In the

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Docket No. 03-3674

ALI SALEH KAHLAH AL-MARRI,

Petitioner-Appellant

-against-

GEORGE W. BUSH, President of the United States of America,
DONALD H. RUMSFELD, United States Secretary of Defense,
M.A. MARR, Commander, Naval Consolidated Brig, Charleston, South Carolina,

Respondents-Appellees

On Appeal From the United States District Court for the Central District of Illinois
Sat Below: Honorable Michael M. Mihm, U.S.D.J.

BRIEF OF PETITIONER-APPELLANT ALI SALEH KAHLAH AL-MARRI

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Appellate Court No: 03-3674

Shon Caption: Al-Marri v. Bush, et *al.*

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Ali Saleh Kahlah al-Marri

(2) The names of **all** law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Gibbons, Del Deo, Dolan, Griffinger & Vecchione. **P.C.**

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Attorney's Signature _____ Date: 11/4/03

Attorney's Printed Name: Mark A. Berman, Esq.

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d) Yes X No ____

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

On July 8, 2003, Petitioner-Appellant Ali Saleh Kahlah al-Marri filed a petition for a writ of habeas corpus in the United States District Court for the Central District of Illinois, challenging his designation and detention by the President of the United States as a so-called "enemy combatant." A34 (Habeas Petition). The federal habeas statute, 28 U.S.C. § 2241, as well as 28 U.S.C. §§ 1331, 1346, 1350, 1356, and 2201, establish subject matter jurisdiction for the federal courts to inquire into claims filed by a petitioner challenging the lawfulness of his detention by the Executive branch. See, e.g., In re Yamashita, 327 U.S. 1, 9 (1946); Ex parte Endo, 323 U.S. 283, 307 (1944); Ex parte Quirin, 317 U.S. 1, 24-25 (1942); Ex parte Milligan, 71 U.S. 2, 32 (1866).

On August 1, 2003, in a published opinion, the district court dismissed Mr. al-Marri's habeas petition *on* venue grounds. A1 (Al-Marri v. Bush, 274 F. Supp. *2d* 1003 (C.D. Ill. 2003)). On August 8, 2003, Petitioner moved the district court to reconsider its venue determination. On August 25, 2003, the district court entered an order denying Petitioner's motion for reconsideration. A7 (Order & Opinion).

On October 2, 2003, Petitioner filed a timely notice of appeal from the final order entered by the court below disposing of all of Petitioner's claims. A160 (Notice of Appeal). This Court has jurisdiction over the present appeal pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

I. Does United States v. Mittelsteadt, 790 F.2d 39, 41 (7th Cir. 1986), compel the dismissal of Mr. al-Marri's petition for a writ of habeas corpus, based upon improper venue, simply because Petitioner -- who was designated an "enemy combatant" by the President, and unlawfully removed from the Central District of Illinois by Respondents -- is currently confined in South Carolina, where the "traditional venue considerations" listed by the Supreme Court in Braden v. Thirtieth Judicial Circuit Court, 410 U.S. 484 (1973), do not otherwise weigh in favor of venue in South Carolina?

II. Under the circumstances of this "enemy combatant" case, is each of the named Respondents properly deemed to be Petitioner's "custodian," within the meaning of 28 U.S.C. § 2241, such that the district court could and should have exercised habeas jurisdiction over each of them?

STATEMENT OF THE CASE

Statement Of The Facts

1. On September 10, 2001, Petitioner lawfully entered the United States, with his wife and five children, for the purpose of obtaining a master's degree from Bradley University in Peoria, Illinois, the same institution from which he had earned a bachelor's degree in 1991. A36 (Habeas Pet. ¶ 7).

2. On December 12, 2002, Petitioner was detained in Peoria by the Federal Bureau of Investigation ("FBI"), as a material witness in the government's investigation of the terrorist attacks of September 11, 2001, and at the direction of the United States Attorney's Office for the Southern District of New York. Thereafter, Petitioner was transported by the FBI from the Peoria County Jail to Metropolitan Correctional Center in New York City ("MCC-NY"). A36 (Habeas Pet. ¶ 8).

3. On January 28, 2002, the government formally arrested Petitioner on a criminal complaint, charging him with credit card fraud. A37 (Habeas Pet. ¶ 10).

4. On February 6, 2002, the government charged Petitioner in a one-count indictment with possession of fifteen or more unauthorized or counterfeit access devices, with intent to defraud, in violation of 18 U.S.C. § 1029(a)(3). The case was assigned to the Honorable Victor Marrero, United States District Judge for the Southern District of New York. A37 (Habeas Pet. ¶ 11).

5. On February 8, 2002, Petitioner entered a plea of "not guilty" to the indictment and thereby asserted his innocence. A37 (Habeas Pet. ¶ 12).

6. The criminal case was litigated in the normal course, during which time the government repeatedly endeavored to elicit Petitioner's cooperation, promising an improvement in the conditions of his confinement in return for his assistance. A37 (Habeas Pet. ¶ 13).

7. On January 22, 2003, when Petitioner continued to assert his innocence, he was charged in a second, six-count indictment with two counts of making a false statement to the FBI, in violation of 18 U.S.C. § 1001, three counts of making a false statement in a bank application, in violation of 18 U.S.C. § 1014, and one count of using a means of identification of another person for the purpose of influencing the action of a federally insured financial institution, in violation of 18 U.S.C. § 1028(a)(7). This second indictment was assigned to the Honorable Denise L. Cote, United States District Judge for the Southern District of New York. A37-38 (Habeas Pet. ¶ 14).

8. On January 24, 2003, Petitioner entered a plea of "not guilty" to the second indictment and thereby asserted his innocence. A38 (Habeas Pet. ¶ 15).

9. On March 28, 2003, Petitioner moved to consolidate the two Southern District of New York indictments. A38 (Habeas Pet ¶ 18).

10. On April 23, 2003, Petitioner moved to dismiss the indictments on the ground that all of the conduct charged was alleged to have taken place in the Central District of Illinois, and that venue was therefore improper in the Southern District of New York. A38 (Habeas Pet. ¶ 19).

11. On April 24, 2003, Judge Marrero granted Petitioner's motion to consolidate the cases. A38 (Habeas Pet. ¶ 20).

12. On May 7, 2003, at the request of the government, Petitioner and counsel met with David N. Kelley, Deputy U.S. Attorney for the Southern District of New York. At that time, Mr. Kelley informed Petitioner that, if he insisted on dismissing the Southern District of New York indictments, and continuing in his assertion of innocence, the circumstances of his confinement, which were already severe, would be further aggravated. A39 (Habeas Pet. ¶ 21).

13. Petitioner remained resolute in his claim of innocence. A39 (Habeas Pet. ¶ 22).

14. On May 12, 2003, Judge Marrero granted Petitioner's motion and dismissed the indictments because venue was constitutionally improper in the Southern District of New York. A39 (Habeas Pet. ¶ 23).

15. On May 13, 2003, Petitioner was arraigned in the Southern District of New York on a new criminal complaint that had been returned in the Central District of Illinois under seal on May 1, 2003. A39 (Habeas Pet. ¶ 24).

16. On or about May 20, 2003, Petitioner was returned from MCC-NY to the Peoria County Jail. A39 (Habeas Pet. ¶ 25).

17. On May 22, 2003, a grand jury sitting in the Central District of Illinois returned an indictment against Petitioner alleging the same seven counts as had been charged in the dismissed Southern District of New York indictments. A40 (Habeas Pet. ¶ 27).

18. On May 29, 2003, Petitioner was arraigned before the Honorable John A. Gorman, United States Magistrate Judge for the Central District of Illinois. Petitioner entered a plea of "not guilty" to the indictment and thereby asserted his innocence to the charges. A40 (Habeas Pet. ¶ 28).

19. Judge Gorman set **a** pretrial conference date **of** July 2, 2003, and a trial date of July 21, 2003, before the Honorable Michael M. Mihm, United States District Judge for the Central District of Illinois. A40 (Habeas Pet. ¶ 29).

20. Following the arraignment, the prosecutors handed to defense counsel a copy of Special Administrative Measures ***("SAM")*** that were imposed against Petitioner on or about May 16, 2003. For the preceding year and a half during which Petitioner was incarcerated, the government had not imposed any such measures. Among other restrictions, the ***SAM:***

A. imposed an absolute bar to attorney-client contact unless Petitioner's counsel signed an "Attorney Affirmation;"

B. mandated that defense counsel be "verified and documented" by at least one and possibly two

United States Attorneys before being permitted to represent Petitioner;

C. required attorneys and others on the defense team to submit to government background checks;

D. imposed an absolute ban on contact visits between Petitioner and his attorneys;

E. suggested that the government planned to monitor attorney-client communications; and

G. imposed additional severe restrictions on the conditions of Petitioner's confinement which were plainly contrary to the presumption of innocence and infringed the constitutional rights retained by pretrial detainees.

A40-41 (Habeas Pet. ¶ 30)

21. During the entire time Petitioner was incarcerated at the Peoria County Jail, he was held in solitary confinement, and denied access to counsel, reading materials, recreation, appropriate medical treatment, and religious items. A41 (Habeas Pet. ¶ **31).**

22. By letter dated June 4, 2003, defense counsel objected to the ***SAM*** *on* the ground that their stated objective was pretextual, their true purpose was retaliatory, and their imposition violated Petitioner's constitutional rights as a pre-trial detainee, including his Fifth Amendment right to due process and his Sixth Amendment right to the assistance of counsel. Defense counsel proposed less restrictive measures that would accommodate Petitioner's rights and the government's stated concerns. A41 (Habeas Pet. ¶ 32)

23. Defense counsel was informed on numerous occasions by the United States Attorney's Offices for the Southern District of New York and the Central District of Illinois that they had considered the *SAM* compromise proposed by defense counsel and were awaiting approval by the Department of Justice *in* Washington, D.C. A42 (Habeas Pet. ¶ 33).

24. On June 18, 2003, defense counsel filed pretrial motions on Petitioner's behalf seeking an Order, among other things, suppressing evidence seized, and statements allegedly obtained, from Petitioner on December 11, 2001, in violation of his rights under the Fourth and Fifth Amendments to the United States Constitution. A42 (Habeas Pet. ¶ 34).

25. On the afternoon of Friday, June 20, 2003, Judge Mihm directed the parties to be prepared to proceed with an evidentiary hearing on July 2, 2003, in connection with Petitioner's pretrial motions, and to confer regarding the witnesses who would testify at such a hearing. A42 (Habeas Pet. ¶ 35).

26. That same afternoon, defense counsel informed Assistant United States Attorney Patrick J. Chesley by telephone that, unless Department of Justice approval of a compromise on the *SAM* could be secured by Monday, June 23, 2003, defense counsel intended to move the district court to resolve the ***SAM*** issue so that counsel would have sufficient time to confer with Petitioner in advance of the July 2, 2003 suppression hearing. A42-43 (Habeas Pet. ¶ 36).

27. At approximately 9:05 a.m., on the morning of Monday, June 23, 2003, defense counsel became aware that United States Attorney Jan Paul Miller was en route to Judge Mihm's chambers. There, Mr. Miller moved ex parte to dismiss the indictment without prejudice based upon a signed order of the President of the United States, A92, which among other things:

A. designated Petitioner as a so-called "enemy combatant";

B. directed the Attorney General to surrender Petitioner to the Secretary of Defense;

C. directed the Secretary of Defense to detain Petitioner as an "enemy combatant."

A43 (Habeas Pet. ¶ 37).

28. When defense counsel requested an opportunity to file a brief in response to the government's application, A24-26 (6/23 Tr. at 7-9), the United States Attorney amended the government's motion to dismiss the indictment with prejudice, A27-28 (6/23 Tr. at 10-11). The district court then concluded that it was without discretion to deny the government's request, A29 (6/23 Tr. at 12), and entered an Order dismissing the indictment against Petitioner with prejudice, A93 (Order).

29. Defense counsel immediately moved the district court to stay any transfer of Petitioner pending the filing of a habeas petition challenging Respondents' actions. A30 (6/23 Tr. at 13). The Court denied counsel's motion but directed the United States

Attorney to inform defense counsel of the location to which Petitioner was to be moved. A43 (Habeas Pet. ¶ 39).

30. Petitioner was immediately taken from the custody of the United States Marshals Service at the Peoria County Jail, into the custody of Respondent Rumsfeld, and removed to the Naval Consolidated Brig in Charleston, South Carolina, which is under the command of Respondent Marr, where he is being held incommunicado. A44 (Habeas Pet. ¶ 40).

Statement *of* Procedural History

1. On July 8, 2003, Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Central District of Illinois, challenging his designation by the President and detention by Respondents as a so-called "enemy combatant." A34 (Habeas Petition).

2. On July 16, 2003, Respondents moved the district court to dismiss Petitioner's habeas petition on the grounds that: 1) the district court lacked jurisdiction because the petition was not signed by Petitioner, and was not expressly denominated a "next-friend" petition; and 2) the district court lacked personal jurisdiction over Respondents because Petitioner was not confined in the Central District of Illinois, and because Respondents Bush and Rumsfeld were not Petitioner's "custodians" within the meaning of the habeas statute. In the alternative, Respondents moved to transfer the petition to South Carolina because venue was proper only in that district, where Petitioner was being confined.

