been able to meet with Padilla over many weeks when he was first taken
18
19 into custody, and again after the district court ordered further access to counsel.¹⁰ In sum, the case law
20
21
22
23

24
25
26 ⁹ As the D.C. Circuit summarized the facts:

27
28 On May 13, 1953, [Toth] was apprehended by military personnel at his place of employment in
29 Pittsburgh, Pennsylvania. After various events, including conversations and statements the
30 details of which are in dispute, he was taken by military authorities by plane to Korea, where he
31 was confined pending investigation and trial. Two qualified military counsel were assigned to
32 represent him, and a civilian lawyer from Pittsburgh, retained by his family, flew to Korea with
33 the assistance of the Air Force.
34

35 Toth's sister filed a petition for a writ of habeas corpus in the United States District
36 Court for the District of Columbia. A rule to show cause was issued; after hearing the writ was
37 issued; Toth was produced in court; a hearing was held, and Toth was ordered released. The
38 Secretary of the Air Force appealed. The order of release was stayed pending this appeal, and
39 Toth was given liberty under bond.
40

41 Talbott v. United States, 215 F.2d 22, 24-25 (D.C. Cir. 1954), overruled by Toth, 350 U.S. 11 (1955). See also Toth
42 Confused by Arrest, N.Y. Times, May 28, 1953, at p. 4.
43

44 ¹⁰ See Padilla v. Rumsfeld, 352 F.3d 695, 703-04 (2d Cir. 2003) ("From May 15 to June 9, 2002, [Padilla's lawyer]
45 met with him in an effort to vacate the material witness warrant and to secure his release."), reversed and remanded on
46 other grounds by Rumsfeld v. Padilla, 124 S. Ct. 2711 (U.S. 2004); Padilla, 124 S. Ct. at 2716 n.5 ("the District Court . . .
47 granted [Padilla] monitored access to counsel"). While Padilla, at certain points in time, may (or may not) have been less
48 accessible to his counsel than Hamdan, the Government's present suggestion that the particular facts of that situation were
49 the "key predicate" for next friend status is wholly without support. On the contrary, the Second Circuit held simply that
50 Padilla's situation constituted more than sufficient grounds for next friend standing. 352 F.3d at 703 ("There is *no dispute*
51 that Padilla is unable to file a petition on his own behalf—he is being held incommunicado.") (emphasis added). More
relevant than any differences in the degree or form of accessibility is the following factual similarity: like Padilla, Hamdan

1 reveals a treatment of next friend that is very different from the one implied by the Government.
2
3 Indeed, courts have regarded the service of a next friend quite favorably in the context of habeas
4 petitions, particularly when the petition has been brought by someone who is not an uninvited meddler.
5

6
7 Finally, it should be noted that in Hamdi, the Government did not contest the next friend status
8 of Hamdi's father, despite the fact that it simultaneously permitted Hamdi to meet with counsel. See
9 Govt. Br. in Opp., Hamdi v. Rumsfeld, No. 03-6696, at 26 n.11. To the contrary, the Government *used*
10 the next-friend status to show the Supreme Court that it had afforded due process. See id. at 35-36. If
11 Respondents' position in this case—that a meeting with a lawyer automatically precludes litigation by a
12 next friend—were correct, then the Supreme Court would have been required to dismiss Hamdi for
13 lack of jurisdiction. Of course, the Supreme Court did no such thing.¹¹
14
15

16
17 In short, the undisputed facts of this case establish that Hamdan lacks meaningful access to the
18 courts and requires the services of a next friend. Indeed, it is hard to imagine anyone under the control
19 of federal or state authorities who faces greater difficulties on that score. If these facts are, as
20 Respondents contend, insufficient to justify Swift's standing as next friend, then the next friend
21 doctrine has become a dead letter. However, because that doctrine serves a vital role in the
22 administration of justice, and because it is not nearly as restrictive as Respondents contend, Swift
23 should be recognized as Hamdan's next friend.
24
25

26 27 28 29 30 31 32 33 **B. Lt. Commander Swift Also Has Third Party Standing in this Action**

34 The general principle that a "litigant must assert his or her own legal rights and interests, and
35 cannot rest a claim to relief on the legal rights or interests of third parties," Powers v. Ohio, 499 U.S.
36 400, 410 (1991), does not stem from the Article III "case or controversy" requirement, but rather from
37
38
39
40
41
42
43

44
45 has met with only one person in the past two years who could serve as his "next friend" in this proceeding, and as in
46 Padilla, that person is the one bringing suit.
47

48
49 ¹¹ The Government's view that Swift should be dismissed is also inconsistent with its submission to the United
50 States Supreme Court in Padilla, which tried to keep Supreme Court jurisdiction to overrule the Second Circuit. See Brief
51 of the United States, No. 03-1027, Rumsfeld v. Padilla, 124 S. Ct. at 10 n.4 ("Since the court of appeals' decision, the
military has allowed Padilla access to respondent Newman. See n.5, infra. Because Padilla is no longer inaccessible, the
petition can be amended on remand to convert it to a direct petition.").

1 prudential concerns.¹² Thus, while a plaintiff must generally assert his or her own legal rights, courts
2 have "allowed this rule to be disregarded when plaintiffs meet certain requirements." Tesmer v.
3 Granholm, 333 F.3d 683, 691 (6th Cir. 2003), cert. granted, Kowalski v. Tesmer, 124 S. Ct. 1144 (U.S.
4 Jan 20, 2004) (No. 03-407). See also HENRY MELVIN HART & HERBERT WECHSLER, THE FEDERAL
5 COURTS AND THE FEDERAL SYSTEM at 175-76 (5th ed. 2003) (stating that modern courts "routinely"
6 find third-party standing upon "some sort" of showing). Third-party standing is permissible where
7 "three important criteria are satisfied: The litigant must have suffered an 'injury in fact,' thus giving
8 him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant must have
9 a close relation to the third party; and there must exist some hindrance to the third party's ability to
10 protect his or her own interests." Powers, 499 U.S. at 410-11 (internal citations omitted). Respondents
11 challenge only "injury in fact."
12
13
14
15
16
17
18
19
20

21 However, Swift has alleged a concrete and direct injury to himself – being forced to operate
22 within an illegal and unjust set of rules and regulations that inhibit his ability to represent his client and
23 violate the ethical code he has followed over the course of a decade-long career as a military lawyer.
24 Swift is under orders to defend Hamdan. Yet he is also under an Order from the President not to bring
25 federal litigation. To bring this lawsuit could expose him to penal and ethical sanctions. See Swift
26 Decl. at ¶ 8. To not bring it would be less than his ethical duty to zealously defend his client using all
27 means available to him under the law. In this freighted setting, this effort to declare the President's
28 Order illegal is essential to vindicate Swift's ethical, reputational, professional, and legal
29 responsibilities.¹³ The dollars and cents at issue in other attorney-standing cases pale in comparison.
30
31
32
33
34
35
36
37
38

39
40
41 ¹² They seek to ensure ripe claims and zealous advocacy. They attempt to prevent courts from "deciding questions
42 of broad social import where no individual rights would be vindicated and . . . limit access to the federal courts to those
43 litigants best suited to assert a particular claim." Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 99-100 (1979). All
44 of these concerns are satisfied here.

