

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

2002
JUL 12 2002
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YASER ESAM HAMDI,

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

Petitioners,

v. Civil Action No. 2:02cv439

DONALD RUMSFELD,
Secretary of Defense,

COMMANDER W.R. PAULETTE,
Norfolk Naval Brig,

Respondents.

MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO TERMINATE
APPOINTMENT OF COUNSEL OR, IN THE ALTERNATIVE, TO REQUIRE
COUNSEL TO SHOW CAUSE WHY THE FINANCIAL ELIGIBILITY
REQUIREMENTS OF 18 U.S.C. 3006A ARE MET

Respondents Donald Rumsfeld, Secretary of Defense, and Commander W.R. Paulette have moved the Court for an Order terminating the appointment of the federal public defender as counsel, or, in the alternative, requiring the federal public defender or the detainee's father to show cause why the financial eligibility requirements of 18 U.S.C. 3006A are met.¹ As explained below, no adequate

¹ Because the Fourth Circuit has yet to issue its mandate, jurisdiction over this matter remains in the Fourth Circuit, and respondents therefore continue to object to this Court's improper effort to exercise jurisdiction. See United States v. Montgomery, 262 F.3d 233, 239 (4th Cir.), cert. denied, 122 S. Ct. 526 (2001); see also Kusay v. United States, 62 F.3d 192 (7th Cir. 1995). The Fourth Circuit's July 12, 2002 decision in this case deals directly with the June 11 Order pursuant to which this Court appointed counsel and the appropriate procedures to be followed in this case, and specifically leaves "for remand" the taxpayer-funded counsel issue that is the subject of this motion. See Hamdi v. Rumsfeld, 4th Cir. No. 02-6895 (Hamdi II), slip. op.

showing has been made in this case to warrant appointment of the federal public defender pursuant to Section 3006A and, thus, the taxpayers should not be required to pay for that representation.

STATEMENT

On June 11, 2002, before the government had any notice of the habeas petition in this case or any opportunity to respond to it, this Court issued an Order that, inter alia, appointed the federal public defender as counsel in this case “for the Petitioner.” June 11 Order at 3. In its June 11 Order (at 2), the Court stated: “The petition includes an affidavit by Esam Fouad Hamdi that his son is without funds to retain his own counsel, and that the father is also unable to pay for an attorney for his son. The Court hereby finds that this affidavit is sufficient evidence of financial eligibility to warrant the appointment of counsel under 28 U.S.C. § 3006A.” The Court’s June 11 Order also required, inter alia, respondents to provide the federal public defender with unmonitored access to the detainee. See June 11 Order at 3.

Respondents appealed the Court’s June 11 Order. On appeal, respondents argued, inter alia, that this Court erred in appointing counsel pursuant to Section 3006A. Respondents explained that in a next-friend case such as this, counsel may be appointed only for the next friend, and not for the detainee on whose behalf he seeks relief; that Section 3006A authorizes appointment of counsel only for a “financially eligible person,” and the affidavit appended to the petition failed to show that the next-friend, Esam Fouad Hamdi, met that requirement; that, in fact, the available evidence suggests that the next friend in this case is not financially eligible for taxpayer counsel; and that this Court erred in failing to inquire into the financial status of the next friend. See U.S. C.A. Br. 39-42.

14 n.2 (4th Cir. July 12, 2002).

On July 12, 2002, the court of appeals issued a decision reversing this Court's June 11 Order and remanding the case. (The court of appeals' mandate has not yet issued.) Although the focus of the court of appeals's decision was the aspect of this Court's June 11 Order requiring respondents to provide the federal public defender with unmonitored access to the detainee, the court of appeals specifically noted that it was "leav[ing] for remand" the question "whether the financial eligibility requirements of 18 U.S.C. § 3006A have been satisfied." Hamdi II, slip op. at 14 n.2. In addition, the court of appeals stated that "the role that counsel should or should not play in resolving questions of law or fact is a matter of immense importance." Id. at 14.

ARGUMENT

This Court should terminate the appointment of the federal public defender as counsel in this case or, at a minimum, require the federal public defender or the detainee's father to show cause why the financial eligibility requirements of 18 U.S.C. 3006A are met.

