

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA**

MARC HALL,

Petitioner,

v.

**JOHN McHUGH, in his official capacity
as SECRETARY OF THE ARMY and
MAJOR GENERAL JEFFREY PHILLIPS,
in his official capacity as SENIOR
COMMANDER FORT STEWART**

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS AND OTHER RELIEF

PRELIMINARY STATEMENT

1. This is a Petition for habeas corpus and other relief. Petitioner Marc Hall is a specialist on active duty in the United States Army who is stationed at Fort Stewart, Georgia and is presently facing court-martial charges alleging that, on various occasions between July 9 and December 11, 2009, he made threats to shoot a number of individuals and soldiers of the rank of First Sergeant or above if he were deployed to Iraq. Since December 11, 2009 he has been incarcerated in the Liberty County, Georgia jail pursuant to these allegations awaiting the convening of a court-martial where he would be able to defend himself.

2. The Army has expressed its intent to transfer petitioner to the jurisdiction of the Multi-National Division Baghdad (MNDB) in Iraq for his court-martial. His transfer is imminent and will be effectuated without any judicial review unless this Court issues a temporary restraining order requiring that petitioner remain in the United States pending a determination of the legality of the decision to transfer him.

3. Petitioner asserts that his pending transfer to the jurisdiction of the MNDB is not for any legitimate reason, but is intended to prejudice his defense of the pending charges against him in violation of his fundamental due process rights. Whether or not that is the respondents' actual intent, that would inevitably be the effect of such a transfer and there is no prosecutorial or military consideration that countervails such denial.

4. Petitioner seeks habeas corpus, injunctive, and other relief to bar his unlawful deployment to Iraq and to require respondents to keep him in the United States so that he can properly defend himself against the pending charges and specifications.

JURISDICTION AND VENUE

5. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 2241 (Habeas Corpus), 1361 (Mandamus) and 1331 (Federal Question). This court has

jurisdiction to issue a writ of habeas corpus and to grant relief as law and justice require under 28 U.S.C. Sec. 2241(a)(c)(1) in that a) the Petitioner is “in custody under or by color of the authority of the United States,” because he is a member of the United States Army and is being held in the Liberty County jail at the behest of the United States Army; b) the Petitioner’s custodian, the Respondent Commander, is present within the territorial jurisdiction of this Court, and c) at the time of his incarceration, the Petitioner was based at Fort Stewart and thus has had meaningful contact with the Army within the jurisdiction of this court. Jurisdiction is also founded in 28 U.S.C. §§1331 and 1292(a), which give federal courts jurisdiction in suits involving federal law seeking injunctive relief.

6. Venue is proper in this Court for the same reasons as is jurisdiction.

PARTIES

7. Petitioner, Marc Hall, is a specialist in the United States Army, currently incarcerated in the Liberty County jail at the initiative and behest of the authorities at Fort Stewart, where he had been stationed immediately prior to his incarceration. He enlisted in the Army in 2006 and had been scheduled to be released from active duty within days of the filing of this petition. He had been advised, however, that he would be retain on active duty and deployed to MNDB pursuant to the military’s

“stop loss” policy. That policy, which has been the subject of much debate and criticism, permits military commanders to retain service members beyond their scheduled date for release from active duty if it is determined that their skills are needed.

8. Respondent, John McHugh, is the Secretary of the Army, the civilian official responsible for the command and welfare of the Petitioner. He is sued in his official capacity.

9. Respondent, Brigadier General Jeffrey Phillips, is the Senior Commander for Fort Stewart and the official responsible for exercising command and control of assigned units and individuals within his command’s region, including Petitioner. He is sued in his official capacity.

FACTS

10. The stop loss policy has been criticized as a “backdoor draft” by many people, including John Kerry who was the Democratic Party’s presidential nominee in 2004, and John McCain, the Republican Party’s presidential nominee in 2008. The United States now claims to have an “all-volunteer” military, having ended the drafting of soldiers into the Army following the Vietnam War. However, significant numbers of service members have expressed opposition to being “stop lossed” and

it is fair to say they did not volunteer for the extended duty they are being required to serve. Indeed, many service members who have been “stop loss” have objected publicly to the policy. Petitioner is one such.