45
46 ¹³ Many have explained that ethics bars participation by attorneys in the commissions:

47
48 It is NADCL's position, by unanimous vote . . . that it is unethical for a criminal defense lawyer
49 to represent a person accused before these military commissions because the conditions imposed
50 upon defense counsel before these commissions make it impossible for counsel to provide
51 adequate or ethical representation. . . . A military or a civilian lawyer...must provide a zealous
and independent defense, notwithstanding the severe limitations on counsel and the denials of

1 The general ethical problems with the commissions are particularly striking in this case. At the
2 time the Petition was filed, Swift was authorized to represent Hamdan for the sole purpose of
3 negotiating a plea. See id. at ¶ 2. The only way Swift could vindicate his role as defense counsel, and
4 not be subject to the possibility of termination of his attorney/client relationship should a plea not be
5 arranged, was to litigate the legality of the Military Order itself. See id. at ¶¶ 3-9. In such a setting,
6 the possibility of a coerced confession looms large—for the only way Hamdan could guarantee access
7 to a lawyer would be to plead guilty. Were Swift complicit in such a coerced confession, it would
8 have gravely undermined his reputation and ethics.
9

10 With far less for the attorney at stake, courts have recognized third-party standing. For
11 example, in Wounded Knee Legal Defense/Offense Committee v. FBI, 507 F.2d 1281 (8th Cir. 1974),
12 a group of lawyers successfully asserted third-party standing in cases involving the Sixth Amendment
13 rights of their Native American clients. The court stated:
14

15 Appellees' contention that the Committee has not alleged an actual injury
16 sufficiently personal to present a justiciable case or controversy cannot stand in
17 light of our decision in Nyberg v. City of Virginia, 495 F.2d 1342, 1344 (8th
18 Cir. 1974), wherein we held that the rights of medical doctors to freely practice
19 medicine are so 'inextricably bound up' with the privacy rights of their patients
20 that the doctors have standing to challenge the validity of abortion laws. See
21 also Doe v. Bolton, 410 U.S. 179 (1973). With even stronger force it may be
22 said that a lawyer has standing to challenge any act which interferes with his
23 professional obligation to his client and thereby, through the lawyer, invades the
24 client's constitutional right to counsel.
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41

42 due process and attorney-client confidentiality and privilege by military commission
43 instructions. The problem with these military commissions is that full zealous representation
44 likely will not and cannot be achieved because of severe and unreasonable limits imposed by the
45 government, in violation of the **UCMJ** and treaties the United States has signed. . . .
46

47 National Association of Criminal Defense Lawyers, Legal Ethics Opinion Regarding Military Commissions, available at
48 [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicsopinions/\\$FILE/Ethics_Op_03-04.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicsopinions/$FILE/Ethics_Op_03-04.pdf). See
49 also REPORT OF THE ABA TASK FORCE ON TREATMENT OF ENEMY COMBATANTS, (August 2003) available at
50 <http://www.abanet.org/media/aug03/ABACivilianDefenseCounselCorrectedFinalReportRecommendation08031.pdf>.
51 Respondents mistakenly claim that Swift's argument would give "all appointed attorneys" standing, when in reality it would
only give standing to those under orders to defend clients before an illegal military commission.

1 Id. at 1284.¹⁴ As these cases demonstrate, courts have been particularly generous about granting third
2 party standing to lawyers when the treatment of a client interferes with the lawyer's professional
3 obligations to provide effective assistance of counsel. Accordingly, even if next friend standing were
4 unavailable to Swift, this Court should have no trouble finding that Swift has third party standing to
5 challenge adjudicatory procedures that not only violate Hamdan's rights, but impair Swift's ability to
6 adequately represent his client.
7
8
9
10
11

12 **C. Respondents' Motion to Transfer Venue Should be Denied Because This is**
13 **Primarily a Mandamus Action**

14 **1. Mandamus Is Appropriate Here Because the Primary Challenge Will Not**
15 **Necessarily Affect the Fact or Duration of Confinement**

16 Respondents argue in the alternative that the Court must transfer this action to the District of
17 Columbia based on Gherebi II. This argument fails, however, because venue in this mandamus case is
18 governed by the liberal venue provision at 28 U.S.C. § 1391(e), not the restrictive habeas statute, 28
19 U.S.C. § 2241. Respondents attempt to overcome this obvious difference from Gherebi by essentially
20 asking the Court to dismiss Petitioner's mandamus claim as a matter of law.¹⁵
21
22
23
24
25
26
27
28
29
30

31 ¹⁴ Likewise, in Keker v. Proconier, 398 F. Supp. 756 (D.C. Cal. 1975), the court granted third party standing to
32 attorneys to attack prison regulations that interfered with rights to counsel. The injury to the attorneys was found in the
33 interference with their right to practice their profession: "This court can discern no reason why attorneys should not be
34 afforded the same scope of constitutional protection [to practice their profession] as is afforded to physicians." Id. at 760.
35

36 The Government interprets United States v. Triplett, 494 U.S. 715 (1990) to mean that third-party standing for
37 lawyers will found only in cases where the abrogation of a client's constitutional rights has a direct financial or reputational
38 effect on the lawyer. A direct injury exists to Swift; moreover, nothing in Triplett says what the Government says that it
39 does. Triplett merely says that courts *have* found third-party standing in cases where lawyers assert direct financial and
40 reputation injuries.
41

42 Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989), again, found lawyers' monetary stake
43 *sufficient* for third-party standing. That case never said such a stake was *necessary*. Respondents' citation is misleading,
44 particularly since the quoted portion comes from the Article III analysis, and neglects the Court's powerful words about
45 attorney third-party standing: "The attorney-client relationship between petitioner and Reckmeyer, like the doctor-patient
46 relationship in Baird, is one of special consequence; and like Baird, it is credibly alleged that the statute at issue here may
47 "materially impair the ability of" third persons in Reckmeyer's position to exercise their constitutional rights. Petitioner
48 therefore satisfies our requirements for jus tertii standing." Caplin, 491 U.S. at 623, n.3.
49

50 ¹⁵ It should be noted than in granting leave to file this motion, the Court instructed Respondents to "assume
51 mandamus is available and still argue the venue issues, rather than go to the merits of the mandamus itself." (See transcript
of July 16, 2004 status conference, at 11, Declaration of Harry H. Schneider, Jr., Ex. A.) Respondents have ignored that

1 It is well settled that an action for mandamus is a proper avenue for relief when officers of the
2 United States, particularly military ones, act in violation of the Constitution and U.S. law. See
3 Petitioner's Memorandum in Support of Petition for Writ of Mandamus Pursuant to 28 U.S.C. § 1361
4 or, in the Alternative, Writ of Habeas Corpus ("Petr.'s Supp. Memo") at 7. Respondents' argument that
5 mandamus relief is unavailable here is simply wrong. This is illustrated by Benny v. United States
6 Parole Comm'n, 295 F.3d 977 (9th Cir. 2002), a case that Respondents themselves rely upon. In
7 Benny, a federal parolee petitioned for a writ of habeas corpus, or for a writ of mandamus, to either
8 terminate supervision (a form of "custody" for purposes of habeas corpus jurisdiction (id. at 989 n.9)),
9 or to compel an early termination hearing and decision. The Ninth Circuit affirmed the district court's
10 denial of Benny's primary request for termination of supervision, but held that it should have granted
11 his request for a writ of mandamus to order the Parole Commission to hold a termination hearing and
12 make a decision. Among the issues that the Ninth Circuit addressed was whether habeas or mandamus
13 was the proper cause of action to compel the hearing. The Court held that *habeas was not proper*, as
14 the outcome of the hearing was uncertain, so it could not be said to definitely affect the fact or duration
15 of confinement:
16
17
18
19
20
21
22
23
24
25
26
27
28

29 The Commission's impropriety lies in being late in determining whether to
30 terminate Benny's parole supervision under the Parole Act's early termination
31 provision. This procedural violation does not affect Benny's current custody. . . .
32 The Commission may still find that Benny is not sufficiently rehabilitated and
33 consequently deny early termination. Benny's duration of confinement then
34 would stand unaffected by the delay in making an early termination
35 decision. . . . The fact or duration of Benny's custody is not causally linked to the
36 Commission's delay in making an early termination decision. We conclude that
37 habeas corpus is not the proper process to compel the Commission to hold an
38 early termination hearing and make a decision as prescribed by § 4211(c)(1) [the
39 federal Parole Commission and Reorganization Act].
40
41
42
43
44
45
46

47 instruction by filing what is essentially a Rule 12(b)(6) motion to dismiss Petitioner's request for a writ of mandamus,
48 arguing that, as a matter of law, mandamus is not available. The Court's instruction quite properly recognized that in
49 considering a threshold motion to transfer venue, the Court does not reach the merits of the claims asserted. See, e.g.,
50 McDonnell Douglas Corp. v. Polin, 429 F.2d 30, 30-31 (3d Cir. 1970) (holding that inquiry into the merits of the claims
51 should only occur after there has been a "determination of the preliminary question of transfer," raised by a motion to
transfer venue pursuant to 28 U.S.C. § 1404(a)).