1. Section 3006A states that, "[w]henver the United States magistrate or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who * * * is seeking relief under section 2241, 2254, or 2255 of title 18." 18 U.S.C. 3006A(a)(2)(B) (emphasis added). (The detainee himself has not sought relief in this case.) Rather, the detainee's father – the next friend who initiated this action – is the "person who is seeking relief." Indeed, one of the necessary predicates for the detainee's father to have next-friend standing to maintain this action is to show (that the detainee is unable to seek relief on his own behalf) See Hamdi v. Rumsfeld, No. 02-6827 (Hamdi I), slip op. at 9 (4th Cir. June 26, 2002) (discussing Whitmore v. Arkansas, 495 U.S. 149 (1990)). Accordingly, in a recent next-friend action, the Third Circuit ordered that counsel be appointed for the next friend, and not for the detainee on whose

behalf the next friend sought relief. See In re Heidnik, 112 F.3d 105, 112 (3d Cir. 1997). ✓

If anything, the recent appeals in this case underscore the importance of the next-friend's presence in maintaining this litigation. The federal public defender initially was appointed by this Court under 18 U.S.C. 3006A to maintain this action on his own behalf as next friend for the detainee. See May 29, 2002 Order at 2-3. On appeal, the court of appeals held that the federal public defender lacked next-friend standing to maintain this litigation on behalf of the detainee, and that the initial actions filed in this case should be dismissed. See Hamdi I, supra. It was only after the detainee's father filed this next-friend action that the court of appeals recognized that any jurisdiction was present. See Hamdi II, supra. These appeals demonstrate that the identity of the "person who is seeking relief" is of jurisdictional significance.

2. Under Section 3006A, the person seeking court-appointed – and taxpayer-provided – counsel must establish that he is "financially eligible" for such services. 18 U.S.C. 3006A. Courts have recognized that "[t]he burden of proving inadequate financial means * * * lies with the [party seeking appointment]." United States v. Bauer, 956 F.2d 693, 694 (7th Cir. 1992) cert. denied, 506 U.S. 882 (1992); see also United States v. Santiago-Fraticelli, 818 F. Supp. 27 (D.P.R. 1993). To meet that burden, "[i]t is not enough to claim inability to hire a lawyer and back up the claim with an affidavit; the statute provides for 'appropriate inquiry' into the veracity of that claim." Bauer, 956 F.2d at 694 (emphasis in original). The person who is seeking relief in this case – i.e., the detainee's father as next friend – has failed to demonstrate (as opposed to merely claim) that he is financially eligible for appointment of counsel under Section 3006A. ✓

The detainee's father (and the federal public defender) have failed to submit the typical form filed with 18 U.S.C. 3006A applications for court-appointed counsel (see Exhibit 1, attached), which

requires, inter alia, a listing of the assets held by the person seeking relief and income earned by that person. Instead, the purported proof of financial eligibility consists entirely of an affidavit appended to the habeas petition, stating in pertinent part: “My son Yaser Esam Hamdi, who is in a prison in the United States of America, has no assets whatsoever, with which he will be able to retain the services of a lawyer and also that I personally will be unable to provide funds for the legal services which my son will require.” Affidavit of Esam Faoud Amin Hamdi, Pet., Exh. D. For several reasons, that affidavit is insufficient to satisfy Section 3006A’s financial-eligibility requirement.

First, because the detainee’s father is the person who is seeking relief, the detainee’s assets are irrelevant for purposes of determining whether the federal public defender may be appointed in this next-friend action. Section 3006A properly places the focus on the financial eligibility of the person who is seeking relief. Any other result would make little sense in the next-friend context. An indigent family member seeking relief as a next-friend for a detainee who has substantial assets should not be denied counsel. But neither should persons who are financially able to pay for legal representation be entitled to the taxpayer-funded counsel to bring a next-friend action. In enacting Section 3006A, Congress plainly intended to allocate scarce funding to pay for the appointment of counsel only when such funding was financially necessary to ensure that counsel would be available. Congress did not intend to fund litigation initiated by those who could pay for it themselves.

Second, the statement in the affidavit appended to the petition that the detainee’s father “personally will be unable to provide funds for the legal services which my son will require” is inadequate to satisfy Section 3006A. That statement contains no information with respect to the detainee’s father’s assets, income, or other means by which he might retain counsel for his son. In fact, the affidavit does not even declare that the detainee’s father is “financially unable” to provide

the funds necessary to retain counsel for his son, but rather only that he is “unable” to do so. That loosely worded and unsupported statement cannot supply the only basis for appointment of counsel in this case. Indeed, to take one example, the father may only have sworn that he is unable (or disinclined) to federal express or wire funds from overseas.