3. The district court heard oral argument on July 28, 2003, at the outset of which it listed the questions presented for its consideration as follows: 1) "Is this matter properly in this court?"; 2) "Whether counsel can initiate a habeas petition on behalf of Mr. al-Marri?"; and 3) "Who are the proper respondents?" A114-15 (7/28/03 Tr. at 3-4).

4. Ultimately, the district court heard argument on the first question, which it limited to the question of venue. The court concluded that the petition was not properly filed in federal court in Peoria, Illinois because Petitioner was confined at the Navy Brig in Charleston, South Carolina. The court also held that it had no non-speculative basis for concluding where the material events underlying the President's designation of Mr. al-Marri as an enemy combatant took place, a matter as *to* which Respondents presented no evidence.

5. On August 1, 2003, in a published opinion, the district court dismissed Mr. al-Marri's habeas petition on the ground that venue was improper in the Central District of Illinois. A1 (Al-Marri v. Bush, 274 F. Supp. 2d 1003 (C.D. Ill. 2003)). The district court's ruling was expressly based upon this Court's statement in United States v. Mittelsteadt, 790 F.2d 39, 41 (7th Cir. 1986), that "the proper venue for the habeas corpus proceeding is the district where [the petitioner] is being held." A4 (274 F. Supp. 2d at 1007).

6. On August 8, 2003, Petitioner moved the district court to reconsider its venue determination.

I. On August 25, 2003, the district court entered an Order and Opinion denying Petitioner's motion for reconsideration. A7 (Order & Opinion).

8. On October 2, 2003, Petitioner filed *a* timely notice of appeal from the final order entered by the court below disposing of all of Petitioner's claims. A160 (Notice of Appeal).

SUMMARY OF ARGUMENT

On the morning of June 23, 2003, shortly before his scheduled trial in the United States District Court for the Central District of Illinois on charges that, among other things, he made false statements to the FBI regarding his alleged relationship with leaders of al-Qaeda, Petitioner Ali Saleh Kahlah al-Marri was suddenly removed from the criminal justice system, in which he had been a defendant for 18 months, designated an "enemy combatant" by President George W. ***Bush,*** taken out of the State of Illinois by agents of Secretary of Defense Donald H. Rumsfeld, and transferred to the Naval Consolidated Brig in Charleston, South Carolina, which is under the command of Commander Melanie A. Marr, United States Navy. Petitioner, who has always asserted his innocence, is being held incommunicado, without charge, without access to counsel and, according to the district court, without recourse in the Central District of Illinois, the very district in which Petitioner's unlawful detention commenced, and from which he was unlawfully removed. According to the district court, venue was proper only in South Carolina, the district in which Petitioner presently is imprisoned by Respondents.

The district court's venue ruling was based upon a misapprehension of the scope of this Court's decision in United States v. Mittelsteadt, 790 F.2d 39 (7th Cir. 1986), which it believed to be controlling. When interpreted consistently with the Supreme Court's decision in Braden v. Thirtieth Judicial Circuit

Court, 410 U.S. 484, 500 (1973), Mittelsteadt begs the two jurisdictional questions the district court purported not to address, see All (8/25 Order at 5), but which are necessary parts of its venue determination: 1) who is Petitioner's custodian(s); and 2) can the district court exercise personal jurisdiction over them.

As discussed below, this case would be controlled by Mittelsteadt if and only if the district court had first determined that no proper respondent could be reached by process in the Central District of Illinois, an issue disputed by the parties. If, on the other hand, any one of the Respondents could be reached by process in the Central District of Illinois, then the district court could exercise jurisdiction over that Respondent, and should have done so regardless of the fact that Petitioner is confined in South Carolina, because Respondents failed to bear their burden of demonstrating that the "traditional venue considerations" delineated by the Supreme Court in Braden weighed in favor of a different forum. As the district court itself acknowledged, A5 (274 F. Supp. 2d at 1099), Respondents did not come forward with any evidence that South Carolina is a more appropriate venue than the Central District of Illinois. That omission must be construed against them, and not -- as the district court construed it -- against Petitioner.

Where, as here, the questions of jurisdiction and venue are intertwined, the former should be decided before the latter. See

Leroy v. Great Western United Corp., 443 U.S. 173 (1979) ("The question of personal jurisdiction, which goes to the court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum."). Thus, the district court should have explicitly considered and ruled upon the threshold jurisdictional questions which it did not address with counsel at oral argument, and which fundamentally affect the venue analysis. In failing to do so, and in refusing to limit Mittelsteadt to the context in which it arose, the district court erred, as follows:

1) Here, unlike Mittelsteadt and cases following it, Petitioner is not (nor is he in any way akin to) the typical federal convict who seeks to challenge the execution of a sentence duly imposed by a federal court; rather, he is an individual unilaterally designated by the President of the United States as an "enemy combatant" based upon "material events" that only could have occurred in the Central District of Illinois, who challenges ab initio the basis for such designation and the lawfulness of his detention by Respondents, which commenced in the Central District of Illinois. See Point I.

2) Here, unlike Mittelsteadt and cases following it in which the only custodian is the petitioner's "immediate" custodian, President Bush and Secretary

Rumsfeld are properly deemed to be Petitioner's custodians because Commander Marr cannot "produce the body" of Petitioner al-Marri without their consent, and it is they (and not she) who directly control whether and when he will be released. See Point II(A).

3) Here, unlike Mittelsteadt and cases following it in which the only court whose process can reach the petitioner's custodian(s) is the court in the district in which the petitioner is confined, the district court's process can reach all three Respondents. See Point II(B).

The Court should not condone Respondents' unilateral detention of an individual lawfully present in the United States, who was a party to a pending proceeding in a federal court, by adopting a rule which would limit habeas relief to the district of Respondents' choosing, thereby encouraging them to designate as an "enemy combatant" one -- like Mr. al-Marri -- whose only proven "offense" is that he asserted his rights in a criminal court proceeding venued in the very district from which he was then surreptitiously removed by Respondents. Indeed, if Respondents are legally permitted to remove an individual from Illinois to South Carolina, there will be no impediment to their transferring the next person to some other place beyond the reach of the Great Writ entirely. See Al Odah v. United States, 321 F.3d 1134 (D.C. Cir.)

(holding that district court lacked jurisdiction to entertain habeas petitions filed by "enemy combatants" detained by military at Guantanamo Bay), cert. granted 72 **U.S.L.W. 3171** (Nov. 10, 2003). Therefore, the Court should take this opportunity to correct the district court's improperly broad construction of Mittelsteadt, and hold that, under the circumstances of this case, venue and jurisdiction are properly laid in the Central District of Illinois.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT VENUE WAS IMPROPER IN THE CENTRAL DISTRICT OF ILLINOIS.

Standard of Review

Generally, this Court reviews a district court's venue determination for abuse of discretion. When, as here, a case involves questions of law, and not the discretionary interpretation of disputed facts, this Court reviews venue determinations ~~de novo~~. See Waeltz v. Delta Pilots Ret. Plan, 301 F.3d 804, 806-07 (7th Cir. 2002); Milwaukee Concrete Studios, Ltd. v. Fjeld Mfg. Co., 8 F.3d 441, 445 (7th Cir. 1993).

Argument

The district court held that venue was improper in the Central District *of* Illinois because Petitioner "is being held in the naval brig in Charleston, South Carolina," because "[h]is immediate custodian is there," and because "the Court has no non-speculative basis for concluding where the material events underlying his designation as an enemy combatant took place or where pertinent records and witnesses are likely to be found." A9-10 (8/25 Order at 3-4). In so holding, the district court indicated that it felt bound by this Court's statement in United States v. Mittelsteadt, 790 F.2d 39, 41 (7th Cir. 1986), that "the proper venue for the habeas corpus proceeding is the district where [the petitioner] is being held." As discussed below, the district court: 1) misconstrued Mittelsteadt, and 2) improperly imposed upon

Petitioner the burden of disproving that South Carolina is the proper venue for his petition, thereby condoning Respondents' refusal to come forward with facts supporting their claim that venue was improper in the Central District of Illinois. Accordingly, the Court should reverse the order of the district court.

A. The Court Should Interpret Its Decision In Mittelsteadt Consistently With The Supreme Court's Decision In Braden.

Agents of Respondents Rumsfeld and Marr seized Petitioner al-Marri on order of Respondent Bush designating him an "enemy combatant," and then unlawfully removed him from a Peoria prison cell to South Carolina, a jurisdiction of their own choosing. The district court was "unaware of any case in the Seventh Circuit expressly addressing this type of situation" and, for that reason, applied what it construed to be the black-letter rule of Mittelsteadt, i.e., that a habeas petition must be filed in the district in which the petitioner is confined. See A4 (274 F. Supp. 2d at 1007). The district court was correct that there is no Seventh Circuit case addressing this unique situation, but it erred in failing to explain why Mittelsteadt's general rule, which arose in an entirely different context, and expressly declined to adopt an absolute rule for venue in habeas cases, should be applied to these atypical circumstances.

In Mittelsteadt, the petitioner -- who had been convicted in federal district court in Wisconsin, and who was serving his

sentence in a federal prison in Minnesota -- filed a post-sentencing motion asking the Wisconsin court to correct an error in his presentence report that might have affected his parole eligibility. This Court explained that because the purpose *of* the petitioner's motion was not to challenge the validity of his underlying federal conviction and sentence but, rather, to attack the manner in which his sentence was being executed by the federal Bureau of Prisons, the only mechanism was a habeas petition filed in the district of incarceration:

> We agree ... with the Eighth Circuit's decision in a similar case, United States v. Leath, **711** F.2d 119 (8th Cir. 1983), that the only court with jurisdiction of such a claim would be the federal district court where the movant is imprisoned. Section 2255 provides the procedure for challenging federal convictions and sentences; if a prisoner wants "out" for some other reason his remedy is habeas corpus, Coates v. Smith, 746 F.2d 393, 396 (7th Cir. 1984); and (with immaterial exceptions) the proper venue for the habeas corpus proceeding is the district where he is being held. See Braden v. Thirtieth Judicial Circuit Court, 410 U.S. 484, 500 (1973).

Id. at 40-41. Thus, in a single sentence, the Court in Mittelsteadt determined both that the district court in Wisconsin lacked jurisdiction over Mittelsteadt's petition, and that venue was properly laid elsewhere.

Taken at face value, as the district court did, the Court's statement in Mittelsteadt that venue lies only in the district in which a prisoner is confined, contradicts the holding of the United States Supreme Court in Braden, *supra.* There, the petitioner was

serving a sentence in an Alabama prison, but applied to the United States District Court for the Western District of Kentucky for a writ of habeas corpus, alleging the denial of his constitutional right to a speedy trial in Kentucky. The Supreme Court addressed questions of both jurisdiction and venue, but held that considerations other than the place of the petitioner's confinement were determinative of each. Thus, with respect to habeas jurisdiction, the Supreme Court held that the determinative factor is whether the district court can reach the custodian by service of process:

> § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction" requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction.

Braden, 410 **U.S.** at 495. And, with respect to venue, the Supreme Court held that the determinative factor is a weighing of "traditional venue considerations:"

> (1) "where all of the material events took place;"
>
> (2) where "the records and witnesses pertinent to petitioner's claim are likely to be found;" and
>
> (3) the convenience of the forum for the parties.

Id. at 493-94. Clearly then, the Supreme Court in Braden viewed jurisdiction and venue as questions to be decided separately. See

Leroy v. Great Western United Corp., 443 U.S. 173 (1979). The district court, however, conflated the two, though it purported to decide only the latter, A3 (274 F. Supp. 2d at 1005 n.1).

If a petitioner's presence is not required for a district court to exercise habeas jurisdiction in the first instance, as the Supreme Court held in Braden, then his presence could not possibly be the determinative factor with respect to the secondary question of venue; otherwise, venue would always trump the threshold jurisdictional analysis, contrary to both the order in which jurisdiction and venue are typically decided, Leroy, 443 U.S. at 180, and the result in Braden, 410 U.S. at 495, which overruled the "inflexible jurisdictional rule" adopted in Ahrens v. Clark, 335 U.S. 188 (1948), that "the presence within the territorial jurisdiction of the District Court of the person detained is [a] prerequisite to filing a petition for writ of habeas corpus."

Such a black-letter rule would also effectively overrule the Supreme Court's decision in Ex Parte Endo, 323 U.S. 283, 307 (1944), which holds that the government cannot defeat a court's exercise of habeas jurisdiction by removing a habeas petitioner from the district in which the court sits. Were a petitioner's presence required for venue to be proper, as the district court held, then the government could -- as it did here -- simply remove a petitioner from a district in which it preferred not to litigate, thereby defeating venue and effecting an end-run around these binding Supreme Court precedents. Indeed, the district court

itself observed that this may well have been the motive behind Respondents' surreptitious "race ... from the courthouse" in this case. See A5 (274 F. Supp. 2d at 1008 n.2); A151 (7/28/03 Tr. at 40).