1 Id. at 989. Instead, the Ninth Circuit held that mandamus was proper. Id. at 990. Notably, the Court
2 saw no difficulty with the district court disposing of certain claims pursuant to the habeas cause of
3 action (i.e., those that went to the fact or duration of confinement) and others pursuant to mandamus
4 (i.e., those that went to a procedure statutorily due to the petitioner).
5
6

7
8 Subsequently, in Ramirez v. Galaza, 334 F.3d 850 (9th Cir. 2003), the Ninth Circuit again
9 addressed the scope of habeas jurisdiction, and reiterated that habeas stands as the sole cause of action
10 *only* where the fact or duration of confinement is at issue. "Habeas jurisdiction is absent...where a
11 successful challenge to a prison condition will not necessarily shorten the prisoner's sentence." Id. at
12 859. The Court held that a prisoner's action alleging Due Process violations could proceed under 42
13 U.S.C. § 1983, because, "if successful, [the petitioner] will not necessarily shorten the length of his
14 confinement." Id. at 859.
15
16

17
18
19
20
21
22 Where the prison's alleged constitutional error does not increase the prisoner's
23 total period of confinement, a successful § 1983 action would not necessarily
24 result in an earlier release from incarceration, and hence, does not intrude upon
25 the "heart" of habeas jurisdiction.
26

27 Id. at 858.

28
29 The holdings of those cases apply here. Swift is not "challenging the very fact or duration of
30 [Hamdan's] physical imprisonment." Respondents' Motion to Dismiss or Transfer ("Resp.'s Motion")
31 at 11. Prior to the July 2003 finding that Hamdan is subject to the President's Military Order, Hamdan
32 was already facing indefinite detention due to his status as an "enemy combatant." This action
33 challenges the legality of the military commission process and the debilitating conditions of Hamdan's
34 confinement, i.e., his solitary confinement in Camp Echo. However, as in Benny and Ramirez,
35 remedying the procedural violations that arise from that process, and the illegal conditions of
36 confinement, will not necessarily result in ending, or even shortening, Hamdan's detention. It is
37 entirely possible that even after an appropriate adjudication of his status and of the claims against him
38 (i.e., adjudication in a forum and pursuant to a process that fully respects his rights under the
39 Constitution, laws, and treaties of the United States), he will be nevertheless be found to be an enemy
40 combatant lawfully detained as a POW, or a war criminal duly convicted and sentenced under U.S. law
41 as enacted by Congress, or in conformity with customary international law. Thus, the thrust of the
42
43
44
45
46
47
48
49
50
51

1 Petition filed herein is not to prove facts that will require Hamdan's release, or shorten the period of his
2 confinement, but to ensure that a process is put in place that respects his rights.
3

4
5 Should there be any doubt about what this Petition challenges, the *Government has admitted*
6 that it can detain someone even after a Military Commission acquits someone because detention is a
7 "completely different questio[n]" and that detention and commissions are "two distinct issues." On the
8 day that Hamdan was made eligible to be tried by commission, the Defense Department stated that
9 "there is no change to [his] status. They are being held as enemy combatants right now. They are
10 being held simply as a function of the war on terrorism and detained because they are a threat to the
11 United States." <http://www.defenselink.mil/transcripts/2003/tr20030703-0323.html>, attached as
12 Exhibit A to the Declaration of Lieutenant Commander Charles Swift dated April 5, 2004 ("April 5th
13 Swift Decl."). A reporter then asked:
14
15

16
17
18
19
20
21
22 Q: So is it possible then that somebody could go through a commission, be
23 found not guilty, and then have them say well, congratulations, you're not
24 guilty but you're still an enemy combatant so back into wherever we're
25 holding you?
26

27
28 A: (Senior Defense Official): As a legal matter, they're two completely
29 different questions. They're not being held because of any criminal activity
30 or any charges. They're being held because they're enemy combatants in an
31 ongoing armed conflict. What we're talking about with military
32 commissions is a criminal process so in that regard they're two distinct
33 issues.
34

35 The Government, in effect, attacks a phantom petition when it characterizes this case as a
36 "core" habeas action for release from confinement. Lt. Commander Swift has never once said that
37 Hamdan ought to be released if the military commissions are found unconstitutional. It is true that
38 Petitioner (out of an abundance of caution given the rules governing successive habeas petitions)
39 includes within his Prayer for Relief a request that the Court, "[o]rder Respondents promptly to justify
40 as lawful any continued detention of Mr. Hamdan" and "retain jurisdiction over this matter to permit
41 Mr. Hamdan to respond to arguments advanced by Respondents on matters related to his continued
42 detention." Petition for Writ of Mandamus Pursuant to 28 U.S.C. § 1361 or, in the Alternative, Writ of
43 Habeas Corpus ("Petition") at 25. However, these aspects of the requested relief go to *process*, and are
44
45
46
47
48
49
50
51

1 sought because Respondents have been holding Hamdan for over two years without affording him any
2 process.
3

4 Granting the requested relief in full would not necessarily affect the fact or duration of
5 Hamdan's confinement. In this respect, Petitioner's claims for relief are no different from the claim
6 asserted by the federal parolee in Benny that he was entitled to an early termination hearing.
7 Mandamus rather than habeas was the proper procedure in that case because the outcome of the
8 hearing was uncertain, and might (or might not) result in a refusal to terminate the confinement at
9 issue. So, too, providing Hamdan with process might (or might not) result in changes in the
10 conditions, location, or extent of his confinement. At this juncture, the outcome is entirely speculative.
11 The Ninth Circuit has made clear that such speculation is insufficient to bar a non-habeas claim. Thus,
12 in Neal v. Shimoda, 131 F.3d 818 (9th Cir. 1997), the Ninth Circuit allowed prisoners to bring § 1983
13 actions against their classification as sex offenders because a judgment in their favor would "in no way
14 *guarantee* parole or *necessarily* shorten their prison sentences by a single day." Id. at 824 (emphases
15 added). See also Ramirez, 334 F.3d at 858-59 (stating three times that the key inquiry is whether relief
16 would "necessarily" alter fact or duration of confinement). In this case, all that can be said with
17 certainty is that ordering the relief requested by Hamdan would not "necessarily" alter the fact or
18 duration of his confinement.
19
20
21
22
23
24
25
26
27
28
29
30
31

32 The Government's argument that Hamdan can *only* bring a habeas petition is particularly
33 inappropriate since it comes without any explanation of what policy aims Petitioner is supposedly
34 circumventing via mandamus. Unlike Preiser v. Rodriguez, 411 U.S. 475 (1973), where the fear was
35 that Section 1983 would permit an end-run around the exhaustion requirements set up to promote the
36 doctrine of federalism, see id. at 489-90, the Government has not explained how or why the exhaustion
37 rules would differ between the habeas and mandamus contexts, or whether those rules (to the extent
38 they exist at all in the military context) would apply with the same force as something so cardinal to
39 our system as Preiser's federalism.¹⁶ Indeed, the writ of Mandamus enjoys a special solicitude in
40
41
42
43
44
45
46
47
48
49
50
51

¹⁶ United States v. McVeigh, 106 F.3d 325 (10th Cir. 1997) stands only for the limited proposition that mandamus cannot be used to evade the limitations set by Congress in 18 U.S.C. § 3731 on the Government's right to appeal a criminal