Third, not only does the proffered statement fail to make the necessary showing of financial need, but other reports suggests that the detainee’s father is financially capable of retaining counsel on his own. Press reports indicate that Esam Hamdi is a successful engineer. See, e.g., A. SImotawa, Saudi seeks release of son from US jail, May 3, 2002, (<http://www.arabnews.com/sarticle.asp?sct=esam%20Hamdi&id=14905>), (“Hamdi * * * holds a prestigious job in a private company in the Jubail Industrial City”); T. McGlone, An Innocent or an Enemy?, *Virginian-Pilot*, May 17, 2002 at A1, (“With his father holding a high-paying job in the oil business, Hamdi and his four siblings were raised comfortably.”); J. Mintz, Qatar Lawyer Builds Case for Detainees at Guantanamo Bay, *Washington Post*, May 13, 2002 at A3, (Hamdi’s father, Esam Hamdi, a petrochemical engineer in the Saudi city of Jubail * * *.”). Neither the federal public defender nor the detainee’s father has ever disputed these reports, nor sought to explain why, assuming the detainee’s father does hold such employment, he is financially eligible for the taxpayer-funded services of the federal public defender in this case.

Finally, the detainee’s father himself has described his employment status to the United States Department of State. In a June 5, 2002 letter to the American Ambassador in Saudi Arabia, Esam Hamdi wrote: “I have worked for SABIC for about 20 years after my graduation from King Fahad University as a Chemical Engineer in 1978.” Exhibit 2, attached. SABIC appears to be the acronym for Saudi Arabia Basic Industries Corporation, a “leading international petrochemical

compan[y]” with earnings of \$475.2 million (U.S.) in net profit in 2001. wysiwyg://http://www.sabic.com/en/company/company.htm; wysiwyg://http://www.sabic.com/en/press/press_details.asp?id=44. (See Exhibit 3, attached.) In addition, in the same letter, the detainee’s father indicated that he has been able to secure the services of a foreign lawyer in seeking to assist his son.

These reports foreclose a finding that the financial eligibility requirement of Section 3006A is satisfied here. But, at a minimum, the reports – which neither the detainee’s father nor the federal public defender has ever disputed – cast doubt on whether the financial eligibility requirement may be met in this case, and therefore require the federal public defender (or the detainee’s father) to come forward with the additional evidence necessary to establish that appointment of counsel is warranted in this case. See United States v. Harris, 707 F.2d 653, 661 (2d Cir. 1983) (“[W]here a defendant’s inability to afford counsel has been put into doubt, he has the burden of coming forward with evidence”; there is no warrant for appointment of counsel if “a defendant fails to come forward with additional evidence instead of relying on a terse form affidavit”).

3. Finally, whatever may be true in the typical proceeding, the extraordinary nature of this litigation and foreign affairs and national security interests that it implicates warrant that this Court take particular care to ensure that the requirements of Section 3006A are met for the appointment of counsel. See Hamdi II, slip op. at 7-9, 14-15. There is no reason to confront the sensitive issues raised by this litigation if, as is the case for the reasons set forth above, the federal public defender was not properly appointed under Section 3006A.

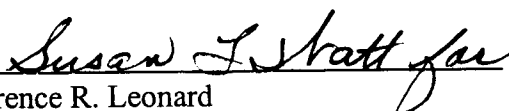
CONCLUSION

For the foregoing reasons, the Court should terminate the appointment of counsel in this case or, in the alternative, require the federal public defender or the detainee's father to show cause why the financial eligibility requirements of 18 U.S.C. 3006A are met

Respectfully submitted,

Paul J. McNulty
United States Attorney

Paul D. Clement
Deputy Solicitor General
Alice S. Fisher
Deputy Assistant Attorney General

By: 
Lawrence R. Leonard
Managing Assistant United States Attorney
World Trade Center, Suite 8000
101 W. Main Street
Norfolk, Virginia 23510
(757) 441-6331

Dated: July 23, 2002

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Memorandum in Support of Respondents' Motion to Terminate Appointment of Federal Public Defender as Counsel for Petitioners, with three attached exhibits, was served, this 23 day of July, 2002, by fax and by hand delivery addressed to:

Larry W. Shelton
Supervisory Assistant Federal Public Defender
Jeremy C. Kamens
Assistant Federal Public Defender
Office of the Federal Public Defender
150 Boush Street, Suite 403
Norfolk, Virginia 23510



