No. 10-6086

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STEVEN LANG KANAI,
Petitioner-Appellee,

v.

JOHN M. McHUGH,
Secretary of the Army,
Respondent-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF MARYLAND
and
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
in Support of Petitioner-Appellee

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May 20, 2010

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 10-6086 Caption: Kanai v. McHugh, Secretary of the Army

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INTRODUCTORY STATEMENT AND INTERESTS OF AMICI

The right of conscientious objection to war has emerged from society's deep respect for individual religious and conscientious convictions, and from our collective recognition that the obligations of military engagement and service may conflict with some individuals' sincere convictions and conscientious beliefs. The United States recognizes a right of conscientious objection (CO) (50 U.S.C. app. 456(j) and DoD Reg. 32 C.F.R. Part 75), as does the international community (Art. 18 of the Universal Declaration of Human Rights & Art. 18 of the International Covenant on Civil and Political Rights). In United States v. Seeger, 380 U.S. 163 (1965), the Supreme Court acknowledged our nation's legal, moral and social commitment to liberty of conscience, and the right of conscientious objection, quoting Chief Justice Hughes's declaration that "in the forum of conscience, duty to a moral power higher than the state has always been maintained." Seeger continues, quoting Harlan Fiske Stone, later Chief Justice: "[L]iberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation

of the conscience of the individual will not in fact ultimately lose it by the process." Id. at 169-70 (citations omitted).

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The American Civil Liberties Union of Maryland (ACLU-MD) is a statewide affiliate of the national ACLU. Since its founding in 1920, the ACLU has been deeply committed to defending the right of conscientious objection, to protect conscientious objectors' important rights of religious liberty and conscience; and to the development and maintenance of fair processes and appropriate standards for the adjudication of claims by those seeking exemption from military service on that basis. The national ACLU and the ACLU-MD, along with ACLU affiliates across the country, have a long tradition of representing conscientious objectors.[1] This controversy squarely implicates amici's concerns for religious liberty and for fair processes. The parties have consented to amici filing this brief.

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[1] In recent years, the ACLU and its affiliates have represented conscientious objectors in several proceedings, including Martin v. Sec'y of the Army, 463 F. Supp. 2d 286 (N.D.N.Y. 2006) (New York Civil Liberties Union [NYCLU]); Lee v. Sec'y of the Army, ED CV 07 1382-SJO (FMO) (C.D. Cal.) (ACLU-Southern California); Brown v. Geren, CV 07-1250 (ESH) (D.D.C.) (ACLU-National Capital Area & NYCLU); Jacobrown v. Garcia, 1:09-cv-1420 (RMU) (D.D.C.) (national ACLU & ACLU-National Capital Area). The NYCLU also participated as amicus curiae in Watson v. Geren, 569 F.3d 115 (2d Cir. 2009).

ARGUMENT

I. DACORB'S CLAIMED GROUNDS FOR REJECTING MR. KANAI'S APPLICATION FAILED TO RESPECT HIS FUNDAMENTAL RIGHTS AS A CONSCIENTIOUS OBJECTOR APPLICANT WITH NONTRADITIONAL RELIGIOUS BELIEFS.

A. Mr. Kanai Properly Stated a Religious and Moral Basis for Conscientious Objection.

The district court properly found that Mr. Kanai based his opposition to his participation in war upon religious training and belief. Mr. Kanai's CO application explained that his "religious foundation is built upon the basic Christian tenets that value love and compassion." He further explained that, during his early years at the Academy, he "explored the virtues of Eastern religions," "became a practicing Buddhist," "became a vegetarian," "practiced meditation," and attended a Buddhist retreat where his "sense of compassion toward [his] fellow men and women truly blossomed, leading to increased spiritual growth." He believed "in one of the central Buddhist tenets forbidding one from killing another living creature." JA 175.

Mr. Kanai wrote that he attends church "multiple times a week because church is where [he feels] most in touch with the love that [he believes] connects humanity." He takes religious peace-makers as role models: "I try to see the world through the eyes of a Jesus Christ, or Buddha, and that has impacted my daily thoughts and actions." JA 176.