1 American constitutional law. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). It is
2 exceptionally difficult to claim that mandamus—subject to a revered status at the Founding that has
3 never dissipated—somehow evades Congressional intent. That is why the Government offers no case
4 holding that mandamus is inappropriate when habeas corpus is available. While such an argument
5 might be made about §1983, which after all was drafted near the time federal habeas corpus was
6 extended to review state courts, see 14 Stat. 385 (1867), it is entirely unconvincing against the historic
7 writ of mandamus.
8

9
10
11
12
13
14 In the end, Respondents' heavy reliance on Preiser is misplaced. That case does not bar this
15 mandamus action. A further illustration of this is seen in Holmes v. United States Board of Parole, 541
16 F.2d 1243 (7th Cir. 1976). In that case, a prisoner requested a writ of mandamus challenging the
17 Government's decision to classify him as a "special offender" without a hearing. The court held that
18 mandamus relief was appropriate, rejecting the Government's reliance on Preiser for the proposition
19 "that habeas corpus is available to a federal prisoner attacking the conditions of confinement."¹⁷
20 Respondents offer not a single Ninth Circuit case to the contrary.¹⁸ To claim that only habeas can be
21 used to challenge failures on the part of the military to conform to its own regulations would create
22 new law about the limits of mandamus that have never been accepted.
23
24
25
26
27
28
29
30
31
32

33
34 case. Id. at 332. The Government has not pointed to any similar "important interests" set by Congress in this case that
35 would be safeguarded by limiting review to the habeas statute.
36

37
38 ¹⁷ Id. at 1248. "In accordance" with its decision, the court noted that "several other circuits have deemed the
39 mandamus remedy appropriate to challenge conditions of confinement." Id. (citing Kahane v. Carlson, 527 F.2d 492 (2d
40 Cir. 1975); Workman v. Mitchell, 502 F.2d 1201 (9th Cir. 1974); Mead v. Parker, 464 F.2d 1108 (9th Cir. 1972); Taylor v.
41 Blackwell, 418 F.2d 199 (5th Cir. 1969); Barnett v. Rodgers, 133 U.S. App. D.C. 296, 410 F.2d 995 (1969); Long v.
42 Parker, 390 F.2d 816 (3d Cir. 1968); Toles v. Katzenbach, 385 F.2d 107 (9th Cir. 1967), vacated, 392 U.S. 662, 88 S. Ct.
43 2292, 20 L. Ed. 2d 1353 (1968); Walker v. Blackwell, 360 F.2d 66(5th Cir. 1966)).
44

45
46 ¹⁸ In Workman, the Ninth Circuit held that mandamus was an appropriate vehicle for prisoners to challenge
47 punishment procedures in a federal penitentiary. See 502 F.2d at 1205 ("The district court unquestionably had jurisdiction,
48 under the mandamus statute, 28 U.S.C. § 1361, to require defendants, all of whom were officers or employees of the United
49 States, or an agency thereof, to perform the ministerial duty of complying with their own regulations."). The
50 appropriateness of mandamus is even stronger here because Swift is not merely challenging his particular situation; rather,
51 he is challenging a larger national policy of illegally subjecting detainees to military tribunals. In a closely similar context,
the Second Circuit has observed, "[i]ndeed, the present action is a more appealing candidate for mandamus than those
earlier cases, since Kahane is in effect challenging a nationwide policy of the Bureau of Prisons rather than the conditions
of confinement in a single penitentiary." Kahane, 527 F.2d at 493 n.1.

1 **2. Habeas Claims Can Be Heard in This District Under the Doctrine of**
2 **Pendent Venue**
3

4 This Petition seeks primarily mandamus relief. However, to the extent that any aspect of the
5 relief requested is addressed by means of habeas corpus, the pendent habeas claim should not affect
6 this Court's consideration of the mandamus claims. The Ninth Circuit has found that habeas corpus
7 and mandamus claims can exist simultaneously in the same action. See Mead v. Parker, 464 F.2d 1108
8 (9th Cir. 1972). This holding has been affirmed in other decisions.¹⁹
9

10 Moreover, even if there are some claims in this action that could only be the subject of habeas
11 relief, those claims should nevertheless remain before this Court as pendent to the mandamus claims.
12 Respondents completely ignore this fact, for an entirely different set of rules apply when the habeas
13 claim is pendent to another set of claims for which venue lies. See Petr.'s Supp. Memo at 26 (citing
14 pendent venue cases); see also Burnett v. Al Baraka Investment, 274 F. Supp. 2d 86, 98 (D.D.C. 2003);
15 Rodriguez v. Chandler, 641 F. Supp. 1292, 1302 (S.D.N.Y. 1986). This is why the Government's
16 invocation of Judge Matz's Gherebi decision backfires. For the policy identified by Respondents is
17 precisely the one that underlies the doctrine of pendent venue—it would make no sense to send the
18 habeas part of this action to the District of Columbia when (unlike in Padilla and Gherebi) mandamus
19 claims are already properly before this Court. As such, the entire case properly belongs before this
20 Court, even were the Petition to raise "core" habeas challenges, which it does not.
21

22 **D. Swift Is a Resident of Washington, Making Venue Proper in This District under**
23 **the Mandamus and Venue Act**
24

25 Respondents acknowledge that the purpose of the Mandamus and Venue Act, 28 U.S.C.
26 § 1391(e), was "to provide *nationwide venue for the convenience of individual plaintiffs* in actions
27 which are nominally against an individual officer but are in reality against the Government." Resp.'s
28
29
30
31
32

33
34
35
36
37
38
39
40
41
42
43
44
45 ¹⁹ See, e.g., DiStefano v. Fed. Bureau of Prisons, 2004 WL396999, at 3 (S.D.N.Y. Mar. 4, 2004) ("Because
46 jurisdiction is available under both § 2241 and § 1361, it is not necessary to consider whether DiStefano may also bring a
47 claim for a declaratory judgment under 28 U.S.C. § 2201."); Zucker v. Menifee, 2004 WL 102779 (S.D.N.Y. Jan. 21, 2004)
48 (concluding that court has jurisdiction under *both* the federal habeas and mandamus statutes to challenge the Bureau of
49 Prisons' policy regarding transfer of federal prisoners to halfway houses); O'Rourke v. Smith, 1983 U.S. Dist. LEXIS
50 13496, at *3-4, *7 (S.D.N.Y. Sept. 23, 1983) (concluding that court had "jurisdiction of these claims pursuant to 28 U.S.C.
51 § 2241 and, alternatively, 28 U.S.C. § 1361" and stating that "conditions of confinement may be challenged by means of a
petition for a writ of habeas corpus" and "pursuant to 28 U.S.C. § 1361").

1 Motion at 13, quoting Stafford v. Briggs, 444 U.S. 527, 542 (1980) (emphasis added). Respondents
2 also acknowledge that, under the statute, venue is proper in the place where the petitioner "resides." 28
3 U.S.C. § 1391(e)(3).²⁰ The Supreme Court has discussed the legislative impetus for the Act:
4
5

6
7 Without doubt, under § 1391(e), *venue lies in every one of the 95 federal*
8 *districts*, and suits may be pending in a dozen or several dozen at any one time.
9 Even though the burden of defending multiple suits while in office may be
10 onerous, the United States Attorney in each of the districts and the Department
11 of Justice carry that burden. In a mandamus suit only rarely would the officer
12 himself be obliged to travel to the district in which the case was heard; if so
13 obliged, the travel would be at Government expense. When an official leaves
14 office, his personal involvement in a mandamus suit effectively ends and his
15 successor carries on. No personal cost or inconvenience is incurred, either while
16 in office or later. It was with this understanding that Congress sought to
17 ameliorate the inconvenience and expense to private plaintiffs seeking relief
18 from the action or inaction of their Government.
19
20

