IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

ALI SALEH KAHLAH AL-MARRI, Plaintiff, v. DONALD RUMSFELD, Secretary of Defense of the United States, COMMANDER C.T. HANFT, U.S.N. Commander, Consolidated Naval Brig, Defendants.	Civil Action No. 2:05-cv-02259-HFF-RSC

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Neither the Administrative Procedures Act (APA) nor the Religious Freedom Restoration Act (RFRA) waives sovereign immunity in the extraordinary circumstances presented here, where an alien determined to be an enemy combatant by the President and Commander-in-Chief attempts to challenge his military detention in the middle of an ongoing war. Although plaintiff asserts that he may nonetheless seek declaratory and injunctive relief against alleged violations of his constitutional (as opposed to statutory) rights, he cites no case applying that principle in extraordinary circumstances such as these. In any event, plaintiff has failed to state a claim upon which relief can be granted because he has pointed to no authority supporting the proposition that he is entitled to the full panoply of constitutional rights implicated by his list of grievances. Plaintiff is a wartime alien enemy combatant -- not, as his arguments assume, a run-of-the-mill pre-trial detainee in the criminal justice system. To the extent that plaintiff has any constitutional right to challenge his detention and the manner in which it is carried out, that right has been and will be addressed through the Court's adjudication of his separate habeas corpus petition.

ARGUMENT

I. THE UNITED STATES HAS SOVEREIGN IMMUNITY AGAINST SUIT.

Plaintiff does not dispute that he sued the defendants in their official capacities, see Cmplt. ¶¶ 12, 13; that suits against federal officers in their official capacities are in effect suits against the sovereign, see Kentucky v. Graham, 473 U.S. 159, 165 (1985); Wyoming v. United States, 279 F.3d 1214, 1225 (10th Cir. 2002); or that the sovereign is immune to suit save as it consents to be sued, see United States v. Testan, 424 U.S. 392, 399 (1976).[1]

Although plaintiff relies on the APA's waiver of sovereign immunity, it is well established that the APA effects a broad exclusion for military functions. See Richey v. United States, 322 F.3d 1317, 1327 n.3 (Fed. Cir. 2003) ("The military is largely exempt from the APA.") (citing 5 U.S.C. §§ 554(a)(4), 701(b)(1) (2000)); Zhang v. Slattery, 55 F.3d 732, 744 (2d Cir. 1995). In particular, the APA expressly exempts from its waiver of immunity suits challenging "military authority exercised in the field in time of war or in occupied territory." 5 U.S.C. § 701(b)(1)(G); see 5 U.S.C. § 701(b)(1)(F). Plaintiff argues that this exemption does not apply because he was not "captured on a battlefield." Opp. at 12-13. Section 701(b)(1)(G)'s exemption, however, is not limited only to the exercise of military authority "in combat zones." Doe v. Sullivan, 938 F.2d 1370, 1380 (D.C. Cir. 1991); see also Rasul v. Bush, 215 F. Supp. 2d 55, 64 n.11 (D.D.C. 2002), aff'd, 321 F.3d 1134

[1] The bulk of the cases cited by plaintiff for the proposition that he need not demonstrate a waiver of sovereign immunity involved claims against federal officers in their individual capacities. See, e.g., United States v. Lee, 106 U.S. 196, 210 (1882) ("The case before us is a suit against Strong and Kaufman, as individuals, to recover possession of property.") (emphasis added); Philadelphia Co. v. Stimson, 223 U.S. 605, 619-620 (1912) ("The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded.") (emphasis added); Shields v. Utah Idaho Cent. R. Co., 305 U.S. 177 (1938) (defendant was sued both individually and as United States Attorney).

(D.C. Cir. 2003), rev'd on other grounds, 542 U.S. 466 (2004). And the exercise of military authority at issue in this case readily falls within Section 701(b)(1)(G).

The United States is currently engaged in military hostilities backed by a Joint Resolution of Congress. Auth. for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224. Plaintiff's detention is directly related to, and intended to advance, the ongoing war effort by denying enemy forces the continued services of those detained and by enabling military authorities to gather potentially critical intelligence that may both aid the military in the field and protect the Nation from future attacks. See Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (plurality) (the "capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice' are 'important incident[s] of war'") (citation omitted); Ex Parte Quirin, 317 U.S. 1, 27-28 (1942) ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."); id. at 28-29 ("An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.").