11. On March 18, 2009, Secretary of Defense William Gates announced that the Army would end the stop loss practice, beginning in August and September 2009 for the Army Reserve and National Guard respectively and in January 2010 for the regular Army.

12. Petitioner previously served one tour of duty in Iraq. In the summer of 2009, he was advised that he would likely be returned to Iraq under the “stop loss” policy, rather than be released from active duty. In July 2009, he wrote a rap song objecting to the policy, which he forwarded to the Pentagon. The song included lyrics that suggested superior officers could be shot by a disgruntled enlisted person subjected to “stop loss.” No action was taken against petitioner at that time. It was written and produced when petitioner was off duty.

13. Over the next several months, petitioner became more and more vocal about his opposition, not just to the “stop loss” policy, but to the United States military adventure in Iraq.

14. On December 12, 2009, several months after petitioner released his song, but shortly before his tour was to be extended under the “stop loss” policy, he was

taken into custody by his command at Fort Stewart and remanded to the custody of the Liberty County jail, where he remains.

15. Petitioner was initially charged with five specifications of communicating threats. The charge and specifications are somewhat vague as to time and place. None of the individuals to whom the alleged threats were allegedly communicated were the targets. Rather, the allegations appear to be that petitioner threatened to engage in some sort of violent action if he were deployed to Iraq via “stop loss.” At least one of the specifications was that the threat was communicated through his song.

16. As a consequence of the charge being brought and of petitioner’s incarceration, this matter has generated a considerable amount of publicity.¹

17. In early February 2010, his command announced that petitioner would be deployed to MNDB for his court-martial. It also announced an additional charge, with six specifications alleging he communicated threats “at divers (sic) times” between July 1 and December 11, 2009 to various individuals. The new charge sheet did not include any allegation concerning the rap song itself. Because petitioner had

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A Google search of “Marc Hall stop loss” on February 13, 2010 elicited 574,000 hits. Although not all pertained to this matter, there is no doubt that many thousands did.

not yet been deployed, all the alleged incidents occurred in the continental United States, although it remains unclear who the targets of the purported were directed and to whom they were made.

18. Prior to the Army's announced intention to deploy petitioner overseas for his court-martial and the announcement of the new charge and specifications, petitioner had been working with his military defense lawyer, Capt. Anthony Schiavetti, and his supporters, to defend himself against the allegations. Such preparation included locating witnesses to testify on his behalf and consultation with civilian lawyers who, along with Capt. Schiavetti, might be able to represent him. Witnesses could well include experts to testify concerning whether any of his alleged comments, if made, should be taken as serious threats or as mere venting.

19. Over the course of time, particularly from July 2009, as petitioner became increasingly disenchanted with the war in Iraq, his views on war in general crystallized to the point where he became opposed to war in any form. Consequently, while he was incarcerated, petitioner filed an application to be treated as a conscientious objector. Army Regulation 600-43, 2-10(a) states:

Except as provided in *b*,² below, persons who have

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Paragraph *b* applies only to second or subsequent applications and is thus not relevant to petitioner.

submitted applications (see para 2-1) will be retained in their unit and assigned duties providing minimum practicable conflict with their asserted beliefs, pending a final decision on their applications. Reassignment orders received after the submission of an application will be delayed until the approval authority makes a final determination. In the case of trainees, they will not be required to train in the study, use, or handling of arms or weapons. The trainee is not precluded from taking part in those aspects of training that do not involve the bearing or use of arms, weapons, or munitions. Except for this restriction, conscientious objector applicants are subject to all military orders and discipline, and regulations to include those on training.

20. Adherence to the foregoing regulation would, on its face, preclude the Army from transferring petitioner from his current position at Fort Stewart.