21 Stafford, 444 U.S. at 544 (emphasis added); see also Ashe v. McNamara, 355 F.2d 277, 279 (1st. Cir.
22 1965) (allowing plaintiff to use home district to sue the Secretary of Defense to challenge his
23 dishonorable discharge and noting that after the adoption of § 1391 "obstacles which until recently
24 might have impeded this suit in any district other than the District of Columbia, no longer exist."). A
25 central animating factor for the 1962 Act was to avoid the congestion and delay that resulted when all
26 mandamus cases had to be brought in the District of Columbia.²¹
27
28
29
30
31
32
33

34
35
36 ²⁰ Petitioner has never relied upon 1391(e)(4) as the Government contends, since there has not been an (e)(4)
37 provision since 1990. See Pub. L. 101-650, § 311(3) (consolidating Sec. 1391(e)). Petitioner relies on (e)(3). The
38 permissive venue provision of the 1962 Mandamus and Venue Act is discussed in the Memorandum of Law filed in support
39 of the Petition. That discussion, see Petr.'s Supp Memo at 7-9, 24-25, is incorporated herein.
40

41 21

42
43 Congress found that no sound reason required all actions against federal officials to be litigated
44 exclusively in the District of Columbia (S. Rep. No. 1992, 87th Cong., 2d Sess. 3 (1962) U.S.
45 Code Congressional and Administrative News, p. 2784, and expressed the view that the more
46 liberal venue provisions would materially reduce congestion in the District Court for the District
47 of Columbia which is "already heavily burdened" and where "substantial delays are incurred."
48 H.R.Rep.No.536, 87th Cong., 1st Sess. 3 (1961).
49

50 Starnes v. McGuire, 512 F.2d 918, 923 n.2 (D.C. Cir. 1974) (citation omitted); see also id. at 932 ("Although congestion
51 alone is not sufficient reason for transfer, relative docket congestion and potential speed of resolution is an appropriate
factor to be considered.")

1 Respondent's motion is a transparent attempt to turn the clock back to 1961, when suits against
2 Government officials had to be brought in the District of Columbia. In 1962, Congress made an
3 explicit choice to permit plaintiffs to impose some hardships on the federal Government in mandamus
4 actions. The Padilla decision suggests that habeas corpus is governed by a quite different set of
5 objectives.²²
6
7
8
9

10 In this case, Petitioner has come forward with evidence that he resides in this District. See
11 April 5th Swift Decl. at ¶¶ 2-7. Nevertheless, Respondents assert that a next friend is only a "nominal
12 party," and for purposes of determining venue, courts look to the real party in interest. Respondents
13 cite a treatise, but no cases, to support this assertion. That treatise, in turn, provides only one case
14 dealing explicitly with venue, Blackwell v. Vance Trucking Co., 139 F. Supp. 103 (E.D.S.C. 1956).²³
15 Blackwell was concerned about litigants deliberately naming nominal parties in order to "create venue
16 in the federal court." Id. at 105. In this case, by contrast, there can be no allegation that Hamdan
17 deliberately manufactured venue. Hamdan did not select Swift because of his residence in Washington
18 State; the Government selected Swift.
19
20
21
22
23
24
25
26

27 Blackwell has never been cited for the Government's venue proposition, by any court,
28 anywhere. And whatever the merits of Blackwell, neither it nor any other case offered by the
29 Government touches upon venue when the "real party" lacks a domicile and cannot provide a basis for
30 venue. The cases cited by the Government merely concern situations where forum shopping concerns
31 arise because of a conflict between the residence of the "real party" and the "nominal" one. It is not
32 clear that forum shopping concerns are even tenable when it comes to 1391(e)(3) (see Stafford, 444
33 U.S. at 544 ("[w]ithout doubt, under § 1391(e), venue lies in every one of the 95 federal districts, and
34
35
36
37
38
39
40
41
42

43
44 ²² See Feliciano v. Laird, 426 F.2d 424, 426 (2d Cir. 1970) ("The government raises a preliminary objection to the
45 petition for habeas corpus, challenging the jurisdiction of the Eastern District [of New York] and this court. As we are
46 treating this as a petition for mandamus, we do not consider the issue. Original jurisdiction to issue mandamus has been
47 vested in the several district courts, 28 U.S.C. § 1361 (1964), and venue is proper, 28 U.S.C. § 1391(e) (1964).").
48

49 ²³ The other cases are concerned with preventing litigants from manufacturing diversity jurisdiction—and thereby
50 gaining access to the federal courts in the first instance—by naming as a nominal party a diverse citizen. Where, as here,
51 the federal courts already have jurisdiction under both habeas and mandamus, and the only remaining question is *which*
federal district this action can be brought, the concern is clearly not implicated.

1 suits may be pending in a dozen or several dozen at any one time.")). And the essential point is that
2
3 forum shopping is impossible when no conflict between the nominal and real parties exist. In those
4
5 settings, there must be a default rule, and there is nothing to suggest that the default rule is to
6
7 eviscerate (e)(3) and give the *defendants* the power to select the forum. Such a result is inconsistent
8
9 with the text, history, and precedent surrounding the 1962 Act.

10 Finally, Respondent's argument ignores the real interest that Swift has in this action in his own
11
12 right, an interest that makes him something other than a "nominal" party. Indeed, the only "nominal"
13
14 parties in this case are the named Respondents. As Stafford recognized, mandamus actions "are
15
16 *nominally* against an individual officer but are in reality against the Government." 444 U.S. at 542
17
18 (emphasis added). Thus, even if Swift is only a nominal party, Respondents offer no explanation why
19
20 his convenience and choice of forum must be subordinated to that of the Respondents, who are also
21
22 only nominal parties. Indeed, in light of the intention of Congress in passing the 1962 Act to place
23
24 "the convenience of the plaintiff" above that of the Government where venue is concerned,
25
26 Respondents appear to have it backwards. See also Decker Coal Co. v. Commonwealth Edison Co.,
27
28 805 F.2d 834, 843 (9th Cir. 1986) ("The defendant must make a strong showing of inconvenience to
29
30 warrant upsetting the plaintiff's choice of forum.").

31 Respondents also contend that Swift is only *domiciled* in this district; his *residence* is in
32
33 Virginia. This is entirely wrong. The Government offers not a single case to contradict the well-
34
35 settled principle in American Conflicts-of-Law that govern residence and domicile of military
36
37 officers.²⁴ The general rule is that "[f]or purposes of the venue statutes, residence of an individual is
38
39

40
41 ²⁴ Courts have long allowed military personnel to treat their location before enlistment as their residence and
42
43 domicile for the purpose of instituting legal proceedings. See Dennett v. Dennett, 71 F.2d 975 (D.C. Cir. 1934) (allowing
44
45 soldier stationed in New Jersey to claim District of Columbia as his "residence" for purpose of instituting a divorce);
46
47 Harris v. Harris, 215 N.W. 661, 662 (Iowa 1927) ("Therefore a person under such circumstances cannot, in any proper
48
49 sense of the term, have a residence any where other than the home he has left, since he has no choice as to where he goes,
50
51 the time he can remain, or when he shall return. To gain either an actual or legal residence there is, of necessity, involved
at least the exercise of volition in its selection, and this cannot be affirmed of the residence of either a soldier or sailor in
active service."); Annotation, Residence or Domicile, for Purpose of Divorce Actions, of one in Armed Forces, 21 A.L.R.
2d 1163, 1180 (2004) ("Practically all of the authorities are in agreement that a person inducted into the military service
retains his domicile or residence in the state from which he entered the military service and may institute an action for
divorce there . . ."); Gambelli v. United States, 904 F. Supp. 494, 496-97 (E.D. Va. 1995); Seegers v. Strzempek, 149 F.
Supp. 35, 36 (E.D. Mich. 1957); Furman v. Gen. Dynamics Corp., 377 F. Supp. 37, 45 (S.D.N.Y. 1974) ("The general rule

1 equivalent to permanent residence or legal domicile." 17 JAMES WM. MOORE, MOORE'S FEDERAL
2 PRACTICE § 110.03; see also id. § 110.31 (repeating the same proposition for § 1391(e)).²⁵
3