The Department of Defense is, to be sure, an agency under the APA. See Opp. at 11. The cases cited by plaintiff on that point (Opp. at 11-12), however, involved regulatory or administrative decisions of the Department, not decisions integral to an ongoing war effort. See, e.g., Stehney v. Perry, 101 F.3d 925, 928 (3d Cir. 1996) (claim regarding revocation of a security clearance); Sharp v. Weinberger, 798 F.2d 1521, 1523 (D.C. Cir. 1986) (claim regarding reassigning of reservists);

Andrean v. Secretary of U.S. Army, 840 F. Supp. 1414, 1418 (D. Kan. 1993) (claim regarding military retirement pay). War-related decisions such as those governing the detention of a captured enemy combatant fall squarely within Section 701(b)(1)(G)'s exemption.[2]

A second reason that the APA's waiver of sovereign immunity does not apply here is that the Act does not sanction challenges to executive action "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). That exception includes matters that have been "traditionally left to agency discretion." Lincoln v. Vigil, 508 U.S. 182, 191 (1993) (emphasis added). Plaintiff is unable to refute the basic notion that military operations during periods of ongoing hostilities have traditionally been left to the discretion of the Executive. Although plaintiff is correct that Department of Navy v. Egan, 484 U.S. 518 (1988), involved circumstances different from those here (see Opp. at 17), he has provided no basis to conclude that the principle that courts are reluctant "to intrude upon the authority of the Executive in military and national security affairs," 484 U.S. at 530, is limited to the Egan facts. See also Johnson v. Eisentrager, 339 U.S. 763 (1950); Hirota v. MacArthur, 338 U.S. 197, 215 (1948) (Douglas, J., concurring). Likewise, while Eisentrager and Hamdan v. Rumsfeld, 415 F.3d 33, 39 (D.C. Cir.), cert. granted, 126 S. Ct. 622 (2005), do not present issues of sovereign immunity, those cases further demonstrate that military operations during periods of ongoing hostilities have traditionally been left to the discretion of the Executive.

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[2] Nor do the other cases relied on by plaintiff (Opp. at 13-14) consider the applicability of the APA's military exception to exercises of the military's authority during time of war. See Doe, 938 F.2d at 1381 (emphasizing that the challenge was to a regulation promulgated by the Food and Drug Administration pursuant to the Federal Food, Drug, and Cosmetic Act); Jaffee v. United States, 592 F.2d 712, 720 (3d Cir. 1979) (relying on the fact that the challenge was based on actions undertaken after the end of the Korean War); Wan v. E.E. Black, Ltd., 75 F. Supp. 553, 561-562 (Haw. 1948) (holding that the APA was irrelevant because the defendant was a private corporation, not the government, and sovereign immunity was therefore not an issue).

Thus, plaintiff's action is not, as he claims, a "simpl[e] challeng[e] [to] the legality of his treatment and of his conditions of confinement." Opp. at 20. Plaintiff is an enemy combatant being detained by the military as part of an ongoing war effort, not a typical pre-trial detainee in the civilian criminal justice system. Plaintiff therefore errs in relying on cases involving pre-trial detainees. And the APA's limited waiver of sovereign immunity does not apply to the wartime detention at issue here.[3]

Nor does RFRA's waiver of sovereign immunity apply here. RFRA authorizes certain suits against the federal government, but it by no means authorizes the extraordinary action attempted by the plaintiff here. There is no basis for concluding that Congress intended to subject the military to claims under RFRA by an enemy combatant detained by the military as part of an ongoing war effort, and principles of judicial restraint and constitutional avoidance counsel strongly against that interpretation. Rather, as discussed, military operations during times of war have traditionally been left to the discretion of the Executive, see American Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003), and courts do not presume that Congress wishes to curtail the discretion of the Executive with respect to military functions unless Congress does so in clear and unequivocal terms, see Egan, 484 U.S. at 530 ("unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"). The cases cited in defendants' opening memorandum all support the proposition that the

[3] Plaintiff errs in asserting (Opp. at 15) that the defendants conflate claims under the APA with the APA's waiver of immunity for non-APA claims. Section 702's waiver of sovereign immunity, just like the APA's substantive provisions, is limited by other sections of the APA, such as Sections 701 and 703. See Radin v. United States, 699 F.2d 681, 687 n.13 (4th Cir. 1983); see also Beamon v. Brown, 125 F.3d 965, 967 (6th Cir. 1997) (§ 702 suit limited by § 701 and § 704). If plaintiff is precluded from bringing a suit under the APA due to Section 701(b)(1)(G), he is likewise precluded from relying on the APA's waiver of sovereign immunity.

presumption in favor of judicial review "runs aground when it encounters concerns of national security . . . committed by law to the appropriate agency of the Executive Branch." Id. at 527.