FINANCIAL AFFIDAVIT

IN SUPPORT OF A REQUEST FOR ATTORNEY FEES OR OTHER COURT SERVICES WITHOUT PAYMENT OF FEE

IN UNITED STATES MAGISTRATE DISTRICT APPEALS COURT or OTHER PANEL (Specify below)

IN THE CASE OF

_____ V.S. _____

FOR _____
AT _____

LOCATION NUMBER

PERSON REPRESENTED (Show your full name)

- 1 Defendant—Adult
- 2 Defendant - Juvenile
- 3 Appellant
- 4 Probation Violator
- 5 Parole Violator
- 6 Habeas Petitioner
- 7 2255 Petitioner
- 8 Material Witness
- 9 Other _____

DOCKET NUMBERS
Magistrate
District Court
Court of Appeals

CHARGE/OFFENSE (describe if applicable & check box →) Felony Misdemeanor

EMPLOYMENT	Are you now employed? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Am Self-Employed												
	Name and address of employer: _____ IF YES, how much do you earn per month? \$ _____ IF NO, give month and year of last employment How much did you earn per month? \$ _____												
ASSETS	If married is your Spouse employed? <input type="checkbox"/> Yes <input type="checkbox"/> No IF YES, how much does your Spouse earn per month? \$ _____ If a minor under age 21, what is your Parents or Guardian's approximate monthly income? \$ _____												
	Have you received within the past 12 months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, retirement or annuity payments, or other sources? <input type="checkbox"/> Yes <input type="checkbox"/> No												
OTHER INCOME	RECEIVED _____ SOURCES _____ IF YES, GIVE THE AMOUNT RECEIVED & IDENTIFY THE SOURCES \$ _____												
CASH	Have you any cash on hand or money in savings or checking accounts? <input type="checkbox"/> Yes <input type="checkbox"/> No IF YES, state total amount \$ _____												
PROPERTY	Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? <input type="checkbox"/> Yes <input type="checkbox"/> No												
	IF YES, GIVE THE VALUE AND \$ DESCRIBE IT												
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DEPENDENTS	MARITAL STATUS	Total No. of Dependents	List persons you actually support and your relationship to them								
	<input type="checkbox"/> SINGLE <input type="checkbox"/> MARRIED <input type="checkbox"/> WIDOWED <input type="checkbox"/> SEPARATED OR DIVORCED	_____	_____ _____ _____								
OBLIGATIONS & DEBTS	APARTMENT OR HOME:	Creditors	Total Debt Monthly Paymt.								
	DEBTS & MONTHLY BILLS (LIST ALL CREDITORS. INCLUDING BANKS. LOAN COMPANIES. CHARGE ACCOUNTS. ETC.)	_____ _____ _____	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 30%;"></td> <td style="width: 30%; text-align: right;">\$ _____</td> <td style="width: 30%; text-align: right;">\$ _____</td> </tr> <tr> <td></td> <td style="text-align: right;">\$ _____</td> <td style="text-align: right;">\$ _____</td> </tr> <tr> <td></td> <td style="text-align: right;">\$ _____</td> <td style="text-align: right;">\$ _____</td> </tr> </table>		\$ _____	\$ _____		\$ _____	\$ _____		\$ _____
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I certify under penalty of perjury that the foregoing is true and correct. Executed on (date) _____

SIGNATURE OF DEFENDANT
(OR PERSON REPRESENTED) → _____

ADDRESS: _____



5 June 2002

To: **MR. ROBERT JORDAN**
The American Ambassador in Saudi Arabia
Fax: (01) 488-7275

Your Excellency,

My name is Esam Fouad Hamdi, and I am the father of Yaser Esam Hamdi. I have worked for SABIC for about 20 years after my graduation from King Fahad University as a Chemical Engineer in 1978. During my assignment with SABIC, I spent the first 5 years in USA working in Exxon Chemical Plants and training other Saudis, where I had the chance to work on rotating assignments. I worked in Baytown (Texas), Baton Rouge (Louisiana), Irvine (California), and Mont Belvieu Plant (TX). My son Yaser was born in Baton Rouge on Sept. 26, 1980.

As you know, Yaser was captured in Mazar-e-Sharif in Afghanistan in Nov. 2001, then he was sent to Guantanamo bay in Cuba, then to US Navy Base in Norfolk and he is called the second American Taleban.