4
5 Holmes v. United States Board of Parole, 541 F.2d 1243 (7th Cir. 1976) is illustrative.²⁶ In that
6 case, a federal prisoner brought a mandamus action in the district where he resided prior to being
7 imprisoned. The Government moved to dismiss, or in the alternative, to transfer to the district of his
8 incarceration—on the precise ground advanced here—that the prisoner's action was in reality a habeas
9 corpus suit that must be brought where he was confined. The Court held that, even assuming that
10 habeas was available, the district judge did not abuse his discretion in granting mandamus relief where
11 the prisoner was challenging his "conditions of confinement." 541 F.2d at 1248. The Court stated that
12 "we think that mandamus is all the more appropriate in this case because Holmes' attack 'is in effect
13 [here] challenging a nationwide policy of the Bureau of Prisons rather than the conditions of
14 confinement in a single penitentiary.'" Id. (citation omitted). With respect to venue, the Court stated:
15 "We see no reason for purposes of venue under section 1391 to ascribe to Holmes the residence of his
16 district of incarceration rather than the district of his *domicile*. Accordingly, we hold that venue
17 existed in the district court under section 1391(e)(4)." Id. at 1248-49 (emphasis added).²⁷
18
19
20
21
22
23
24
25
26
27
28
29

30
31 in New York and elsewhere is that military service in no way affects a person's domicile or permanent residence, in the
32 absence of acts showing an intent to change it."); Turek v. Lane, 317 F. Supp. 349, 350 (E.D. Pa. 1970); Finger v.
33 Masterson, 152 F. Supp. 224, 225 (W.D.S.C. 1957).

34
35 ²⁵ See Kahane, 527 F.2d at 494 ("[R]esidence for the purposes of § 1391 is often interpreted as equivalent to
36 domicile."); Ellingburg v. Connett, 457 F.2d 240 (5th Cir. 1972) (holding that residence for § 1391(e) "means neither more
37 nor less than legal domicile" (citation omitted)); United States ex rel. Harrison v. Pace, 357 F. Supp. 354, 355 (E.D. Pa.
38 1973) ("For venue purposes [referring to § 1391(e)] the term 'resides' refers to domicile."); Ott v. U.S. Bd. of Parole, 324 F.
39 Supp. 1034, 1037 (W.D. Mo. 1971) ("[I]t is settled that 'resides' for venue purposes under § 1391 refers to domicile."). This
40 is part of a more general equivalency. See Ellingburg, 457 F.2d at 241 (quoting King v. Wall & Beaver St. Corp., 145 F.2d
41 377, 379 (D.C. Cir. 1945)) ("It is well established that the words 'inhabitant' and 'resident in' as used in Section 51 of the
42 Judicial Code mean neither more nor less than legal domicile.); United States v. Harrison, 357 F. Supp. 354, 356 (1973).
43 ("For venue purposes the term 'resides' refers to domicile . . .").
44

45 ²⁶ Holmes was overruled in part on other issues by Solomon v. Benson, 563 F.2d 339 (7th Cir. 1977).

46
47 ²⁷ The Court also rejected the Government's contention that mandamus was not an appropriate vehicle to litigate
48 complex constitutional issues. The Court concluded that "[a] transfer or dismissal by this court without prejudice so that
49 Holmes could file an action under section 2241 [the habeas statute] would serve only to perpetuate a gross injustice in favor
50 of preserving judicially formulated niceties which are neither required nor jurisdictional. We do not countenance such a
51 result." Id. at 1248. "Constitutional obligations as well as statutory duties are included within the perimeters of 28 U.S.C.
1361. In cases charging a violation of constitutional rights, mandamus should be construed liberally." Id. at 1249.

1 To the extent courts have ever drawn distinctions between "residence" and "domicile," they
2 have indicated that domicile is the broader term.²⁸ Thus, while Swift may temporarily reside in
3 Virginia, he still retains a residence in his domicile in Washington. After all, § 1391(e) liberalized
4 venue for the convenience of plaintiffs. If Swift has more than one residence, it is his prerogative—
5 and not the Government's—to decide which one he will use.
6
7
8
9

10 The Western District of Washington is also the most appropriate venue because there is no
11 guarantee that Swift satisfies the requirements for an alternative residence elsewhere. For example,
12 when a petitioner is involuntarily incarcerated or stationed somewhere against his will, courts often
13 *require* him to file in the district of his domicile.²⁹ It is therefore, quite common—and at times
14 required—for prisoners to file mandamus petitions from their domicile.³⁰ Indeed, the only case the
15 Government cites that discusses the venue statutes (rather than defining "residence" and "domicile"
16 more generally) acknowledges that it adopts a minority position contrary to the position of, for
17 example, the Ninth Circuit. See In re Pope, 580 F.2d 620, 622 (D.C. Cir. 1978) (per curiam) ("There is
18
19
20
21
22
23
24
25
26

27 Likewise, in order to further § 1391's goal of liberalizing venue options, other courts have employed a flexible and
28 functional analysis. In Kahane, for example, the Second Circuit allowed an orthodox rabbi who was convicted and
29 sentenced to prison in the Eastern District of New York to seek a writ of mandamus in the Eastern District challenging his
30 prison conditions, even though during his probation he had moved to Israel. The Second Circuit reasoned that even though
31 Kahane may have technically relocated to Israel, his "long-time residence in the Eastern District combined with his
32 probation obligations to the court of that district" created proper venue for his petition for mandamus. Kahane, 527 F. 2d,
33 at 494.
34
35

36 ²⁸ "Residence is physical, whereas domicile is generally a compound of physical presence plus an intention to
37 make a certain definite place one's permanent abode" Weible v. United States, 244 F.2d 158, 163 (9th Cir. 1957). As
38 the Government itself concedes, Swift "may have several residences, but only one domicile." United States v. Namey, 364
39 F.3d 843, 845 (6th Cir. 2004) (quotations omitted).
40

41 ²⁹ "The fact that one lives in a state under military compulsion, in the absence of any act showing an intention to
42 establish a residence there, has been held not to satisfy the factual requirements of a residence or domicile of choice for the
43 purposes of a divorce suit." 21 A.L.R. 1163L; see also Ellingburg v. Connett, 457 F.3d 240 (5th Cir. 1972); Nobuo
44 Hiramatsu v. Phillips, 50 F. Supp. 167, 168 (S.D. Cal. 1943) (preventing Japanese Americans who were forcibly removed
45 from California and placed in an Arizona "relocation center" during WWII from using their Arizona residence to claim
46 diversity jurisdiction and sue the California citizens who imprisoned them).
47

48 ³⁰ Billiteri v. United States Bd. of Parole, 385 F. Supp. 1217 (W.D.N.Y. 1974) (prisoner's district of residence may
49 be where he resided before incarceration); Stone v. Bd. of Parole, 360 F. Supp. 22 (D. Md. 1973) (venue present in district
50 of prisoner's residence before incarceration); United States ex rel. Harrison v. Pace, 357 F. Supp. 354 (E.D. Pa. 1973)
51 (granting prisoner's petition for mandamus filed in prisoner's domicile before incarceration); Ott v. U.S. Bd. of Parole, 324
F. Supp. 1034 (W.D. Mo. 1971) (preventing prisoner from claiming district of his incarceration as his residence).