In addition to these religious and spiritual practices, Mr. Kanai undertook moral study. He "sought out texts that would help [him] learn to grow intellectually and spiritually." These included readings from Emerson, Thoreau, Hesse and Hemingway, which "influenced [his] beliefs" and "affirmed [his] view of war as a tragic and inhumane endeavor, one that [he] can not, with a clear conscience, participate in." Mr. Kanai concluded: "My spiritual and religious beliefs have combined with the ideas and values gleaned through my close reading of literature and philosophy to produce my firm belief in non-violent conflict resolution." JA 175.

Thus, Mr. Kanai's CO application set out a thoughtful, religiously based explanation for his opposition to war in any form, influenced by Christian and Buddhist teachings and beliefs.

B. DACORB Improperly Disparaged Kanai's Religious and Moral Conscientious Objector Beliefs.

The requirement that a CO applicant's religion be within a single tradition is contrary to law. See U.S. ex rel. Greenwood v. Resor, 439 F.2d 1249, 1250 (4th Cir. 1971) (relief granted to applicant who described his beliefs as including, inter alia, "the study of the philosophy of religion"). In derogation of this standard, each of the DACORB members to vote against approving Mr. Kanai's application

disparaged the diversity of Mr. Kanai's religious and moral bases for opposition to participation in war in any form.

One line officer disparaged Mr. Kanai's blending of Christian and Buddhist beliefs and values as "dabbling," and "outside the norm." JA 86 ("And even though he dabbled with other religious beliefs outside the norm, does not indicate pacifism or religious conversion or convictions.").

The second line officer was similarly dismissive of Mr. Kanai's Christian values and beliefs, of his two-year commitment to Buddhist practice, and of his continued adoption of Buddhist beliefs: "His logic for how his ethical and spiritual beliefs developed are questionable. A three day weekend at a Buddhist Monastery and turning vegetarian is not sufficient evidence to substantiate his beliefs are sincerely held and govern his actions in word and deed." JA 87.

The DACORB President also disparaged Mr. Kanai's religious and moral beliefs. Along with her positive comments about Mr. Kanai, she cast aspersions on Mr. Kanai's integrity by referring to his "alleged increase in chapel attendance" and observed, "it seems strange to me that Cadet Kanai has not offered any collaboration [sic] to these alleged changes." JA 89.

The DACORB also mislabeled Mr. Kanai's moral and ethical beliefs as "philosophical," and, thus, disqualified them for CO recognition.[2] Nothing in the record justifies this label. To the contrary, the record shows that Mr. Kanai thoughtfully presented his ethical, moral and religious beliefs. The DACORB nevertheless knowingly imposed this conclusory and results-oriented label of "philosophical," for the purpose of causing the denial of Mr. Kanai's application. See JA 89 (Mr. Kanai's beliefs were "definitely philosophical with sociologic angles" but concluded that they are not "moral or ethical" because "they lack that heart-felt quality."). Nothing in the DACORB memoranda explains why a "heartfelt quality" would have distinguished Mr. Kanai's moral and ethical beliefs, which would be recognized, from his philosophical beliefs, which would not.[3] Moreover, the DACORB members did not meet Mr. Kanai in person and "heart-felt quality" is not something that one can easily judge from the written page. Substantial record evidence demonstrates that Mr. Kanai's beliefs were "heart-felt." Each of Mr. Kanai's six supporting witnesses commented on one or more

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[2] See AR 600-43 ¶ D-4 ("a conscientious objector . . . is a person who is sincerely opposed, because of religious or deeply held moral or ethical (not political, philosophical, or sociological) beliefs to participation in war in any form . . . .").

[3] Indeed, the Second Line Officer criticizes Mr. Kanai for being "outspoken" and "perhaps confrontational," JA 87, about his beliefs at the same time that the DACORB President criticizes Mr. Kanai for being insufficiently passionate and "heart-felt," JA 89. Neither is supported by the record.

attributes consistent with his "heart-felt beliefs." Mr. Kanai is described as having a deep belief system (JA 183); as being "earnest," "forthright," and sincer[e]," (JA 184); as being "genuine in his claims to be a" CO (JA 185); as being "absolutely without guile," (JA 186); and as being a "morally responsible" person, "not given to rash decisions" (JA 187).