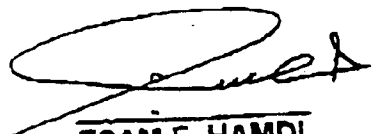
I am sending this letter seeking your guidance and cooperation on how to handle the situation of my son, knowing that I already appointed Dr. Najeeb Al-Nuaimi (Former Justice Minister of Qatar) as a lawyer to work on Yaser case, and I am also in contact with the Federal Public Defender Office (Mr. Frank Dunham) in Washington who is also coordinating his efforts with Dr. Al-Nuaimi.

Since my son is an American Citizen, I would like to know what steps should I take to ensure that the rights of my son are being observed and protected, and what can I do to help him?

I would like to visit with you to discuss the situation of my son in more details.

Looking forward hearing from you. My contact numbers are shown below.

Best Regards,

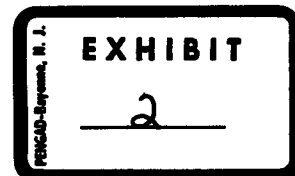

ESAM F. HAMDI

Contact Numbers:

Telephone No. (Office): 03-341-6646

Mobile No.: 05-590-3131

Fax No. (Office): 03-340-0420





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The Power

GO

Company

- CEO's message
- Board of Directors
- Vision & Mission
- Corporate Overview
- Global Reach
- History
- Manufacturing base
- Research & Technology
- Human Resources
- Safety & Environment
- Directory

Products

Financial

Press Room

Company

SABIC was established in 1976 to add value to Saudi Arabia's natural hydrocarbon resources. Today we are among the leading international petrochemical companies in terms of sales and product diversity. Headquartered in Riyadh, we are also the Middle East's largest non-oil industrial company.

Our businesses are grouped into five core sectors: _____ and _____. Each sector consists of several Strategic Business Units (SBUs) that are entirely dedicated to the customers they serve. Our manufacturing network in Saudi Arabia consists of 18 world-scale industrial complexes operated by _____. Most of these affiliates are based in Jubail Industrial City on the Arabian Gulf. Two are located in Yanbu Industrial City on the Red Sea and one in the Eastern Province city of Dammam. We are also partners in three regional ventures based in Bahrain.

The vision that led to our creation was closely associated with the aspirations of Saudi Arabia as a developing nation. We continue to play an important role in achieving some of those aspirations, including the development of the country's _____. We are also committed to Saudi social and cultural values and international business and _____ standards.

SABIC is owned by the Saudi Government (70%) and the private sector (30%). Private sector shareholders are from Saudi Arabia and other countries of the six-nation Gulf Cooperation Council (GCC).

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Press room

RIYADH, Saudi Arabia (February 13, 2002) – Saudi Basic Industries Corporation (SABIC) earned a net profit of SR 1.782 billion (US \$475.2 million) in 2001.

Minister of Industry and Electricity and Chairman of SABIC's Board of Directors, Dr Hashim A. Yamani, noted that sales exceeded SR 28.9 billion (US \$7.71 billion), an increase of 9 percent on 2000 with 27.4 million metric tons of product marketed, a rise of 28 percent on the year. Meanwhile, total production reached 35.4 million metric tons, a 26 percent rise over 2000.

Yamani added that global recession and international events in the last quarter of the year had contributed to the economic difficulties facing companies throughout the world.

Vice Chairman and Managing Director, Mohammad H. Al-Mady, said the results were better than many other companies in the industry. Many of SABIC's competitors had announced bigger losses, some by as much as 150 percent on 2000. He added that SABIC's marketing and sales performance had helped offset the negative effects of recession.

Prices across many product lines had reached all time lows – especially in polyethylene, styrene and ethylene di-chloride (EDC) which form key parts of SABIC's product portfolio.

Global prices for flat steel faced great pressure. Additionally, a lack of controls in the local market on standard specifications and the continuation of the dumping of imports from abroad had impacted on profits and had lowered prices.

Al-Mady added that many expansion projects entered commercial operation creating additional operating costs during the year. Affiliates had also to pay-back some SR 500 million (US \$133.34 million) to the Saudi Public Investment Fund.

Al-Mady predicted that prices will gradually increase during the second half of 2002. Improvements in price indicators were already being seen as was price stability across some product lines.

He praised ongoing efforts to improve, develop and train employees and noted continuing efforts to progress current projects that will benefit the company in the future.

Mohammad Al Motawa
Vice President, Public Relations