1 considerable support for the notion that one does not change his residence to the prison by virtue of
2 being incarcerated there. The law in this Circuit, however, is otherwise." (citations omitted)); Cohen v.
3 United States, 297 F.2d 760, 774 (9th Cir. 1962) ("One does not change his residence to the prison by
4 virtue of being incarcerated there").³¹ And Pope relied on Starnes, a case that dramatically undermines
5 this motion. See supra p. 28 n.21.
6
7
8
9

10 Finally, Respondents' argument fails to recognize that Hamdan has a very significant
11 connection to the Western District of Washington through counsel at Perkins Coie, who are located
12 here. Indeed, Perkins Coie attorneys and staff in this district have invested hundreds of hours in
13 litigating this case. (Schneider Decl. ¶ 2.) Courts have held that the location of counsel is relevant to
14 the venue determination. See, e.g., Padilla ex rel. Newman v. Bush, 233 F. Supp. 2d 564, 587
15 (S.D.N.Y. 2002) (subsequent history omitted) (noting that Padilla's lawyers were in the district and
16 denying Government's motion to transfer). Likewise, this Court has already devoted valuable and
17 scarce judicial resources to the matter, which goes to speed of adjudication and the overall "interests of
18 justice" factor in venue determinations. Commodity Futures Trading Comm'n v. Savage, 611 F.2d
19 270, 279 (9th Cir. 1979) (affirming district court's denial of motion to transfer venue based in part on
20 the court's familiarity with the case, and the prospect that transfer would likely lead to delay); see also
21 Intranexus, Inc. v. Siemens Medical Solutions Health Servs. Corp., 227 F. Supp.2d 581, 585 (E.D.Va.
22 2002) (court's speedier resolution of cases favored retaining venue).³²
23
24
25
26
27
28
29
30
31
32
33

34 In any event, Respondents' argument concerning connection to the forum is properly part of an
35 analysis of venue under either 28 U.S.C. § 1406(a), or 28 U.S.C. § 1404(a). However, Respondents
36
37
38
39
40

41
42 ³¹ That many of these cases concern prisoner suits does not materially distinguish them from this petition. Swift's
43 actual physical residence at any particular time is involuntary, it is determined by assignments from his military superiors,
44 and more likely to reflect the Government's convenience than his own. See Manley v. Engram, 755 F.2d 1463 (11th Cir.
45 1985) (declaring that although defendant was stationed in Georgia and lived there with his family, his permanent home in
46 Florida is his residence for purposes of venue); United States v. Scott, 472 F. Supp. 1073, 1076 (N.D. Ill. 1979), aff'd, 618
47 F.2d 109 (7th Cir. 1980).
48

49 ³² The Government's assertion that it is not convenient for Swift and his attorney to come to Seattle rings hollow.
50 It neglects the fact that the majority of his legal team is based in Seattle, and has logged hundreds of hours on this case.
51 The Government, holding Hamdan in a place that is virtually inaccessible in an attempt to evade the review of any court,
has little credibility when it comes to addressing the "convenience" of Swift or his legal team.

1 have completely failed to provide an adequate analysis under either statute. Instead of submitting
2 evidence concerning the relevant factors that the Court should consider on such venue motions,
3 Respondents offer nothing more than the conclusory assertion that "cases challenging the detention of
4 enemy combatants in Guantanamo Bay have no connection with the Ninth Circuit and can best be dealt
5 with in a single forum with a more obvious connection to the controversy." (Resp.'s Motion at 12.)
6 That assertion, aside from misstating the nature of this case and lacking any evidentiary support for the
7 "obvious connection" of this case to the District of Columbia, disregards the delay attendant upon
8 transfer, which militates against transfer.
9

10
11
12
13
14
15
16 **E. Even in the Absence of Mandamus, Gherebi II Does Not Require Transfer of**
17 **Venue in This Case**
18

19 In addition, even if mandamus were deemed to be unavailable here, the circumstances of this
20 case differ from Gherebi II and Padilla such that a transfer of venue would be improper. Nothing in
21 either of those cases forces *all* habeas actions from detainees abroad to lodge in the District of
22 Columbia. To begin with, the Government far overreads the language in a footnote in Padilla, where
23 the Court observed that, in two cases where American citizens detained overseas (and thus outside the
24 territory of any district court) filed habeas petitions, "*we have allowed* the petitioner to name as
25 respondent a supervisory official and file the petition in the district where the respondent resides."
26 Padilla, 124 S. Ct. at 2725 n.16 (emphasis added). This retrospective *description* of prior cases does
27 not erect some sort of prospective mandatory barrier to habeas actions being brought in other places.³³
28 Thus, these cases stand only for the proposition that detainees held outside the territory of any district
29 court *may* sue national military leaders in the District of Columbia. Those cases, as well as Padilla
30 itself, leave open the question of whether such suits *must* be heard in the District of Columbia.³⁴
31
32
33
34
35
36
37
38
39
40
41

42
43
44 ³³ The two cases to which Padilla referred were Burns v. Wilson, 346 U.S. 137 (1953) and United States ex rel.
45 Toth v. Quarles, 350 U.S. 11 (1955). In Burns, court-martial convicts detained in Guam sued the Secretary of Defense in
46 the District of Columbia, and in Toth, a court martial convict held in Korea sued the Secretary of the Air Force in the
47 District of Columbia. In neither case did the Court suggest that petitioners could file suit only in the District of Columbia.
48

49 ³⁴ Instead, the Government overreads the Padilla footnote and yokes its misreading to a view espoused by only
50 two justices in the Rasul case. Yet even in that concurrence, Justice Kennedy, joined only by Justice O'Connor, never
51 announced the iron-clad rule the Government tries to put forth here. To the contrary, the language that the Government
cites is preceded by Justice Kennedy's observation that "This does not mean that habeas petitions are governed by venue

1 Indeed, Justice Scalia understood the recent decisions in Padilla and Rasul to jointly imply that
2 detainees held overseas could bring habeas actions in any federal district: "Under today's strange
3 holding Guantanamo Bay detainees can petition in *any* of the 94 federal judicial districts." Rasul, 124
4 S. Ct. 2686, 2711 (Scalia, J., dissenting) (emphasis added).
5
6

7
8 Gherebi II is no different. The Ninth Circuit's panel decision, without oral argument, briefing,
9 or the opportunity for others such as *amici* to be heard, provided no rule of decision or rationale that
10 would bind future cases. It merely said that "it *appears* to us that the proper venue for *this proceeding*
11 is in the District of Columbia." This language can hardly be converted into a mandatory venue-transfer
12 rule. For venue is the quintessential fact-specific inquiry that must be decided on a case-by-case basis,
13 which explains why the Gherebi II panel carefully used the words it did, and also why the Padilla
14 decision itself erected no bar to venue outside of the District of Columbia when challenges are brought
15 from outside the United States. After all, the relationship of the next friend to the forum may differ,
16 contacts between Respondents and the forum may differ, the swiftness of justice may differ, and the
17 claims may be inapposite.³⁵
18
19

20
21 There are strong reasons to believe that each of these differences is significant here. Swift's
22 connections to the forum are significant and many, and there is no doubt that Respondents likewise
23 have significant contacts.³⁶ There is no other forum in the country in which so much work has been
24
25
26

27
28 rules and venue considerations that apply to other sorts of civil lawsuits"—underscoring that *other* civil actions (such as
29 those for mandamus) are not subject to the legal rule he is trying to propose. And not once does Justice Kennedy's
30 concurrence suggest that his proposed venue rule would govern non-core habeas challenges. It also says that, even for
31 habeas, the general question "where the action must be filed need not be resolved with finality in this case." Padilla, 124 S.
32 Ct. at 2728 (Kennedy, J., concurring)
33

34
35 ³⁵ The Government provides a Central District of California case in another Gherebi action for Bivens damages,
36 but that case merely confirms that pendent jurisdiction is appropriate and that one forum should hear the related claims.
37 Furthermore, that transfer order in the Central District case is the subject of ongoing proceedings in the Ninth Circuit. We
38 do not believe that either Gherebi decision provides guidance to the Court about what to do in this mandamus, non-core-
39 habeas action.
40

41
42 ³⁶ Approximately 53,000 men and women are stationed in Washington State. See [http://www.ofm.wa.gov/
43 pop/poptrends/poptrends_03.pdf](http://www.ofm.wa.gov/pop/poptrends/poptrends_03.pdf), p. 42, 45). Respondent President Bush traveled to Spokane on June 17 to raise money for
44 Senate Republican candidate George Nethercutt. He stayed overnight in Washington State and addressed military
45 personnel at Fort Lewis on June 18, 2004. (<http://www.whitehouse.gov/news/releases/2004/06/20040618-1.html>).
46 Respondent Secretary Rumsfeld has also visited Washington State as Secretary of Defense. See
47 <http://www.defenselink.mil/today/2002/to20020419.html>.
48
49
50
51