21. However, AR 600-43 (c) does provide that, if a soldier's unit is deploying to a new duty station, submission of an application "will not preclude the Soldier from deploying with his or her unit." Petitioner's former unit deployed to MNDB while he was incarcerated.

22. When petitioner was taken into custody, he was transferred from his forward unit, which has since been deployed to MNDB, to a rear unit, which remains at Fort Stewart. Petitioner therefore alleges that deploying him to MNDB would be in violation of the Army's own regulations in that he is no longer a member of the unit that was deployed and, since his former unit has already left, he would not be

deployed “with” it. Indeed, since his former unit has been deployed, he is no longer with it and, of necessity, is now in a different unit. While petitioner maintains he was in a different unit at the time he filed his application, he is clearly now in a different unit. In either event, the Army’s own regulations require that he remain with his current unit pending decision on his application.

23. To date, no military judge has been assigned to preside over petitioner’s court-martial. In fact, no judge could yet be assigned because the court-martial has not yet been convened. In the military system, courts-martial are convened by a commanding officer known as the “court-martial convening authority.” Had respondents chosen to try petitioner at Fort Stewart, a court-martial could have been convened by General Phillips, the general court-martial convening authority for Fort Stewart. However, there is a different convening authority for the MNDB. Until petitioner is under his jurisdiction, there can be no court-martial and therefore no military judge. Consequently, petitioner has no recourse within the Army to contest his pending transfer to MNDB.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

24. Petitioner has exhausted his administrative remedies. More precisely, he has no recourse within the Army to protest his deployment to MNDB for his court-

martial and thus no administrative remedies to exhaust. Absent this Court's intervention, he will find himself in confinement, overseas, in a war zone, away from his family and friends, facing court-martial charges and represented by a military lawyer who is based in Fort Stewart.

25. Capt. Schiavetti has made whatever efforts he could, with extremely limited options, to keep petitioner in the continental United States for his court-martial. The command has persisted in its stated intent.

26. Because his deployment is imminent, any further attempt by petitioner to prevent it within Army channels would be impossible, futile and impractical. Indeed, the inevitable result would be either further denial of his request or his transfer prior to any such request being acted upon.

27. To date, neither respondents nor their representatives have stated a specific reason for their decision to try petitioner in MNDB. Petitioner believes the purported reason will be that the prosecution witnesses (although clearly not all the alleged targets of the alleged threats) are there.

28. Petitioner has attached to this petition the declarations under penalty of perjury of Dahr Jamail, Jeff Paterson, Ann B. Wright and David Gespass, as Exhibits A, B, C and D. Mr. Jamail is a journalist who has been covering petitioner's case, Mr. Paterson is the project director of Courage to Resist, an organization supporting

petitioner, Ms. Wright is a retired U.S. Army colonel and potential witness, and David Gespass is an attorney. Each attests to the impossibility of their fulfilling their potential roles if the court martial is held in Iraq.

COUNT ONE

29. Petitioner adopts and incorporates the forgoing allegations.

30. Petitioner's transfer to MNDB for his court-martial would violate his right to due process of law and will significantly compromise his ability to defend himself in several respects, as outlined below. In general, holding the court-martial in MNDB might not constitute a formal abrogation of his rights, but it will, as a practical matter, deny them in fact.

31. Petitioner will be denied his right to a public trial as guaranteed by the Sixth Amendment to the United States Constitution. While his court-martial in MNDB would presumably be "public" in the sense that it would be open to anyone who was able to attend, it would be impossible for petitioner's friends and supporters to attend and observe the proceedings. In fact, it would be difficult for most, if not all, of the reporters who have been covering this matter to find the wherewithal to travel to a war zone in order to cover the proceedings.

32. Petitioner will be precluded from presenting a complete defense for lack

of witnesses. He would not have compulsory process of civilian witnesses located in the United States. Potential witnesses would likely, if faced with the prospect of testifying in Iraq, be less forthcoming about what they knew of the facts of this case and even those who would be completely forthcoming would likely not accept the hardship of traveling to Iraq to testify. Expert witnesses would be far more difficult to secure.