Of course, as the district court noted, A3 (274 F. Supp. 2d at 1005-06), the Supreme Court in Braden, while rejecting Ahrens' "inflexible jurisdictional rule," explained the result in Ahrens in terms of venue. The district court, however, ignored the reason the Supreme Court offered for doing so. Specifically, the Supreme Court in Braden did not hold that venue is proper only in the district in which the petitioner is confined (the black-letter venue rule the district court deduced from Mittelsteadt); rather, the Court explained at some length that, at the time Ahrens was decided in 1948, and under the circumstances of that specific case, the government would have been unduly burdened if it were forced to transport all one hundred-twenty (120) of the Ahrens petitioners from Ellis Island, in the Eastern District of New York, to the District of Columbia where they had filed their habeas petitions, but with which they had no prior contact. Braden, 410 U.S. at 496-500. For those reasons, Ahrens properly was venued in the Eastern District of New York.

This case, which involves a single petitioner, is quite different. For their part, Respondents did not even attempt to explain why they would be unduly burdened by litigating in the Central District of Illinois, where the government previously

brought a criminal prosecution against Petitioner, and to and from which they repeatedly transported Petitioner to suit their own venue preferences. Moreover, whereas the petitioners in Ahrens had never been present in the District of Columbia, where they filed their habeas petitions, Petitioner's contacts with the Central District of Illinois were direct and extensive:

1) Respondents do not dispute that Petitioner resided in the Central District of Illinois for years as a college student attending Bradley University;

2) Respondents do not dispute that Petitioner resided in the Central District of Illinois with his family prior to his arrest on December **12, 2001;**

3) Respondents do not dispute that Petitioner's current detention by the Department of Defense as an "enemy combatant" commenced in the Central District of Illinois;

4) Respondents do not dispute that the government previously charged Petitioner in a criminal indictment with offenses alleged to have occurred solely within the Central District of Illinois that, the government has claimed, link Petitioner to al-Qaeda;

5) Respondents do not dispute that, among those charges, the government previously alleged that Petitioner made a telephone call in the Central District of Illinois to a cellular number belonging to an al-Qaeda official named Mustafa Ahmed al-Hawsawi, which the government has charged links Petitioner to al-Qaeda;

6) Respondents do not dispute that the government previously charged Petitioner with committing bank fraud in the Central District of Illinois which, according to the government, was part of an al-Qaeda plan to interfere with the United States banking system;

7) Respondents do not dispute that the government has previously alleged that Petitioner used his computer in the Central District of Illinois to download from the internet terrorist-related information, which the government has alleged links Petitioner to al-Qaeda; and

8) Respondents do not dispute that the government has previously alleged that Petitioner possessed images of Osama bin Laden on his computer in the Central District of Illinois, which the government has alleged links Petitioner to al-Qaeda.

The district court dismissed these particulars as mere "speculation," A5 (274 F. Supp. 2d at 1008), even though they were at the core of the criminal case filed by the government against Petitioner, and even though Respondents did not dispute or endeavor to disprove their relevance to Petitioner's designation by the President as an "enemy combatant."

More fundamentally, this Court could not have intended in Mittelsteadt to announce a black-letter venue rule which attributes dispositive significance to the place of a petitioner's confinement, the effect of which would be to overrule Braden. Nor did it purport to do so. Rather, Mittelsteadt must be interpreted consistently with Braden. See Koerner v. Grigas, 328 F.3d 1039, 1050 (9th Cir. 2003) (noting that Circuit law must, if possible, be interpreted consistently with Supreme Court precedent); Morris v. Sullivan, 897 F.2d 553, 558 (D.C. Cir. 1990) (same). Such an interpretation is readily apparent.

Mittelsteadt, and the two cases cited therein, each involved a habeas petition challenging the manner in which a sentence duly imposed by a federal district court was being executed by the federal Bureau of Prisons. In such run-of-the-mill cases, the only "custodian" is the local warden of the institution in which the petitioner is physically incarcerated, for no one else has the authority to "produce the body" of the petitioner in response to a court order. Consequently, the district court sitting in the district in which the petitioner is actually incarcerated is, in those cases, the only court in which "the custodian can be reached by service of process" and, thus, the only court with jurisdiction over the prisoner's habeas petition. Braden, *supra.* Compare Leath, 711 F.2d at 120 (holding that district court in Missouri lacked "jurisdiction" to consider habeas petition filed by petitioner incarcerated in Texas, challenging presentence report) with Coates, 746 F.2d at 395-97 (holding that district court in Illinois erred in finding that it lacked jurisdiction to consider habeas petition filed by petitioner, sentenced in the District of Columbia, but incarcerated in Illinois, "challenging the manner in which [his] sentence is being executed"). Therefore, it is not surprising that subsequent cases citing Mittelsteadt have not focused on venue but, rather, have examined whether the petitioner's custodian was outside the jurisdictional reach of the district court. See United States v. Katzin, 824 F.2d 234, 238 n.6 (3d Cir. 1987) (noting that Mittelsteadt was decided on

jurisdictional grounds); Kramer v. United States, 798 F.2d 192, 195 n.2 (7th Cir. 1986) (same).[1]

In such cases, Mittelsteadt provides -- consistent with Braden .. that the habeas petition must be filed in the district of incarceration, not because the petitioner is imprisoned there per sé (as Respondents insist) but, rather, because it is the only district that can exercise jurisdiction over the petitioner's custodian who, in the typical case, is the local warden. In this respect, Mittelsteadt is not a "venue" case at all but, rather, one in which this Court -- like the Eighth Circuit in Leath, which it cited for support -- concluded that the district court lacked jurisdiction over the appropriate custodian in the first instance. Indeed, any other interpretation of Mittelsteadt, including the one afforded to it by the district court in its August 1 Order, simply cannot be reconciled with the Supreme Court's holding in Braden.

The dispute over the identity of Petitioner's "custodian," discussed at Point 11, infra, goes to the core of the jurisdictional issue that is intertwined with the district court's venue ruling. Thus,

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[1] See also Johnson v. United States, 805 F.2d 1284, 1291 (7th Cir. 1986) (holding that prisoner "who wants to correct inaccuracies in his presentence report that might affect the date of his parole ... must use the procedure outlined in ... Mittelsteadt ...."); United States v. Draiman, 640 F. Supp. 1322, 1324 (N.D. Ill. 1986) (holding that court lacked jurisdiction to correct presentence report where petitioner was incarcerated outside of the district); cf. Mikolon v. United States, 844 F.2d 456, 460-61 (7th Cir. 1988) (holding that prisoner incarcerated in the Northern District of Illinois properly filed habeas petition challenging presentence report errors in that district).

1) If this Court concludes that: (a) Commander Marr is Petitioner's sole "custodian" within the meaning of 28 U.S.C. § 2242, and (b) Commander Marr cannot be reached by process in the Central District of Illinois, Braden and Mittelsteadt would require the Court to send the case to South Carolina, not for improper venue but, rather, because the district court would then lack jurisdiction over Petitioner's custodian.

2) Conversely, if the Court concludes that: (a) any one of the three named Respondents is Petitioner's "custodian," and (b) that Respondent can be reached by process in the Central District of Illinois, this case falls into the category of "exceptions" noted by Mittelsteadt, 790 F.2d at 41, and the district court could exercise habeas jurisdiction under Braden. Only then would the Court be required to address the question of venue, which it must do by weighing the "traditional venue considerations" dictated by the Supreme Court in Braden.

As discussed below, those traditional venue considerations militate in favor of venue in the Central District of Illinois.

B. The District Court Erred By Imposing On The Petitioner The Burden Of Disproving That South Carolina Was The Proper Venue For This Action.

Respondents' argument that venue in habeas actions is rigidly controlled by 28 U.S.C. § **2241** to require that a petition be filed in the district in which the petitioner is incarcerated was specifically rejected by the Supreme Court in Braden as being "fundamentally at odds with the purposes of the statutory scheme." 410 U.S. at 494. Indeed, the Court in Braden made clear that the choice of venue hinges upon a fact-sensitive weighing of "traditional venue considerations." 410 U.S. at 493, 500. Yet, Respondents (and the district court) relied upon the single fact of Petitioner's presence in South Carolina -- a fact unilaterally created by Respondents to defeat venue in the Central District of Illinois -- and asserted that it trumps not only the deference traditionally accorded to a plaintiff's choice of forum, see *Piper* Aircraft Co. v. Reyno, 454 U.S. 235, 242 (1981); Roberts & Schaefer Co. v. Merit Contracting, Inc., 99 F.3d 248, 254 (7th Cir. 1996); General Portland Cement Co. v. Perry, 204 F.2d 316, 319 (7th Cir. 1953), but also the other traditional venue considerations summarized by the Supreme Court in Braden. Those considerations, properly weighed, favor venue in the Central District of Illinois.

Other than the fact that Respondents unlawfully removed Petitioner to South Carolina, and have chosen to detain him in that district, there is absolutely no connection between this case and that forum:

1) The location where the materials events took place is in the Central District of Illinois alone: that is where Petitioner resided; that is where he was detained pending trial; that is the district in which Petitioner was first unlawfully detained, and from which he was then removed, by Respondents; and that is where any actions Respondents may one day allege Petitioner undertook to warrant his being designated an "enemy combatant" occurred, for he was never anywhere else in the United States. Specifically, all of the events that underlie President Bush's designation of Petitioner .. a civilian lawfully present in the State of Illinois -- as an "enemy combatant," occurred in the Central District of Illinois. for example, the President asserts in his June 23 Order that Petitioner was an enemy combatant "at the time he entered the United States in September 2001." A92 (Enemy Combatant Order). Petitioner denies this allegation but, even if accepted as true, Petitioner entered this country through Chicago's O'Hare International Airport, promptly drove to Peoria, and never left the State *of* Illinois. Notably, Judge Marrero's dismissal of the two Southern District of New York criminal indictments was premised upon the government's concession, and Judge Marrero's conclusion, that all material events occurred and, hence, venue was constitutionally appropriate, in the Central District of Illinois. Neither Respondents nor the district court offered any reason why Petitioner's detention as an enemy combatant was not related to the

criminal prosecution, as it clearly was, or why Judge Marrero's venue determination should have been reconsidered.

2) The location of records and witnesses also favors venue in the Central District of Illinois. If Petitioner is to be afforded an opportunity to present evidence and witnesses at some future hearing, such witnesses certainly will not be drawn from South Carolina, where no material events took place, but rather from in and around Peoria, the only place Petitioner lived prior to his arrest.

3) Respondents will not be prejudiced by litigating in the Central District of Illinois. The government was prepared to try Petitioner in Peoria until the very day he was designated an "enemy combatant." Moreover, Respondents are represented in the Central District of Illinois not only by the United States Attorney himself, but also by the very same attorneys from the Office of the Solicitor General who have appeared on Respondents' behalf in the other "enemy combatant" cases.[2]

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[2] The district court based its venue decision in part upon its observation that South Carolina might be "more" convenient for Petitioner's counsel. See A5 (274 F. Supp. 2d at 1008). Even if this were so, which it is not, convenience of counsel **is** not a traditional venue consideration at all. See In re Horseshoe Entertainment, 305 F.3d 354, 358 (5th Cir. 2002) (holding that "[t]he factor of 'location of counsel' is irrelevant and improper for consideration in determining the question of transfer of venue," and noting that the party making the assertion, as well as the district court that relied upon it, were unable to cite a single case to support it); Chicago Rock Isl. & Pac. R.R. Co. v. Igoe, 220 F.2d 299, 304 (7th Cir. 1955) (flatly rejecting the argument that the convenience of counsel is a valid reason for change *of* venue).

Although many of the claims set forth in Mr. al-Marri's habeas petition (as in any pleading) present legal questions that could be determined by any federal court, his core claim is purely factual in nature: "Petitioner is in fact a civilian, not a combatant, and was treated as such by Respondents for over one year and a half." A47 (Petition, Second Claim). It simply is not **so,** as the district court stated, that there is "no non-speculative basis for concluding where the material events underlying his designation as an enemy combatant took place." A9 (8/25 Order at 3 note 1). As demonstrated by the nine circumstances listed *supra* at 24, which link this case to the Central District of Illinois, the fundamental question of whether Petitioner is a civilian or an "enemy combatant" can be answered, if at all, by the presentation of evidence regarding his life as a civilian or, as Respondents would have it, his double-life as an al-Qaeda "sleeper agent," all of which took place in the Central District of Illinois.