Plaintiff claims (Opp. at 12) that his suit constitutes the only potential remedy for the defendants' alleged violations of his constitutional rights. That is incorrect. Any such constitutional rights have been and will be addressed through the Court's adjudication of his separate habeas corpus proceeding. Indeed, plaintiff raised several of his claims in his separate habeas action, including his assertion that his detention is unlawful because he is being held without criminal charge or formal military tribunal determination of his combatant status, as well as his complaints about access to counsel and past interrogations. See No. 2:04-2257-26AJ, Habeas Pet. ¶¶ 37-41, 42-45, 46-51, 52-55.

Finally, plaintiff contends that no waiver of sovereign immunity is required for his constitutional (as opposed to statutory) claims that seek prospective declaratory or injunctive relief. In Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), the Supreme Court stated that a suit against a federal official is not a suit against the sovereign "where the officer's powers are limited by statute [and] his actions [are] beyond those limitations," id. at 689, or where "the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional," id. at 690. Larson itself did not involve a constitutional claim, however, and none of the other cases cited by plaintiff for that proposition involved circumstances at all analogous to those present here. The statute that generally governs waiver of sovereign immunity in cases seeking injunctive relief against the government is the APA, and as explained above, the APA expressly excludes military actions such as those at issue here from its scope, in deference to the Commander-in-Chief's longstanding constitutional authority over such matters. Indeed, the mere

fact that this plaintiff's constitutional challenge to his conditions of confinement as an enemy combatant appears to present a complex issue of first impression, notwithstanding the number of wars throughout our Nation's history in which the military has detained enemy combatants, underscores that plaintiff's position is inconsistent with our constitutional traditions. In any event, the question whether the United States is immune from suit with respect to plaintiff's constitutional claims could be avoided by dismissing those claims for failure to state a claim.

II. PLAINTIFF HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE THERE IS NO LAW SUPPORTING THE PROPOSITION THAT ENEMY COMBATANTS ARE ENTITLED TO THE RANGE OF CONSTITUTIONAL RIGHTS IMPLICATED BY PLAINTIFF'S COMPLAINT.

Plaintiff argues that he has stated a valid claim largely by repeating the allegations of his complaint. Opp. at 25-42. Plaintiff fails, however, to address the fundamental principles that the President has legal authority to order his detention as an enemy combatant during the ongoing hostilities with al-Qaeda, and that citizens and aliens have different rights in that regard. See Memorandum Opinion and Order (July 8, 2005) (reported at 378 F. Supp. 2d 673); id. at 7 (rejecting claim that "aliens in this country, at all times, have access to the same constitutional protections as citizens"); cf. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2660-2674 (2004) (Scalia, J., dissenting). Plaintiff is an alien enemy combatant being held by the military in wartime, not a typical pre-trial detainee in the criminal justice system (as his arguments assume). Thus, plaintiff's repeated references in both his opposition memorandum and his complaint (see, e.g., Cmplt. ¶¶ 128, 132, 136-137, 141, 165, 167, 170, 173) to the constitutional requirements for the confinement of citizens and others detained by civil authorities for violations of domestic criminal laws is utterly misplaced. Although plaintiff criticizes the government for citing little legal precedent on point, it is plaintiff that bears the burden, especially in light of the thousands of alien enemy combatants and prisoners

of war previously held by the United States and the complete absence of precedents supporting his position. Although plaintiff cites numerous cases, they are largely beside the point because they did not involve alien enemy combatants. Plaintiff has not identified any valid legal basis, and there is none, for permitting his claims to proceed in view of the extraordinary circumstances in which this case arises.

CONCLUSION

For the foregoing reasons, as well as those set forth in the defendants' opening memorandum, the Court should dismiss the Complaint with prejudice.

Respectfully submitted.

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December 30, 2005

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FOR THE DISTRICT OF SOUTH CAROLINA

ALI SALEH KAHLAH AL-MARRI,	)	
	)	
Plaintiff,	)	
v.	)	Civil Action No.
	)	2:05-cv-02259-HFF-RSC
DONALD RUMSFELD,	)	
Secretary of Defense of the United States,	)	
COMMANDER C.T. HANFT,	)	
U.S.N. Commander, Consolidated Naval Brig,	)	
	)	
Defendants.	)	
	)	CERTIFICATE OF SERVICE

As attorney of record, on December 30, 2005, I caused my legal assistant, Lisa Gillam, to serve one true and correct copy of the

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

via the court's e-noticing system, but if that means failed, then by regular mail, on the following persons(s):

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