33. Petitioner's family and supporters have been attempting to secure civilian counsel for him. If his court-martial were to take place in MNDB, that would not be possible and he would be denied counsel of his choice. The least important issue would be the cost of travel.³ The real difficulties would be the time that would be required to undertake the defense. Counsel would have to travel to the MNDB and stay there for an extended period in order to prepare a defense and try the case. It would not be possible to make multiple trips. The time away from his or her office would necessitate fees far higher than would be needed to defend the case at Fort Stewart, where counsel could reasonably make multiple trips between which s/he could return to his or her office to engage in trial preparation with the assistance of others in the office.

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Capt. Schiavetti believes that the Army would pay the costs of travel for civilian defense counsel if one were retained.

34. The nature of this case, and petitioner's defense, raise significant issues of freedom of speech under the First Amendment. While petitioner does not dispute that one could be prosecuted and convicted under Article 134 of the Uniform Code of Military Justice for some purely verbal acts, he disputes that any of the speech he engaged in can be proven not to be protected. Petitioner contends that the decision to try him in MNDB was not made for any good faith reason, but as a means to make it more difficult for him to defend himself and as a means to place pressure on him to enter a guilty plea.

35. This matter involves significant constitutional issues, the resolution of which do not impinge on the military function or require military expertise.

36. The prosecution's witnesses will have to attend the trial whether in the United States or in MNDB and it is only their time away from their units that would have any impact on the military function. While a trial in the United States may require them to be away from their unit for a somewhat longer time than if the case were tried in MNDB, the difference is negligible, particularly as compared to the likely impossibility of petitioner securing the bulk of his witnesses if the case is tried there. In short, the Army is far better able to return witnesses to the United States from MNDB to testify than petitioner is able to secure witnesses to testify on his behalf overseas.

37. These issues are all concerned with insuring petitioner a fair trial that protects his constitutional, a judgment this Court is, by its nature and function, better able to make than his commanding officer. Not only does it not require military expertise to resolve these issues, it does require the expertise that is peculiarly the domain of United States district judges. This Court, under its Article III duties and by its very nature, is the appropriate authority to pass judgment on the constitutional issues of free speech, due process, right to a public trial, right to counsel of one's choice, right to compulsory process, and the consent to continued military service, than is the petitioner's commanding officer.

COUNT TWO

38. Petitioner adopts and incorporates the forgoing allegations.

39. Petitioner's transfer to MNDB for court-martial would violate the Army's own regulation concerning the handling of an application for discharge as a conscientious objector, as detailed above. These regulations are not discretionary. Therefore, they cannot be ignored because of any purported concern for the mission. Rather, they were created by experts to insure that an application for conscientious objector status be handled in such a way as to protect the rights of the applicant with the least disruption to the service.

RELIEF REQUESTED

Based upon the foregoing allegations, petitioner requests the following relief:

1. That this Court issue a temporary restraining order prohibiting respondents or their subordinates from moving petitioner pending a final resolution of this matter;
2. That this Court issue a writ of habeas corpus to respondents requiring them to bring petitioner before it and show cause, if any there be, why he should be deployed to MNDB for his court-martial;
3. That, upon hearing this matter, this Court issue a permanent injunction prohibiting petitioner's transfer and deployment to MNDB and requiring that, if he is court-martialed, that the trial take place at Fort Stewart or such other location within the United States where petitioner's constitutional and regulatory rights would be secured.

/s/ John P. Batson

John P. Batson
(Georgia Bar No. 042150)
PO Box 3248
Augusta, GA 30914-3248
706-737-4040
706-736-3391 (fax)
Email: jpbatson@aol.com

/s/ David Gespass

GESPASS & JOHNSON

On behalf of the Military Law Task
Force of the National Lawyers Guild

P.O. Box 550242

Birmingham, AL 35255-0242

205-323-5966

205-323-5990 (fax)

Email: thepasss@aol.com

ADMISSION PRO HAC VICE PENDING

Attorneys for Petitioner