If speculation were required, as the district court insisted, the only reason is that Respondents chose not to disclose to the district court any facts underlying Petitioner's designation as an "enemy combatant" which the court could have considered in making its venue determination. In this regard, it is well established -- indeed, "traditional" -- that the party seeking to transfer venue from a forum that may exercise jurisdiction over a case bears the burden of coming forward with preponderant proof that such a transfer is warranted. In re Peachtree Lane Assocs., Ltd., 150

F.3d 788, 792 (7th Cir. 1998) ("[T]he party challenging venue bears the burden of establishing by a preponderance of the evidence that the case was incorrectly venued"); Coffey v. Van Dorn Iron Works, 796 F.2d 217, 219-20 (7th Cir. 1986) ("The movant ... has the burden of establishing by reference to particular circumstances, that the transferee forum is clearly more convenient"). As the district court acknowledged, A5 (274 F. Supp. 2d at 1009), Respondents did not come forward with any evidence whatsoever that South Carolina is a more appropriate forum than the Central District of Illinois, even though it was they who sought to transfer the case, and it is they and only they who would know why Petitioner was designated an "enemy combatant."[3]

Thus, the district court was not presented with any evidence to rebut the manifestly reasonable inference that, because Petitioner resided in the Central District of Illinois, and because the acts at issue in Petitioner's dismissed criminal indictment occurred in the Central District of Illinois, proofs regarding his

[3] See United States v. Butler, 570 F.2d 1017, 1026 (2d Cir. 1992) ("A party with an affirmative goal and presumptive access to proof on a given issue normally has the burden of proof as to that issue."); King v. General Elec. Co., 960 F.2d 617, 623 (7th Cir. 1992), quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 359 n.45 (1977) (recognizing that burdens of proof 'are often created ... to conform with a party's superior access to the proof"); see also Ward v. Massachusetts Health Res. Inst., Inc., 205 F.3d 29, 35 (1st Cir. 2000) (imposing burden of proof on civil defendant who had "better access to the relevant evidence"); United States v. Cowart, 90 F.3d 154, 159 (6th Cir. 1996) (switching burden of proof where criminal defendant had better access to the relevant evidence); United States v. Dortch, 5 F.3d 1056, 1060-61 (7th Cir. 1993) (same).

"enemy combatant" status are located there, as well. Certainly no "material events" took place in South Carolina, and no relevant evidence is located in that district. Indeed, until he was moved to the Navy Brig in Charleston, Petitioner had never been in South Carolina. See So v. Reno, 251 F. Supp. 2d 1112, 1126-27 (E.D.N.Y. 2003) (holding that venue was proper in New York, and not Louisiana, because petitioner resided and was first incarcerated by the INS in New York, and because the underlying removable offense occurred in New York, even though he was later transferred by the INS to Louisiana); Barton v. Ashcroft, 152 F. Supp. 2d 235, 240-41 (D. Conn. 2001) (holding that venue was proper in Connecticut even though petitioner had been removed by the INS to Louisiana because, among other reasons, petitioner had been a Connecticut resident prior to his incarceration); Mojica v. Reno, 970 F. Supp. 130, 167-68 (E.D.N.Y. 1997) (holding that venue was proper in New York, where petitioner resided and was first incarcerated, despite his later transfer by the INS to Louisiana, and noting that rule limiting venue to Louisiana would, under such circumstances, encourage forum-shopping by the government).

Nevertheless, the district court reached the following troubling conclusion:

> Although the Court's inability to make this determination *is* attributable to the fact that the Government has not divulged the specific details underlying the decision to designate [Petitioner] as an enemy combatant, this does not entitle al-Marri to the inference he asks the Court to draw.

A5 (274 F. Supp. 2d at **1009). By** imposing upon Petitioner the burden of disproving that South Carolina is the proper venue for his petition, the district court not only ignored traditional venue considerations, contrary to Braden, but also condoned Respondents' refusal to come forward with facts supporting its claim that South Carolina is the only venue for this action. This was a grave error of law. See, e.g., Coffey, 796 F.2d at 220 (affirming denial of transfer motion where movant failed to "point to particular circumstances that would indicate, that the convenience of the parties weighed in favor of transfer"). Indeed, by dismissing Petitioner's argument with respect to venue as "primarily speculation," while overlooking the conceded fact that Respondents did not present any facts to support venue in South Carolina, or endeavor to refute the reasonable inferences that Petitioner asked the district court to draw regarding venue in the Central District of Illinois, the district court allowed Respondents to prevent it from conducting the venue analysis required by the Supreme Court.

Based upon the facts with which it was presented, the district court could only have concluded that venue was proper in the Central District of Illinois, even though Petitioner is being detained in South Carolina. Accordingly, the district 'court's order dismissing Petitioner's habeas petition on venue grounds must be reversed.

11. THE DISTRICT COURT PROPERLY COULD AND SHOULD HAVE EXERCISED JURISDICTION OVER EACH OF THE RESPONDENTS.

Standard of Review

The existence of personal jurisdiction is subject to plenary review. Steel Warehouse of Wis., Inc. v. Leach, 154 F.3d **712,** 714 (7th Cir. 1998).

Argument

The Supreme Court held in Braden that a federal district court may exercise habeas jurisdiction so long as its process can reach the petitioner's custodian, regardless of whether the petitioner is incarcerated within the court's territorial jurisdiction. 410 **U.S.** at 495. As indicated above, the district court did not address the two jurisdictional questions that it should have addressed before turning to venue and which, in fact, are critical to the court's venue determination: (1) which of the three Respondents are properly deemed to be his custodian; and (2) can the district court exercise jurisdiction over them. As discussed below, under the unique circumstances of this "enemy combatant" case, all three Respondents properly are deemed to be Petitioner's custodian, and each can be reached by the district court's process.

A. Each Of The Respondents Is Petitioner's Custodian.

The district court held in its August 1 Order that Commander Marr, as Petitioner's "immediate" custodian, is the only proper Respondent, relying upon **Wales** v. Whitney, 114 U.S. 564, 574 (1885) and Samirah v. O'Connell, 335 F.3d 545 (7th Cir. 2003). Neither

Wales nor Sarnirah held, however, that a petitioner's "immediate custodian" is always the proper, or sole, custodian for habeas purposes. The Supreme Court held in Wales that the habeas statute:

> contemplates a proceeding against some person who has the immediate custody of the party detained, with power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary

114 U.S. at 574 (emphasis added). Similarly, in Samirah, where the petitioner had named a respondent who had no control over him whatsoever, this Court explained that:

> The custodian, in most cases, is the person having a day-to-day control over the petitioner, because he is the only one who can produce "the body" of the petitioner.

335 F.3d at 551-52 (emphasis added). Thus, both the Supreme Court and this Court recognize that it is not sufficient that a person have immediate custody of the petitioner; rather, the custodian must have the actual authority to produce the body of such person in response to a judicial order. See Rachel E. Rosenbloom, **Is** the Attorney General the Custodian of an INS Detainee?, 27 N.Y.U. Rev. L. & Soc. Change 543, 575 (2002) (noting that the Supreme Court has focused on a respondent's ability to free the petitioner from legal, not physical, restraint)

Thus, it is not true that in *every* habeas case the only proper respondent is the detainee's "immediate" custodian. See Armentero **v.** INS, 340 F.3d 1058, 1064 (9th Cir. 2003) ("Read as a whole, the Supreme Court's pertinent case law indicates that the concept of

custodian is a broad one that includes **any** person empowered to end restraint of a habeas petitioner's liberty, not just the petitioner's on-site, immediate, physical custodian.''); Mojica v. Reno, 970 F. Supp. **130, 166** (E.D.N.Y. 1997) ("habeas statute does not 'specify who the person having custody will be,' nor does it state that there may be only one custodian"), aff'd in part, dismissed in part, Henderson v. INS, 157 F.3d **106** (2d Cir. 1998). As this Court has held:

> The important thing is not the quest for a mythical custodian, but that the petitioner name **as** respondent someone (or some institution) who has both an interest in opposing the petition if it lacks merit, and the power to give the petitioner what he seeks if the petition has merit -- namely, his unconditional freedom.

Reimnitz v. State's Att'y of Cook County, **761** F.2d 405, 409 (7th Cir. 1985). Thus, the appropriate respondent may not be the petitioner's "immediate" custodian where adherence to such a rigid rule would deny the petitioner the possibility of obtaining "meaningful habeas corpus relief." Nwankwo v. Reno, 828 F. Supp. **171**, 174 (E.D.N.Y. 1993); ~~see also~~ Eisel v. Secretary of the Army, 477 F.2d 1251, 1254 (D.C. Cir. **1973)** (rejecting concept of "immediate custodian"); Roman v. Ashcroft, 162 F. Supp. 2d 755, 762-63 (N.D. Ohio **2001)** (holding that Attorney General is proper respondent because contrary decision might effectively deprive petitioner of the protection of the Great Writ).

Although in the "usual case" the local prison warden may have authority to "produce the body," Braden, 410 U.S. at 579, that is

not always true, and there is no formulaic answer as to who qualifies as a "custodian" in such atypical cases. See generally Wade v. Mayo, 334 U.S. 672, 681 (1948) (warning that "the flexible nature of the writ of habeas corpus counsels against erecting a rigid procedural rule that has the effect of imposing a new jurisdictional limitation on the writ"). For example, the Ninth Circuit recently observed that even though it -- like the Seventh Circuit -- "has often applied the rule that a petitioner's immediate physical custodian is the proper respondent in the context of traditional habeas petitions, ... the custodian requirement may be flexibly interpreted to encompass other custodians when it is efficient to do so." Armentero, 340 F.3d at 1064.

Thus, federal courts have frequently held that members of the Executive branch of government, who exhibited far less control over a petitioner than that exerted by these Respondents, were properly named as respondents to habeas petitions. See, e.g., Ex Parte Endo, 323 U.S. at 304-07 (Acting Secretary of the Interior); Bennett v. Soto, 850 F.2d 161, 163 (3d Cir. 1988) (parole board chairperson); Dunn v. United States Parole Comm'n, 818 F.2d 742, 744 (10th Cir. 1987) (U.S. Parole Commission); Demjanjuk v. Meese, 784 F.2d 1114, 1116 (D.C. Cir. 1986) (Attorney General); McCoy v. United States Bd. of Parole, 537 F.2d 962, 964-65 (8th Cir. 1976) (parole board); Carney v. Secretary of Defense, 462 F.2d 606, 607 (1st Cir. 1972) (Secretary of Defense and Secretary of the Navy);

United States ex rel. Circella v. Sahli, **216** F.2d 33, 37 (7th Cir. 1954) **(INS** district director); Bell v. Ashcroft, __ F. Supp. 2d __, 2003 **WL** 22358800, at *3 (Oct. 15, 2003 S.D.N.Y.) (Attorney General); Nwankwo, 828 F. Supp. at 174-75 (Attorney General). Moreover, it has long been an accepted jurisdictional practice to denominate the Secretary of Defense or applicable Service Secretary as a respondent in cases, like this one, where the petitioner is in military custody. See Middendorf v. Henry, 425 U.S. 25 (1976) (Secretary of the Navy); Schlesinger v. Councilman, 420 U.S. 738 (1975) (Secretary of Defense); Secretary of the Navy v. Avrech, 418 U.S. 676 (1974); Strait v. Laird, 406 **U.S.** 341 (1972) (Secretary of Defense); Parisi v. Davidson, 396 U.S. 1233 (1969) (Secretary of the Army); United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955) (Secretary of the Air Force); Burns v. Wilson, 346 **U.S.** 127 (1953) (Secretary *of* Defense); Lantz v. Seamans, 504 F.2d 423, 424 (2d Cir. 1974) (Secretary of the Air Force).

In this regard, the district court held in Padilla v. Rumsfeld, 233 F. Supp. 2d 564 (S.D.N.Y.2002), that an exception to the general approach is warranted to account for the unique circumstance of an "enemy combatant" being detained by the military on order of the President. Judge Mukasey explained:

> [W]hat makes the usual case usual is that the petitioner is serving a sentence, and the list of those other than the warden who are responsible for his confinement includes only people who have played particular and discrete roles in confining him, notably the prosecuting attorney and the sentencing judge, and who no longer have a substantial and

> ongoing role in his continued **confinement.** The warden becomes the respondent of choice almost by default. **As** discussed below, this is not the usual case.

233 F. Supp. 2d at **581.** Here, the President of the United States and the Secretary of Defense have retained direct control over Petitioner's fate not simply as a bureaucratic matter but, rather, by virtue of two specific military orders issued by the President himself on November **13**, 2001 and June 23, 2003. Thus, as discussed below, Respondents Bush and Rumsfeld have a "substantial and ongoing role" in Petitioner's continued confinement; Commander Marr has a nominal one. Hence, each was properly named as a respondent

1) President Bush

President Bush is Petitioner's custodian and, hence, a proper respondent because Petitioner was removed from the district court's jurisdiction, and is currently being detained, based entirely upon the President's **June** 23, 2003 Order designating Petitioner an "enemy combatant." A92 (Enemy Combatant Order). Indeed, under the terms *of* the President's underlying Military Order of November 13, 2001, only he can designate an individual an "enemy combatant," and only he can remove such designation. **A103** (Habeas Pet., **Ex.** 10 at § 2(a)(1)). It is the President alone who has claimed the authority to order, as he did in this case, the removal of an individual from our civil system of justice to a military prison. Id. at § 2(c). Only the President has the authority to direct the Secretary of Defense to transfer Petitioner from the custody of the

Department of Defense to another "governmental authority." Id. at § 7(e). Further, Petitioner awaits a potential trial by military commission, id. at § 4(a), which will occur at a time, and according to general standards, set by the President himself. Id. at § 4(c). Finally, the President alone has the authority to review any determination made by a military commission, unless he delegates that responsibility to the Secretary of Defense, id. at § 4(c)(8). Indeed, it is the President who has ordered that Petitioner does not have the right to seek judicial review of the legality of his detention. Id. at § 7(b)(2). For these reasons, Respondent Bush is Petitioner's primary custodian, and properly was named as a respondent in this case.