1 done on behalf of Hamdan. Unlike Gherebi II, where the Ninth Circuit was selecting between two
2 districts that had not advanced the case beyond threshold issues, or even set a briefing schedule, here a
3 transfer of venue would work hardship and cause delay. In the interim, Hamdan would continue to
4 languish in solitary confinement, jeopardizing his ability to defend himself in these proceedings and in
5 a military commission. No such adverse consequence could be shown to necessarily arise from the
6 transfer in Gherebi.
7
8
9
10

11
12 Finally, the claims in this case are different from those at issue in Padilla and Gherebi. While
13 Padilla articulated a strong district-of-confinement rule governing venue for habeas petitions, it limited
14 that rule to "core habeas petitions challenging present physical confinement." Padilla, 124 S. Ct. at
15 2722. By contrast, when, as here, a habeas petitioner challenges adjudicatory procedures and
16 conditions of confinement, and not necessarily the underlying factual basis for his detention, his venue
17 options are not restricted to the district in which his custodian is located. Indeed, in this respect, the
18 claims in this case more closely resemble those at issue in Braden v. 30th Judicial Circuit Court of
19 Kentucky, 410 U.S. 484 (1973), which the Supreme Court in Padilla acknowledged amounted to a
20 challenge to "something other than...present physical confinement." 124 S. Ct. at 2720.
21
22
23
24
25
26
27

28
29 Because Hamdan, like Braden, does not primarily challenge the fact or duration of
30 confinement, his habeas petition falls into a long line of cases allowing—and sometimes *requiring*—
31 habeas petitioners to bring suit against federal officials outside of the District of Columbia. For
32 example, the Supreme Court has long held that army reservists—who, like Hamdan, fall under the
33 Braden exception, *see id.* at 2720—may challenge their active-duty status in whichever district they
34 have had primary contacts with army personnel. *See Strait v. Laird*, 406 U.S. 341 (1972). Strait found
35 that it would "exalt fiction over reality" to require an army reservist to bring suit against his "nominal
36 custodian" in Indiana when Strait had had no "meaningful contact" with Indiana. 406 U.S. at 344-46;
37 *see also Padilla*, 124 S. Ct. at 2724. In an analogous case applying Strait, the D.C. Circuit declared that
38 when army reservists sue the Army Secretary or other cabinet officers, they *must* file in the district
39 with which they have had the most significant contacts and *may not* file in the District of Columbia.
40
41
42
43
44
45
46
47
48
49 Eisel v. Secretary of the Army, 477 F.2d 1251 (D.C. Cir. 1973).
50
51

1 Similar to the reservists in both Strait and Eisel, Hamdan has had no "meaningful contact" with
2
3 any judicial district except this Court's, where his next friend has brought this Petition. Within this
4
5 Court's district, however, Hamdan's contacts through Swift have been many and substantial. All the
6
7 litigation of Hamdan's Petition has occurred in Washington.

8
9 This case thus presents the "limited circumstances" under which a custodian such as Secretary
10
11 Rumsfeld can be held "present . . . through the actions of his agents." Padilla, 124 S. Ct. at 2724.
12
13 There can be no doubt that Secretary Rumsfeld is "present" in the Western District of Washington for
14
15 these purposes.³⁷ Several practical considerations also militate strongly in favor of finding venue
16
17 regarding habeas. The Eisel court was particularly concerned with a flood of habeas petitions
18
19 overloading the District of Columbia courts: "In short, appellants' relationship to the military located in
20
21 the District of Columbia, including the various civilian Secretaries, is no different from that of any
22
23 other member of the military. Thus, if we were to permit Gelber and Eisel to proceed in the District,
24
25 we would be compelled to permit any inactive reservist, and perhaps any member of the military, the
26
27 same privilege." Eisel, 477 F.2d at 1255 (footnote omitted).³⁸ Even if courts outside of the District of
28
29 Columbia might be unconcerned about the potential flood of habeas petitions landing in another
30
31 circuit, Eisel makes clear *that* court's concern that "such an influx could seriously overburden an
32
33 already busy court system." Eisel, 477 F.2d at 1256. The extraordinary number of habeas petitions
34
35 authorized by Rasul v. Bush, 124 S. Ct. 2686, 2690 (2004) (estimating that 640 prisoners are currently
36
37 detained in Guantanamo, and authorizing all of them to challenge their individual detentions through

38
39
40 ³⁷ Federal courts have routinely found national officials "present" for habeas purposes throughout the entire
41
42 country, and not only in the District of Columbia. See, e.g., Arlen v. Laird, 451 F.2d 684, 687 (2d Cir. 1971) ("To give the
43
44 commanding officer of the Center "custody" of the thousands of the reservists throughout the United States and to hold at
45
46 the same time that the commanding officer is present for habeas corpus purposes only within one small geographical area is
47
48 to ignore reality."); Tartt v. Secretary of Army, 841 F. Supp. 236, 240 (N.D. Ill. 1993); Jones v. Watkins, 422 F. Supp.
49
50 1268, 1273 (D. Ga. 1976). ("the Chief of Naval Personnel, was present in this district for the very limited purpose of habeas
51
52 corpus jurisdiction over the claims of these inactive reservists.").

53
54 ³⁸ Other courts have raised similar concerns that the Government "could seriously undermine the remedy of
55
56 habeas corpus by detaining illegally a large group of persons in one facility so that the resulting 'torrent of habeas corpus
57
58 petitions' would overwhelm the district and magistrate judges of the local United States District Court." Nwankwo v. Reno,
59
60 828 F. Supp. 171, 174 (E.D.N.Y. 1993); see also Henderson v. INS, 157 F.3d 106, 126-28 (2d Cir. 1998) (rejecting
61
62 interpretation of venue that would concentrate immigration habeas cases in District of Columbia).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51

LIEUTENANT COMMANDER CHARLES SWIFT

By /s/ _____
Lieutenant Commander Charles Swift
N.C. Bar #21084
Petitioner, as Next Friend for Salim Ahmed Hamdan

PERKINS COIE LLP

By /s/ Harry H. Schneider, Jr. _____
Harry H. Schneider, Jr., WSBA #9404
Joseph M. McMillan, WSBA # 26527
David R. East, WSBA #31481
Charles C. Sipos, WSBA #32825
Attorneys for Petitioner

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51

IV. CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this 23rd day of July, 2004, I caused to be served a true and correct copy of **Petitioner's Opposition to Respondents' Motion to Dismiss or Transfer** upon the following, at the addresses stated below, via the method of service indicated:

Mr. John McKay	<u> X </u>	Via hand delivery
Brian C. Kipnis	<u> </u>	Via Certified Mail, Return Receipt Requested
U.S. Attorney's Office	<u> </u>	Via Overnight Delivery
601 Union Street, Suite 5100	<u> </u>	Via Facsimile
Seattle, WA 98101	<u> X </u>	Via E-filing
Jonathan L. Marcus	<u> </u>	Via hand delivery
Appellate Section, Criminal Division	<u> </u>	Via Certified Mail, Return Receipt Requested
U.S. Department of Justice	<u> X </u>	Via Overnight Delivery
601 D Street, N.W., Suite 6206	<u> </u>	Via Facsimile
Washington, D.C. 20530	<u> </u>	Via E-filing

DATED at Seattle, Washington, this 23rd day of July, 2004.

PERKINS COIE LLP

By /s/ Harry H. Schneider, Jr.
Harry H. Schneider, Jr., WSBA #9404
Joseph M. McMillan, WSBA # 26527
David R. East, WSBA #31481
Charles C. Sipos, WSBA #32825
Attorneys for Petitioner