The President is also a properly named respondent, regardless of whether he is deemed by the Court to be a custodian within the meaning of 28 U.S.C. § 2242, because the petition explicitly challenges both the President's authority to issue his November 13 Military Order, pursuant to which he purportedly acted, and his June 23 "Enemy Combatant" Declaration. That is, Petitioner has raised federal questions specifically addressing the President's actions, as well as the Court's fundamental power of judicial review of those actions, and of the jurisdiction provided by Article III, section 2 of the Constitution and 28 U.S.C. § 1331. See, e.g., Clinton v. Jones, 520 U.S. 681, 703 (1997); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952); Marbury v.

Madison, 1 Cranch **137** (1803). For this reason, as well, President Bush properly was named as a respondent.[4]

2) **Secretary Rumsfeld**

Secretary Rumsfeld is also Petitioner's custodian and, hence, a proper respondent because he too maintains a substantial and ongoing role in Petitioner's continued confinement. On June 23, 2001, Secretary Rumsfeld was ordered by the President "to receive Mr. al-Marri from the Department *of* Justice and to detain him as an enemy combatant." A92 (Enemy Combatant Order). Under the terms of the President's November 13 Military Order, Secretary Rurnsfeld is compelled to designate the location at which Petitioner is detained. A103 (Habeas Pet., Ex. 10 at § 3(a)). Accordingly, it was Respondent Rumsfeld who ordered the removal **of** Petitioner from

[4] This case is different from Padilla, *supra,* where the court held that the President was not a proper respondent. Significantly, the President's November **13**, 2001 Military Order, which authorizes the detention only of aliens, like Petitioner, A103 (Habeas Pet., **Ex.** 10 at § 2(a)), did not apply to Padilla, an American citizen, and therefore was not at issue in that case. Whereas the Padilla court found that "it is now the Secretary of Defense who decides what happens to" Padilla, 233 F. Supp. 2d at 562-63, here the President continues to be directly involved with determining Petitioner's fate. Indeed, by specifically challenging the President's authority under the Constitution and Congress' Joint Resolution, Petitioner here seeks relief directly from the President, something the district court found lacking in Padilla. Id. Further,, whereas the Padilla court did "not interpret [the Presidential Declaration designating Padilla an "enemy combatant"] to mean that the Secretary must hold Padilla until the President directs otherwise," id., the Military Order pursuant to which Petitioner is being detained does not authorize the Secretary of Defense to unilaterally release him, A103 (Habeas Pet., Ex. 10 at § 7(e)). In sum, the President has a level of involvement in this matter that was absent in Padilla. Accordingly, he is an appropriate (and even necessary) respondent here.

the Central District of Illinois to the Naval Consolidated Brig in Charleston, South Carolina. Indeed, at a news conference on June 24, 2003, Respondent Rumsfeld stated in prepared remarks to the press that "the President designated **Ali** Saleh Kahlah al-Marri ... as an enemy combatant and transferred him to the control of the Department **of** Defense," (Pet'r Br. in Opp'n Mot. to Dismiss. ***Ex.*** C), over which Secretary Rurnsfeld has "authority, direction, and control." **10** U.S.C. § 113(a) & (b).

Pursuant to the President's Military Order, Secretary Rumsfeld has promulgated "Military Commission Order **No.** 1," (Pet'r Br. Opp'n Mot. to Dismiss, **Ex.** M), which delineates guidelines that may affect the duration of Petitioner's detention. He also has presidential authorization to demand the assistance of every department and member of the United States government in carrying out his duties under the November 13 Military Order. A103 (Habeas Pet., **Ex.** 10 at § 5). As noted by Judge Mukasey in Padilla, 233 F. Supp. 2d at 581, this level of involvement by a Cabinet-level official in a habeas petitioner's detention is "unprecedented" and demonstrates that Secretary Rumsfeld is, in fact, Petitioner's custodian. Cf. Henderson v. INS, 157 F.3d 106, 125-26 (2d Cir. 1998) (observing that "unique role that the Attorney General plays" in immigration matters, including the fact that she "has the power to produce the petitioners," suggests that she ***is*** a proper respondent in alien habeas cases). Indeed, Respondents' objection to the contrary is belied by the fact that they did not object to

Secretary Rumsfeld's being deemed a custodian in another "enemy combatant" case, Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003). For these reasons, Secretary Rumsfeld properly was named as a respondent in this case.

3) Commander Marr

The district court held that Commander Marr is Petitioner's custodian and, thus, a proper respondent in this case; she is, however, only a nominal custodian. That is, Commander Marr, an active duty military officer, may not disobey the orders of her superiors, including those of Respondents Bush and Rumsfeld. **10 U.S.C.** § 892. That is, she could not unilaterally release Petitioner and, if she did so, she would be subject *to* prosecution by court-martial for violating her superiors' confinement order, id., and for illegally releasing a prisoner, 10 U.S.C. § 896. Thus, Commander Marr is not one "with power to produce the body of [the petitioner] before the court," Wales, 114 **U.S.** at 574, and she certainly is not "the only one who can produce 'the body' of the petitioner," Samirah, 335 F.3d at 551-52. Rather, she lacks authority to comply with any order directing that she produce Petitioner, other than one from the President or the Secretary of Defense. Because Commander Marr cannot produce Petitioner in response to *a* court order, the fact that she happens to be his "immediate" custodian is legally irrelevant under Wales and Samirah.

The district court, however, stated in its August 1 Order that it "has been assured by the Assistant Solicitor General of the United States and the U.S. Attorney for this district that Commander Marr would obey any court order directed *to* her for execution." A6 (274 F. Supp. 2d at 1009). In fact, the United States Attorney made no such representation to the district court, and the Assistant Solicitor General, when asked whether the district court's order would be obeyed by Commander Marr, simply responded: "Certainly that is true to my knowledge, Your Honor." A126 (7/28/03 Tr. at 15) (emphasis added). The district court did not make any inquiry regarding the scope or validity of the Assistant Solicitor General's representation. See Mounce v. Knighten, 503 F.2d 967 (5th Cir. 1974) (remanding for a factual investigation of whether named custodian "has the authority to produce [petitioner] in court or to release him should the court so order," and recognizing that there might ultimately prove to be two custodians).

With all due respect to the Assistant Solicitor General, it is not at all evident that he has even spoken to Commander Marr, much less that she has told him that she would disobey the President and the Secretary of Defense if so ordered by the district court. Nor is it readily apparent that the Assistant Solicitor General is otherwise authorized to make such a binding commitment on behalf of the President of the United States, the Secretary of Defense, or Commander Marr. At the very least, the district court should have

insisted upon a stipulation from Respondent Marr herself before reaching the conclusion critical to its decision that she would comply with the order of a civilian judge over one issued by her Commander-in-Chief, a conclusion belied by historical precedent, see Ex parte Merryman, 17 F. Cas. 144 (1861), and by the actions of this Administration, see Philip Shenon, U.S. Will Defy Court's Order In Terror Case, N.Y. Times, July 15, 2003, at A1 (reporting that Attorney General Ashcroft would refuse to comply with court order to produce enemy combatant even in face of court sanction).

Indeed, even if the district court were to conclude that Commander Marr is an appropriate custodian, the President and the Secretary of Defense are also his custodians and, hence, properly named respondents. Although the district court stated in its August 1 Order that the only exception to the "immediate" custodian rule "involved limited circumstances where the prisoner was being held abroad ... or ... at an undisclosed location," that simply is not true: in Padilla, Judge Mukasey held that Secretary Rumsfeld (and not Commander Marr) was the actual "custodian" of the petitioner who, like Mr. al-Marri, is being held as an "enemy combatant" at the Naval Consolidated Brig in Charleston, South Carolina. Similarly, in Hamdi, the government did not even object to the fact that Secretary Rumsfeld was named as Hamdi's custodian, and he remains a respondent in that case.

For these reasons, the district court's determination that Commander Marr's status as Petitioner's immediate custodian had

some legal significance with respect to the question of venue was legal error. Under the circumstances of this enemy combatant case, President Bush, Secretary Rumsfeld, and Commander Marr are each Petitioner's custodian, and therefore each properly was named as a respondent.

B. The Trial Court's Process Could Reach The Respondent.

Since President Bush, Secretary Rumsfeld and Commander Marr are each Petitioner's custodian, the question becomes whether the district court could exercise personal jurisdiction over them. Ross v. Mebane, 536 F.2d **1199,** 1201 (7th Cir. 1976) (noting that a court has jurisdiction to hear a habeas petition if it has jurisdiction over the custodian); see also Vazques v. Reno, 233 F.3d 688, 690-91 (1st Cir. 2000); Malone v. Calderon, **165** F.3d 1234, 1237 (9th Cir. 1999); Henderson, 157 F.3d at 122; Pottinger v. Reno, **51** F. Supp. 2d 349, 326 (E.D.N.Y. 1999). A federal district court has jurisdiction to consider a detainee's 28 U.S.C. § 2241 petition so long as the named respondent "can be reached by service of process." Braden, 410 U.S. at 495. Here, the court's process could reach all three Respondents. Therefore, the district court could and properly should have exercised its jurisdiction over them.

In Ahrens v. Clark, 335 U.S. 188 (1948), the Supreme Court held that habeas jurisdiction exists only in the district in which a petitioner is physically detained. In Braden, however, the Court expressly overruled Ahrens:

> § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. **So** long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction" requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself **is** confined outside the court's territorial jurisdiction.

410 U.S. at 495 (holding that "petitioner's absence from the Western District of Kentucky did not deprive the court *of* jurisdiction" because respondent could be reached by the court's process). See also Orito v. Powers, 479 F.2d 435 (7th Cir. 1973) (disposing of respondent's jurisdictional objection on the ground that Braden overruled Ahrens). Furthermore, the Supreme Court has specifically held that the government's removal of a detainee from a district court's jurisdiction cannot defeat the court's authority to consider the merits of a habeas petition filed by the detainee in the district from which he was removed. **Ex** Parte Endo, 323 U.S. at 306-07. Quite clearly, Petitioner's presence within the Central District of Illinois was not required for the district court *to* exercise jurisdiction over this case. Rather, as the Supreme Court held in Braden, the court was permitted to exercise habeas jurisdiction *so* long as its process could reach any one respondent. 410 U.S. at 495

The scope of process in the federal courts is determined according to the law of the state in which the district court is located, Fed. R. Civ. P. 4(e), (i), (k), typically through a

state's long-arm statute. Helicopteros Nacionales de Colombia v. Hall, 466 **U.S.** 408, 414 n.8 (1984); Hyatt Int'l Corp. **v.** Coco, 302 F.3d 707, 713 (7th Cir. 2002); Steel Warehouse of Wis., Inc. **v.** Leach, 154 F.3d 712, 714 (7th Cir. 1998). This is true in habeas cases, as well. See, e.g., Ali v. Ashcroft, 346 F.3d 873, 889 (9th Cir. 2003) (applying Washington long-arm statute to exercise habeas jurisdiction over Attorney General Ashcroft); Padilla, 233 F. Supp. 2d at 587 (applying New York's long-arm statute to exercise habeas jurisdiction over Secretary Rumsfeld); Farah **v.** INS, 2002 WL 31828309, at *2 (D. Minn. Dec. 11, 2002) (applying Minnesota long-arm statute); Roman v. Ashcroft, 162 F. Supp. 2d at 759 (applying Ohio long-arm statute); Barton v. Ashcroft, 152 F. Supp. 2d 235, 238-39 (D. Conn. 2001) (applying Connecticut long-arm statute); Santiago **v.** INS, 134 F. Supp. 2d 1102, 1104 (N.D. Cal. 2001) (applying California long-arm statute).

The Illinois long-arm statute applicable here vests courts sitting in the State of Illinois with "general" jurisdiction over nonresident defendants "doing business" in Illinois, and "specific" jurisdiction over nonresident defendants if the claim at issue arises from their "transactions" within the state. 735 Ill. Comp. Stat. § 5/2-209(a) & (b) (2003). They may also exercise personal jurisdiction to the full extent of the Due Process Clause of the United States Constitution. Id. § 5/2-209(c). See International Med. Group, Inc. **v.** American Arb. Ass'n, Inc., 312 F.3d 833, 846 (7th Cir. 2002); Hyatt, 302 F.3d at 714; International Truck & Eng.

Corp. v. Dow-Hammond Trucks Co., 221 F. Supp. 2d 898, 901 (N.D. Ill. **2002).** Thus, the existence of either "general" or "specific" personal jurisdiction brings Respondents within the district court's territorial jurisdiction. Helicopteros, 466 **U.S.** at 414-15; RAR, Inc. **v.** Turner Diesel, Ltd., 107 F.3d 1272, 1277 (7th Cir. 1997); Wallace v. Herron, 778 F.2d 391, 393 (7th Cir. 1985).[5]

"General jurisdiction" refers to the power of a court to exercise personal jurisdiction over a non-resident in a suit not

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[5] The term "territorial jurisdiction" refers to the scope of a court's authority over persons and property, regardless of whether it is exerted based on geography, domicile, specific jurisdiction or general jurisdiction;.it is not limited to the actual geographic boundaries of a state. International Shoe, 326 U.S. at 316 ("[N]ow that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"); United States ex rel. Belardi v. Day, 50 F.2d 816, 817 (3d Cir. 1931) (stating that territorial jurisdiction is not limited by geography and may be defined by statute). The notion that the territorial boundaries of a state has some transcendent importance for personal jurisdiction expired with Pennoyer v. Neff, 95 U.S. 714 (1877). Milliken v. Meyer, 311 U.S. 457, 463 (1941). As a matter of law, a party is within a court's territorial jurisdiction if it is within reach of the state's long-arm statute, subject to due process limitations. Medical Mut. of Ohio v. DeSoto, 245 F.3d 561, 566 (6th Cir. 2001) (noting that courts rely on state long-arm statutes to establish territorial jurisdiction); Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1198 (8th Cir. 1990) (noting that the trend away from Pennoyer "culminated in the so-called long-arm statutes, which asserted jurisdiction over nonresidents ... who made contracts, committed torts, or caused certain consequences within the State"); Local Union 1219 v. U.B.C.J.A., 493 F.2d 93, 95 (1st Cir. 1974) (holding that service under Maine's long-arm statute brought defendant within court's territorial jurisdiction); Klusty v. Taco Bell Corp., 909 F. Supp. 516, 519 (S.D. Ohio 1995) (stating that it is "fundamental" that a state's long-arm statute brings an individual within the court's territorial jurisdiction).

arising out of or related to the party's contacts with the forum in which the court is located. Id. at 414-15 n.9; Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447-49 (1952). In such cases, a court may exercise general jurisdiction based upon the party's "continuous and systematic contacts" with the forum state. Hyatt, 302 F.3d at 713 (quoting Steel Warehouse, 154 F.3d at 714); Logan Prods., Inc. v. Optibase, Inc., 103 F.3d 49, 52 (7th Cir. 1996); Wilson v. Humphreys (Cayman) Ltd., 916 F.2d 1239, 1245 (7th Cir. 1990). To determine whether a party has sufficient contacts, courts evaluate a wide variety of factors, including whether the party has agents, employees, offices, property or bank accounts in the state, advertises and recruits in the state, or has an agent for service of process in the state. Helicopteros, 466 U.S. at 416; Alpha Tau Omega Fraternity v. Pure Country, Inc., 185 F. Supp. 2d 951, 956-57 (S.D. Ill. 2002); Publications Int'l, Ltd. v. Burke/Triolo, Inc., 121 F. Supp. 2d 1178, 1182 (N.D. Ill. 2000).

By contrast, "specific" jurisdiction refers to the power of a court to exercise personal jurisdiction over a party in a suit arising out of or related to the party's contacts with the forum. A district court may exercise "specific" jurisdiction over a party if they have had "minimum contacts" with the State of Illinois such that it would not offend "traditional notions of fair play and substantial justice" to subject the party to the court's jurisdiction. Helicopteros, 466 U.S. at 416 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) and noting that

this analysis has been "settled for more than fifty years"). A party need not have "physically enter[ed] the forum State" for jurisdiction to attach, so long as the party's efforts are "purposefully directed" toward a resident of the forum state. Burger King **v.** Rudzewicz, 471 **U.S.** 462, 474-76 (1985). The requisite "minimum contacts" can be established through the acts of a party's agents. 735 Ill. Comp. Stat. 5/2-209; Davis v. A & J Elecs., 792 F.2d 74, 76 (7th Cir. 1986); Neirnan v. Rudolf Wolff & Co., 619 F.2d **1189,** 1193 (7th Cir. 1980); Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137, 1144 (7th Cir. 1975).

Here, each named Respondent has sufficient contacts with the Central District of Illinois such that the district court may exercise personal jurisdiction over them, both as a matter of general and specific jurisdiction:

1) President Bush

President Bush, in his official capacity, transacts business in Illinois on a regular basis through all of the agencies of the federal government. Certainly, the Executive branch's departments and agencies, its agents and employees, operate ubiquitously throughout the State of Illinois. Cf. American Int'l Airways, Inc. v. Kitty Hawk Group, Inc., 834 F. Supp. 222, 225 (E.D. Mich. 1993) (finding general jurisdiction over individual based on presence and actions *of* subsidiary and its employees he controlled); Boone v. Sulpher Creek Resort, Inc., 749 F. Supp. 195, 199 (S.D. Ill. 1990) [finding general jurisdiction based on agents' trips into the state

for the purpose of recruiting customers); St. Louis-San Franscisco Ry. v. Gitchoff, 68 Ill.2d 38, 45-46 (1977) (basing general jurisdiction on the presence in the forum of a sales office with seven employees). As but one of the examples of the continuous and systematic contacts that the President has with the State of Illinois, documented to the district court, the President has three United States Attorney's Offices in Illinois, which employ over 180 Assistant United States Attorneys, each of whom is an agent of the President generally, 28 U.S.C. §§ 503, 509 & 541, and for purposes of service of process in particular, see Fed. R. Civ. P. 4(i). Indeed, it would verge on the preposterous to argue that the President of the United States is not generally present in Illinois and, indeed, in every state of the Union.

As a matter of "specific" jurisdiction, on June 23, 2003, the President in this case directed his agent, the Attorney General -- who regularly transacts business in the Central District of Illinois through, among other offices, the United States Attorney's Office for the Central District of Illinois, cf. Mojica v. Reno, 970 F. Supp. 130, 167 (E.D.N.Y. 1997) -- to surrender Petitioner to Secretary Rumsfeld in the Central District of Illinois. Further, the President himself ordered Secretary Rumsfeld to assume custody of Petitioner in the Central District of Illinois, and to remove him from that district to the District of South Carolina. By thrusting himself into the Central District of Illinois on June 23,

2003, through his agents, the President subjected himself to the "specific" jurisdiction of the federal district court.

Finally, the federal district courts have the authority to issue process to the President of the United States as a general matter. See Clinton, 520 U.S. at 703-04; United States v. Nixon, 418 U.S. 683, 713 (1974); United States v. Burr, *25* F. Cas. 30 (C.C. Va. 1807); United States v. Fromme, 405 F. Supp. 578, 583 (E.D. Cal. 1975); United States v. McDougal, 934 F. Supp. 296, 298 (E.D. Ark. 1996). Thus, not only because President Bush is generally present in the Central District of Illinois, but also because, in this case, he purposefully thrust himself into the Central District of Illinois on June 23, 2003, he can be reached by the district court's process, and is a proper respondent here.

2) Secretary Rumsfeld

Respondent Rumsfeld transacts business in Illinois on a regular basis through all of the agencies of the Department of Defense. Indeed, as documented to the district court, he has continuous and systematic contact with Illinois through his agents by virtue of, for example:

* The fifty-four Army National Guard facilities located throughout Illinois;

* The Navy's Recruit Training Command;

* Operations of Scott Air Force Base in Belleville, Illinois; and

* The thirteen Marine Corps Reserve units in the State of Illinois, including two in Peoria.

Again, these are but some of the continuous and systematic contacts that Secretary Rumsfeld and the Department of Defense have with the State of Illinois. As with the President, it would verge on the preposterous to argue that the Secretary of Defense is not generally present here and in every state of the Union.

As a matter of "specific" jurisdiction, *on* June 23, 2003, Secretary Rumsfeld sent agents of the Department of Defense into the Central District of Illinois for the purpose of seizing Petitioner. Because Respondent Rumsfeld thrust himself, through his agents, into the Central District of Illinois on that date, he is subject to the district court's process, and is a properly named respondent in this case. See Padilla, 233 F. Supp. 2d at 587 (finding personal jurisdiction over Secretary Rumsfeld because he sent his agents into Southern District of New York for the purpose of removing alleged "enemy combatant" to Navy Brig in South Carolina).

3) Commander Marr

Commander Marr may not regularly transact business in the State of Illinois, but the United States Navy certainly does, including at the Naval And Marine Corps Reserve Center in Peoria and at the Rock Island Arsenal, both of which are in the Central District of Illinois. In any event, as a matter of "specific" jurisdiction, Commander Marr's actions in dispatching her agents to the Central District *of* Illinois to participate in the unlawful

removal of Petitioner, give rise to personal jurisdiction over her, as well

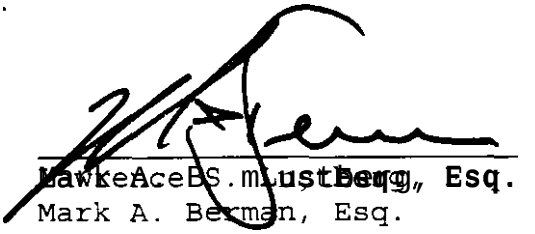
With respect to Commander Marr and, indeed, each Respondent, the Supreme Court's holding in Strait v. Laird, 406 U.S. 341, 344-46 (1972) is of critical importance. In that case, the Court concluded that an Army reservist's "commanding officer in Indiana, operating through officers in California ..., is in California for the limited purpose of habeas corpus jurisdiction," where the reservist's contact with the Army had occurred only in California, and even though the commanding officer was never actually in California. For that reason, the Court held, a federal court in California could exercise habeas jurisdiction over the petitioner's commanding officer, who was "present" in the district only through the acts of others in the hierarchy of command, deeming it "well settled" that such "presence" could suffice for personal jurisdiction. Id. at 346 n.2. In so holding, the Court explicitly distinguished Schlanger v. Seamans, 401 U.S. 487 (1971) (holding that serviceman on "permissive temporary duty" in Arizona could not file habeas petition in that district because "the District Court in Arizona has no custodian against whom its writ can run"), on the ground that "[t]he jurisdictional defect in Schlanger ... was not merely the physical absence of the Commander ... from the District of Arizona, but the total lack of formal contacts between Schlanger and the military in that district." Strait, 406 U.S. at 344. Here, as in Strait, Petitioner had formal contacts both with the

Central District **of** Illinois, in general, and with Respondents, through their agents in that district, on June 23, 2003.

In sum, each Respondent has sufficient contact with the Central District of Illinois to afford the district court personal jurisdiction over them, as a matter of "general" and "specific" jurisdiction. Moreover, the district should have exercised such jurisdiction because the traditional venue considerations, discussed at Point I, *supra,* militated in favor of the Central District of Illinois as the appropriate forum for this action. For these reasons, the Order of the district court dismissing Petitioner's habeas petition should be reversed.

CONCLUSION

For the reasons set forth above, petitioner Ali Saleh Kahlah al-Marri respectfully submits that the Court should reverse the Order of the district court dismissing his petition for a writ of habeas corpus, and remand this matter to the United States District Court for the Central District of *Illinois for* consideration of the merits of Petitioner's claims.



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Dated: November 12, 2003

Fed. R. App. P. 32(a)(7)(C) Certification

I, MARK A. BERMAN, ESQ., hereby certify that the Brief of Petitioner-Appellant Ali Saleh Kahlah al-Marri complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). It contains 13,879 words.

Circuit Rule 30(D) Certification

I, MARK A. BERMAN, ESQ., hereby certify that all of the materials required by parts (a) and (b) of Circuit Rule 30 are included in the appendix attached to this Brief.

Certification Of Service

I, MARK A. BERMAN, ESQ., hereby certify that, on November 12, 2003, I caused two (2) copies (and a digital copy) of the Brief of Petitioner-Appellant Ali Saleh Kahlah al-Marri, and one (1) copy of the separate Appendix, to be served by regular mail upon:

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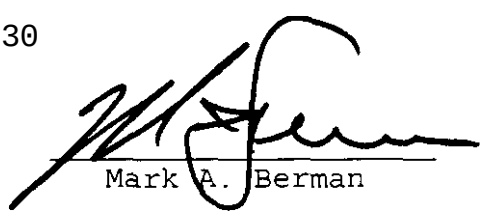

Mark A. Berman

H

United States District Court, C.D. Illinois

Ali Saleh Rahlah AL-MARRI, Petitioner,
v.
George W. BUSH, President of the United States of America, Donald H. Rumsfeld, United States Secretary of Defense, and M.A. MARR. Commander, Naval Consolidated Brig, Charleston, South Carolina, Respondents.

No. 03-1220.

Aug. 1,2003.

Qatari national, who had been indicted on various charges following his legal entry into the United States, brought petition for writ of habeas corpus after being declared an enemy combatant and transferred to custody of the military in South Carolina. Government moved to dismiss or transfer the petition. The District Court, Mihm, J., held that venue was improper.

Petition dismissed.

West Headnotes

[1] Habeas Corpus ⇐441
197k441 Most Cited Cases

[1] Habeas Corpus ⇐507
197k507 Most Cited Cases

A petition seeking habeas corpus relief is appropriate when a defendant is challenging the fact or duration of his confinement. 28 U.S.C.A. § 2241

[2] Habeas Corpus ⇐452
197k452 Most Cited Cases

Writ of habeas corpus may he granted where the defendant is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C.A. § 2241(c)(3).

[3] Habeas Corpus ⇐662.1
197k662.1 Most Cited Cases

The proper respondent in a habeas petition is the detainee's immediate custodian. 28 U.S.C.A. § 2243

[4] Habeas Corpus ⇐639
197k639 Most Cited Cases

Central District of Illinois was not proper venue lor habeas petition brought by alien who. following his indictment in Illinois. had been designated an enemy combatant and transferred to military custody in Charleston. South Carolina. and thus. petition would be dismissed. despite alien's claim that he was unlikely to be successful in Fourth Circuit. and his hope for a more favorable result in the Seventh Circuit. where alien's family was believed to have left country. his lead counsel were located in New Jersey. and Illinois charges against alien had been dismissed. 28 U.S.C.A. § 2241

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ORDER

MIHM, District Judge

This matter is now before tlie Court on Petitioner. Ali Saleh Kahlah Al- Marri's ("al-Marri"), Petition for Writ of Habeas Corpus pursuant to *28* U.S.C. § 2241, and the Government's Motion to Dismiss. For the reasons set forth belou. the Motion to Dismiss [# 7] is GRAKTED.

BACKGROUND

Al-Marri is a Qatari national who legally entered the United States on September 10, 2001, with his wife and children. He had previously obtained a bachelor's degree from Bradley University in Peoria, Illinois, in the early 1990s, and was returning to the United States to obtain a master's degree from Bradley.

On December 12, 2001. al-Marri was arrested by FBI agents in Peoria at the direction of the U.S. Attorney's Office for the Southern District of New York as a material witness in the investigation of the September 11, 2001, terrorist attacks. He was then transferred to New York City.

Al-Marri was formally arrested on a criminal complaint charging him with credit card fraud on January 28, 2002. On February 6, 2002, he was indicted and charged with possession of 15 or more unauthorized or counterfeit access devices with intent to defraud in the United States District Coun for the Southern District of New York. He pled not guilty, and the case followed the normal course of litigation. On January 22, ***2003,*** al-Marri was charged in a second indictment with two counts of making a false statement to the FBI, three counts of making a false statement in a hank application, and one count of using a means of identification of another person for purposes of influencing the action of a federally insured financial institution. He also entered a plea of not guilty to the second indictment and succeeded in having the two indictments consolidated.

Al-Marri initially waived any objection to venue in the Southern District of New York. but later withdrew his waiver after obtaining new counsel. He then moved to dismiss the indictments on grounds of improper venue. On May 12, 2003, al-Marri's motion was granted and the indictments were disiiiissed for improper venue. However, a new criminal complaint had been filed under seal in this district on May I. 2003, and al-Marri was arraigned on that complaint on May 13, 2003. He was then transferred hack to Peoria, where a grand jury indicted him on the same counts that had been charged in the two indictments in the Southern District of New York. Al-Marri was arraigned and a pretrial conference was set for July 2, 2003, with a jury trial to begin on July 21, 2003.

On June 23, 2003, President Bush designated al-Marri as an enemy combatant and directed that he be transferred to the control of the Defense Department for detention. That same morning. the U.S. Anomey's Office moved to dismiss the indictment with prejudice. and the motion was granted. Al-Marri's counsel then requested that the Coun stay the case to prevent any attempt to transfer him from the jurisdiction until he could tile a habeas petition. However. the Court determined that as the case had been dismissed with prejudice. it lacked jurisdiction to issue an) type of a stay The Court did obtain the U.S. Attorney's agreement to inform counsel of the location to which al-Marri was to be moved, and counsel has been so advised. The U.S. Attorney also agreed to provide both the Court and al-Marri's counsel with advance notice if al-Marri was going to be moved to any location *1005 outside of the United States so that counsel could seek an emergency injunction in the appropriate court. Al- Marri was then immediately transferred into military custody and transported to the Naval Consolidated Brig in Charleston, South Carolina, where he continues to be held.

On July 8, 2003, al-Marri's counsel filed the present § 2241 Petition on his behalf. as it is undisputed that al-Marri is unavailable to sign it for himself. In response, the Government moved to either dismiss or transfer the Petition to the District of South Carolina. raising essentially three arguments: (1) the Petition has not been properly brought on al-Marri's behalf: (2) no proper respondent with custody over al-Marri is present within this Court's territorial jurisdiction: and (3) venue over the action appropriately lies in South Carolina, where he is detained. On July 28, 2003. the Coun held oral arguments, and this Order follows.

DISCUSSION

[1][2] A petition seeking habeas corpus relief is appropriate under 28 U.S.C. § 2241 when a defendant is challenging the fact or duration of his confinement. *Preiser v. Rodriguez*, 411 U.S. 475, 490, 93 S.Ct. 1827. 36 L.Ed.2d 439 (1973); *Waletzki v. Keohane*, 13 F.3d 1079, 1080 (7th Cir.1994). The writ of habeas corpus may be granted where the defeiidaiit is in custody in violation of the Constitution or laws or treaties of the United Stares. 28 U.S.C. 2241(c)(3). Al-Marri's ability to pursue relief pursuant to § 2241 is essentially undisputed. What is disputed is the forum in which he sliould pursue such relief. [FN1]

FNI. Although the Government asserts several bases for the dismissal of al-Marri's Petition, each of the bases need not be addressed in resolving the motion, as the Court finds the issue of venue to be dispositive.

[3] Section 2243 provides that any writ of habeas corpus that shall issue "shall be directed to the person having custody of the person detained and that person "shall be required to produce at the hearing the body of the person detained." 28 U.S.C. § 2243. Moreover, it is generally established that the proper respondent in a habeas petition is the detainee's immediate custodian. **See** *Wales v. Whitney,* 114 U.S. 564, 574, 5 S.Ct. 1050, 29 L.Ed. 277 (1885) (noting that the provisions of the habeas corpus statute "contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason **is** shown to the contrary"). The Seventh Circuit has followed this view, noting that "[t]he custodian, in most cases, 'is the person having a day-to-day control' over the petitioner, because he 'is the only one who can produce the body of the petitioner.' " ***Samirah*** *v. O'Connell,* 335 F.3d 545, 2003 WL 21507968, at *5 (7th Cir.2003), *citing Guerra v.* ***Meese,*** 786 F.2d 414, 416 (D.C.Cir.1986). The only noted exceptions to this general rule involved limited circumstances where the prisoner was being held abroad and there was no domestic forum where the prisoner's custodian was present or where the prisoner was being held at an undisclosed location. neither of which apply in the present case. *Id.; Demjanjuk v.* ***Meese,*** 784 F.2d 1114, 1115-16 (D.C.Cir.1986). From this line of cases, the Government argues that the Coun should not entertain the Petition, as it must he brought in South Carolina, where Commander Marr, al- Marri's day-to-day custodian. *is* located.

Al-Marri cites *Braden v 30th Judicial Circuit Court of Kentucky,* 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973), for the proposition that **a** federal district court *1006 has the power to consider a detainee's § 2241 petition so long as the court's process can reach the named respondents. In *Braden,* the Supreme Court took a step back from *Ahrens v. Clark,* 335 U.S. 188, 68 S.Ct. 1443, 92 L.Ed. 1898 (1948), which suggested that the prisoner's presence uithin the territorial confines of the dismct was an invariable prerequisite to thr exercise of a dismct court's habeas jurisdiction. 92 S.Ct. at 1130. ***Ahrens*** involved habeas petitions filed by 120 German nationals confined at Ellis **Island,** New York. pending deponation in which they argued that the statutory removal orders issued by the INS exceeded the President's authority under the Alien Enemy Act of 1789. 68 S.Ct at 1443. The petitions were filed in the District Court for the District of Columbia. naming the Attorney General as the respondent. *Id* at 1443- 44. The Supreme Coun found that the words "within their respective jurisdictions" in the habeas corpus statute limited district court jurisdiction to inquiries into cases brought by those confined or restrained within the territorial jurisdiction of each coun. *Id.* at 1444

In distancing itself from *Ahrens'* inflexible rule, the Supreme Court noted developments in the law since *Ahrens* was decided and criticized a construction that dictated the choice of an inconvenient forum even if the type of case at issue could not have been foreseen at the time of the decision. *Id.* at 1132. Nevertheless, while the Supreme Coun did indicate that "[s]o long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction,' " it later deferred to traditional principles of venue in noting "[o]f course, in many instances the district in which petitioners are held will be the most convenient forum for the litigation of their claims" and based its finding in part on the fact that the respondent had been properly sewed in the district in which the petition was filed. *Id.*

Initially, the Coun notes that this case presents a quite different procedural posture from *Braden,* in which a petitioner confined in Alabama was allowed to proceed with a habeas corpus petition in Kentucky that challenged his right io a speed! trial on a Kentucky charge after the Court Sound that the matter centerrd around a detainer lodged by the state of Kentucky and thai the respondent had been properly served in the Western District of Kentucky. Here. al-Marri is not attacking a detainer lodged by an Illinois court while he is incarcerated in South Carolina or otherwise attacking a form of legal custody that is separate and distinct from his present physical custody. In fact, the Central District of Illinois has no real relationship to his present confinement other than the fact that he was physically present in this District prior to his arrest and at the time that he was taken into military

custody after having been declared an enemy combatant. His family is no longer in this District or even in the United States, and his lead counsel that have established a relationship with him through months of representation are located in Newark, New Jersey. His involvement as a criminal defendant in this Court ceased with the dismissal of all charges against him prior to his transfer into military custody, and the fact that he bad been a defendant in this Court prior to the time that he was removed from the district is only tangentially related to the circumstances of his present confinement in military custody. There is likewise no indication that any Respondent is physically present within or has been served in the Central District of Illinois, and neither *Braden* nor any Seventh Circuit case known to the Coun has addressed or specifically authorized the use of a state's long-arm statute to obtain service as a means of establishing venue in a § 2241 action where the petitioner is confined in another state.

*1007 Subsequent to the Supreme Court's decision in ***Broden,*** the Seventh Circuit has held that "the only court with jurisdiction over [a petition for writ of habeas corpus] is the federal district court where the movant is imprisoned." *United States v. Mittelsteadt,* 790 F.2d 39, 40 (7th Cir.1986). In fact, the Seventh Circuit even cited ***Braden*** in its subsequent finding that "if a prisoner wants 'out' ... the proper venue for the habeas corpus proceeding is the district where [the movant] is being held." *Id., citing Braden,* 93 S.Ct. at 1132; *Mikolon v. United States,* 844 F.2d 456. 461 (7th Cir.1988) (noting that petitioner who was incarcerated in Terre Haute, Indiana. and brought his petition in the United States District Court for the Southern District of Indiana, had satisfied jurisdictional and venue requirements.) The Seventh Circuit recently reaffirmed this view in *Samirah,* where it held that if the petitioner was going to proceed under § 2241, "he must name his custodian as respondent and file the petition in a district court that has jurisdiction over his custodian; otherwise, the district court would lack jurisdiction." 335 F.3d 545, 2003 WL 21507968, at * 5, *citing Montenegro v. United States,* **248** F.3d 585, 594 (7th Cir.2001), *overruled on* ***other.*** *grounds by Ashley v. United States,* 266 F.3d 671, 674-75 (7th Cir.2001); ***see*** *also, Hogan v. Hanks,* 97 F.3d 189, 190 (7th Cir.1996) (finding that if the petitioner is in prison, the warden is the proper respondent); *Hanahan v. Luther,* 760 F.2d 148, 151 (7th Cir.1985). After finding that no custodian was within the district court's territorial limits when the petition was filed. the Court of Appeals concluded that the district court lacked habeas jurisdiction. *Id*

Granted, neither *Mittelsteadt* nor *Samirah* are closely analogous to the facts of this case. *Mittelsteadt* involved a regular habeas petition challenging a parole determination by a petitioner who had been convicted and was in custody in a federal prison. 790 F.2d at 40-41. *Samirah* involved a petition brought by an alien seeking to compel the INS to allou him to return to thr United States. 335 F.3d **545,** 2003 WL 21507968, at *1. In fact, the Court is unaware of any case in the Seventh Circuit expressly addressing this type of situation. Rather, the cases appear to either apply the general rule in addressing the normal habeas situation or address a factual situation that is not sufficiently analogous to compel a particular result in this case. However, *Mittelsteadt, Samirah,* and the other cases that have been decided in this circuit do indicate that the general rule that habeas petitions are generally to be tiled where the petitioner's custodian is located is well- established in the Seventh Circuit.

Under *Braden's* expanded view of habeas jurisdiction. traditional venue doctrines remain fully applicable, as even in rejecting the inflexible jurisdictional rule of *Ahrens,* the Supreme Coun nevertheless reaffirmed the result in that case as the proper product of traditional principlss of venue. 93 S.Ct. at 1132.

> On the facts of Ahrens itself. for example. petitioners could have challenged their detention by bringing an action in the Eastern District of New York against the federal officials who confined them in that district. No reason is apparent why the District of Columbia would have been a more convenient forum, or why the Government should have undertaken the burden of transporting 120 detainees to a hearing in the District of Columbia. Under these circumstances, traditional principles of venue would have mandated the bringing of the action in thr Eastrrn District of New York, rather than the District of Columbia.

93 S.Ct. at 1132. The Coun finds this to be instructive.

*1008 [4] Here. there is no secret as to where al-Marri is being hrld or that lie is being held in military custody in Charleston, South Carolina.

which is within the continental United States. He no longer has substantial ties to the Central District of Illinois, as his family is believed to have left the country, and his lead counsel are located in New Jersey. Under these circumstances, the question then becomes whether there is anything about this case that compels the Court to depart from the general rule and allow the petition to be entertained in a district where neither the petitioner, nor his family, nor lead counsel, nor any Respondent is located. Somewhat regretfully, the Court must conclude that the answer is no.

Al-Marri resists transfer to the District of South Carolina, where he asserts that "it appears, meaningful relief will almost certainly be foreclosed" and cites *Hamdi* v. *Rumsfeld*, 316 F.3d 450 (4th Cir.2003). [FN2] However. the fact that the Fourth Circuit has denied relief in the case of another petitioner that has been designated as an enemy combatant really has no bearing on the question of venue in this case and presumes without any appreciable basis therefore that the Fourth Circuit would not give al-Marri's petition (which differs in several material respects from the situation in *Hamdi*) independent consideration. Whether the law of another forum may be more or less favorable cannot he determinative of venue, or the habeas inquiry would be reduced to little more than forum shopping for a bener outcome.

> FN2. Parenthetically, the Court notes that the timing of the events that unfolded on the morning that the criminal charges in this district were dismissed, al-Marri's immediate turn-over to military. custody. and his swift transport from this district to South Carolina suggest that the Government may have been conscious of forum issues as well.

Al-Marri argues that his choice of forum "must be accorded substantial deference." While the Coun would generally agree with that assertion if this were a routine civil case, this is a habeas corpus proceeding. and it is axiomatic that not all general principles of civil law apply. for obvious reasons. Al-Marri has not provided, and the Court is otherwise unaware of, any support for the extension of this concept to the realm of habeas corpus proceedings as justification for defeating well-established principles of venue in habeas cases compelling another result.

Al-Marri attempts to persuade the Coun to follow the reasoning of *Padilla* v. *Rumsfeld*, 233 F.Supp.2d 564 (S.D.N.Y.2002). in which the district court heard the petition in New York arid declined to transfer the case to South Carolina. where Padilla was being confined. However. this portion of the non- binding opinion in *Padilla* is extremely brief and can be readily distinguished on several bases, not the least of which is the fact that Padilla's counsel, uho had beeii working to obtain his release prior to his transfer to South Carolina. were located in New York. *Id* at 587. It is clear from the opinion that the district judge in that case considered this to be a key fact. as he stated that "the convenience of counsel is served by keeping the case here" and reiterated that "considerations of convenience and practicality ... are served by keeping the case here." *Id*. Here. the counsel with whom al-Marri has an established relationship are located in New Jersey, and it is presumably just as convenient, if not more so. for them to travel to South Carolina.

Al-Marri also contends that the material events charged in the indictment which led to his designation by President Bush as an enemy combatant took place in this district and that records/witnesses pertinent to the claim are likely to be found here. However. this is primarily speculation. Although it *1009 appears that al-Marri resided in Peoria for a substantial part of the time that he was in this country, there was a lengthy period of time between the time he obtained his bachelor's deyrce and his return on September 10. 2001. when he was not in the United States The Court has no basis for determining whether the facts upon which he has been designated an enemy combatant crntrr upon conduct that al-Marri allegedly engaged in while inside or outside of the country, or both. Although the Court's inability to make this determination is attributable to the fact that the Government has not divulged the specific details underlying the drcision to designate him as an enemy combatant, this docs not entitle al-Marri to the inference he asks the Court to draw.

After careful review and scrupulous considerarion. the Court concludes that there is nothing about this situation or the relief al-Marri requests that causes the Court to deviate from traditional principles of

venue in habeas cases. This is not a situation where the petitioner's whereabouts are unknown or where he is being held outside the confines of the United States. Al-Marri is being held in the naval brig in Charleston, South Carolina. There is a district court there. His immediate custodian is there, and the Coun has been assured by the Assistant Solicitor General of the United States and the U.S. Attorney for this district that Commander Marr would obey any court order directed to her for execution.

Nor is there anything about al-Marri's claims or relief sought that compels venue in the Central District of Illinois. His argument that he is being held unconstitutionally centers on his confinement in South Carolina. His request for a declaration that the President's designation of him as an enemy combatant and the Military Order of November 13, 2001, are invalid and void involves a challenge to actions taken in the District of Columbia, does nothing to tie venue to this district, and can be addressed just as easily in South Carolina. Any order directing Secretary Rumsfeld to release him from custody or prohibiting his removal from the United States would be implemented in either the District of Columbia or South Carolina, as he is not in custody in the Central District of Illinois. Al-Marri also seeks a copy of the Petition, access to counsel, access to Qatari consular officers. access to representatives of the International Committee for the Red Cross. conditions of confinement that are not harmful to his mental or physical well being. conditions of confinement that do not deprive him of constitutional rights normally afforded to pretrial detainees such as the right to freely exercise his religion. and a restriction on his being interrogated outside the presence of counsel; these requests presently relate solely to the conditions and circumstances of his confinement in South Carolina and have no relationship whatsoever with the Central District of Illinois.

Despite the fact that none of the relief sought in al-Marri's Petition is directly related to this district, he maintains that he is entitled to seek relief here because the Government's actions in removing him from this district were unseemly. With all due respect, whether his removal from this district was or was not unseemly is not an issue for this Coun to resolve. While the Court fully understands why he would like to have his Petition heard in a circuit that has not yet addressed a challenge to the detention of an individual designated as an enemy combatant. al-Marri's hope for a more favorable result in the Seventh Circuit is not enough to justify an exception to the general rule set ionh in *Mitchelstcadt* that habeas cases should be brought in the district of confinement. After applying traditional principles of venue in habeas *1010 cases. the Coun concludes that the Central District of Illinois is not the proper venue for this action. and the merits of al-Marri's Petition should nor he entertained in this district.

After announcing this conclusion *during oral* argument on July 28, 2003, the Court asked counsel for al-Marri whether they would prefer to have the Petition dismissed without prejudice in order to facilitate an immediate appeal or have the Petition transferred to the District of South Carolina. As counsel has now informed the Coun that they prefer dismissal, the Coun finds that al-Marri's petition shall be dismissed without prejudice.

CONCLUSION

For the reasons set fonh herein. the Government's Motion to Dismiss [# 7] is GRANTED. and al-Marri's Petition for Writ of Habeas Corpus pursuant to § 2241 is DISMISSED WITHOUT PREJUDICE. All other pending motions are now DENIED AS MOOT. and this matter is TERMIN..\TED.

274 F.Supp.2d 1003

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(22)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ALI SALEH KAHLAH AL-MARRI.

Petitioner,

v.

GEORGE W. BUSH, President of the United States of America, DONALD H. RUMSFELD, United States Secretary of Defense, and M.A. MARR, Commander, Naval Consolidated Brig, Charleston, South Carolina,

Respondents.

Case No. 03-1220

ORDER

This matter is now before the Court on Petitioner, Ali Saleh Kahlah al-Marri's ("al-Marri"), Motion for Reconsideration from the dismissal of his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. For the reasons set forth below, the Motion for Reconsideration [#20] is DENIED.

DISCUSSION

"Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." Caisse Nationale de Credit v. CBI Industries, 90 F.3d 1264, 1269 (7th Cir. 1996). Furthermore, it is not appropriate to argue matters that could have been raised in prior motions or rehash previously rejected arguments in a motion to reconsider. Id. at 1270.

Al-Marri seeks reconsideration of the Court's Order dismissing his habeas corpus petition on venue grounds. Specifically, he asserts that the Court

(22)

misapprehended the Seventh Circuit's decision in United States v. Mittelsteadf. 790 F.2d 39 (7th Cir. 1986). and interpreted it inconsistently with the Supreme Court's decision in Braden v. Thirtieth Judicial Circuit Court, 410 U.S. 484, 93 S.Ct. 1123 (1973). He also suggests that the Court erred in deciding the venue question prior to addressing questions of territorial jurisdiction.

With respect to the latter contention, the Court notes that the order in which the Court intended to address the issues presented in al-Marri's Petition was set forth at the beginning of the hearing. Although counsel had every opportunity *to* argue that questions of jurisdiction must be reached before questions of venue, counsel indicated that they had no objection to proceeding first with the venue issues. Thus, this argument attempts to present matters that could have been raised previously, and is inappropriately raised in a motion to reconsider. Moreover, it is appropriate to determine questions of venue prior to jurisdictional issues "where there is a sound prudential justification for doing so, " such as where the question of venue is clear under the well-established law *of* the circuit, and the jurisdictional issue involves a novel question of constitutional law. Lerov v. Great Western United Corp., 443 U.S. 173, 180 (1979). Such was the case here.

Al-Marri's suggestion that the Court interpreted Mittelsteadt in an manner that conflicts with the Supreme Court's decision in Braden amounts to little more than a rehashing of a previously rejected argument. As the Court indicated in its prior Order, the Supreme Court in Braden ultimately deferred to traditional principles *of* venue in noting that "in many instances the district in which petitioners are held will be the most convenient forum for the litigation of their claims" and based its finding in part

on the fact that the respondent had been properly served within the district in which the petition was filed. 93 S.Ct. at 1132. Again, al-Marri's case presents a quite different procedural posture from Braden, in which a petitioner confined in one state was allowed to challenge a detainer issued by another state in the district court for the state that had issued the detainer.

Al-Marri is neither attacking a detainer lodged by any court in this state, nor otherwise attacking a form of legal custody arising in and being imposed by the state of Illinois that is separate and distinct from his present physical custody. In fact, other than the speculative assertion that some of the predicate acts for which he was designated an enemy combatant may have transpired in this district,' the Central District of Illinois has no real relationship to his present confinement, as his family is no longer in this District, and his lead counsel who have established a relationship with him through months of representation are located in Newark, New Jersey. His involvement as a criminal defendant in this Court (which centered on his alleged conduct while within this District) ceased with the dismissal of all charges against him with prejudice prior to his transfer into military custody, and the fact that he had been a defendant in this Court prior to the time that he was removed from the district

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[1] As the Court indicated in its prior Order, the Court has no non-speculative basis for concluding where the material events underlying his designation as an enemy combatant took place or where pertinent records and witnesses are likely to be found, due to the fact that al-Marri was not physically present in this District for a substantial amount of time, as well as the fact that the predicate acts upon which he was so designated are not before the Court. Nor is there any basis for concluding that this forum is more convenient for the parties, who are physically located in South Carolina, New Jersey, and the District of Columbia. *See* Braden, 93 S.Ct. at 1129.

is only tangentially related to the circumstances of his present confinement in military custody. There is likewise no indication that any Respondent is physically present within or has been served in the Central District of Illinois.

In Mittelsteadt, which was decided after the Supreme Court's decision in Braden and even cited the case in support for its holding, the Seventh Circuit held that "the only court with jurisdiction over la petition for writ of habeas corpus] is the federal district court where the movant is imprisoned." 790 F.2d at 40. This view was recently reaffirmed in Samirah v. O'Connell, __ F.3d __, 2003 WL 21507968 (7th Cir. 2003), where the Seventh Circuit held that a § 2241 petitioner generally, "must name his custodian as respondent and file the petition in a district court that has jurisdiction over his custodian; otherwise, the district court would lack jurisdiction." 2003 WL 21507068, at • 5.

Even if the Court were to look solely to Braden to decide the question of venue in this case, the result would be the same, as Braden makes it clear that traditional venue doctrines remain fully applicable. 93 S.Ct. at 1132. Al-Marri has presented the Court with no legitimate basis for concluding that this case presents circumstances sufficient to justify treating it as anything other than a standard habeas petition. He is not being held at an undisclosed location and remains within the continental United States. Al-Marri is being held in the naval brig in Charleston, South Carolina. His immediate custodian is there. and the Court has been assured by the Assistant Solicitor General of the United States and the U.S. Attorney for this District that this custodian would obey any court order directed to her for execution. South Carolina is also the location where the conditions of confinement of which he complains are

being imposed and implemented. He no longer has substantial ties to the Central District of Illinois, and the counsel with whom he has an established relationship are located in New Jersey. Moreover, nothing about al-Marri's claims or the relief sought compels venue in the Central District of Illinois. In fact, the Court exhaustively examined each prayer for relief in its prior Order, and each prayer either was not tied to any particular venue, specifically centered on particular aspects of his confinement in South Carolina, or challenged actions taken in the District of Columbia.

Contrarytoal-Marri's assertion, the Court did not abandon traditional principles of venue and apply a "black-letter rule" that "conflated" jurisdiction and venue. Rather, the Court scrupulously analyzed the facts and considerations of this case, before concluding that these factors did not establish any justification for treating this case as an exception to the well-established law of this circuit with respect to venue in habeas corpus cases where a petitioner is challenging his physical detention in another state. The Court did not reject the suggestion that the Petition might be within its jurisdiction. In fact, the Court did not reach the jurisdictional issue at all; al-Marri's argument to the contrary misconstrues the context of the August 1, 2003, Order.

The Government correctlyobserves that while this case involves the somewhat unique circumstances surrounding al-Marri's designation as an enemy combatant, it nevertheless involves a classic use of the writ of habeas corpus to challenge his present physical detention in South Carolina. And as a classic use of the writ, traditional principles of venue in habeas corpus cases compel the result reached by the Court in dismissing the present Petition.

CONCLUSION

For the reasons set forth herein, al-Marri's Motion for Reconsideration [#20] is DENIED.

ENTERED this 25th day of August. 2003.

Michael M. Mihm
United States District Judge