C. DACORB's Disparagement of Mr. Kanai's Religious and Ethical Beliefs Undercuts Settled Law and Army Regulations for Nontraditional Religious Conscientious Objectors.

When DACORB variously refers to Mr. Kanai's religious beliefs as "dabbling" and "outside the norm," and labels his substantial moral and ethical beliefs "sociologic" and "philosophic," it betrays a hostility to CO applicants whose beliefs are not based in a mainstream religious tradition, including those CO applicants whose claims are based in whole or in part on ethical and moral beliefs. This hostility is contrary to both regulation and law, and operates to risk a higher threshold of proof, and greater likelihood of denial, for such applicants.

Conscientious objectors may lawfully identify multiple religious, moral and ethical sources to support their beliefs. In United States v. Seeger, 380 U.S. 163 (1965), Mr. Seeger, like Mr. Kanai here, looked to many sources to explain the basis for his CO beliefs, including "Plato, Aristotle and Spinoza." Id. at 166. Far from considering Mr. Seeger's statement of beliefs as "dabbling," "outside the norm," or "philosophic," the Court acknowledged a wide range of theological and

ethical viewpoints on the nature of belief: "These are but a few of the views that comprise the broad spectrum of religious beliefs found among us. But they demonstrate the diverse manners in which beliefs, equally paramount in the lives of their possessors, may be articulated. They further reveal the difficulties inherent in placing too narrow a construction on the provisions of [the conscientious objector statute]." Id. at 183.

In Seeger, the Court expanded the definition of "Supreme Being" in the conscientious objector regulations to include all religions, and took the broadest possible view of the meaning of "Supreme Being" in light of the diversity of faith viewpoints in America. Id. at 165-66. In Welsh v. United States, the Court expanded the definition of "training and belief" to include ethical and moral convictions that are held with the strength of more traditional religious beliefs. 398 U.S. 333, 339-40 (1970). Finally, in Gillette v. United States, 401 U.S. 454 (1971), it acknowledged that the conscientious objector regulations could not, without violating the Establishment Clause, favor one religious belief over another. "When government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact." Id. at 450. It stated:

> [T]he relevant individual belief is simply objection to all war, not adherence to any extraneous theological viewpoint. While the objection must have roots in conscience and personality that are

> "religious" in nature, this requirement has never been construed to elevate conventional piety or religiosity of any kind above the imperatives of a personal faith.

Id. at 454.

Seeger, Welch, and Gillette instruct that conscientious objector applicants whose beliefs are based on ethical and moral teachings are entitled to recognition as conscientious objectors on an equal footing with traditionally religious conscientious objectors. The DACORB's repeated expressions of hostility to Mr. Kanai's varied religious, moral and ethical beliefs ignore that teaching.

Successful conscientious objectors commonly identify multiple sources (multiple religious traditions, texts, and paths to belief) as contributing to the basis for their beliefs. And, commonly, courts acknowledge this diversity, either in granting habeas corpus to a CO applicant, or in reversing a conviction for failure to report for induction.

For example, in United States ex rel. Lehman v. Laird, 430 F.2d 96, 97 (4th Cir. 1970), this Court granted Mr. Lehman habeas relief despite the Government's objection that his CO beliefs were not "religious in nature." Mr. Lehman wrote that "I see God as a magnificent spirit, that lives with the vision of life with peace and understanding. I am created in the image, and follow the philosophy." He cited the philosophies of Henry David Thoreau, Gandhi and Dr. King, as well as "other anti-war people." Id. at 97. In United States v. Vlasits, 422 F.2d 1267,

1268 (4th Cir. 1970), the Court reversed a conscientious objector's conviction for failure to appear for induction. Mr. Vlasits's application "disclaimed any pretension that his beliefs were 'congruent with the formal creeds' of these churches, but he asserted that his religious training contributed to 'his humanistic philosophy and belief in a higher moral law than that of man,'" and cited David Mussey's Ethics as a Religion. United States v. Wainscott, 496 F.2d 356, 360-61 (4th Cir. 1974), reversed the denial of a conscientious objection application based on "a personal moral code," and a disavowal of a belief in God and immortality. United States v. Davis, 460 F.2d 792, 797 (4th Cir. 1972), reversed a conscientious objector's conviction for failure to appear for military induction; the applicant's religious training and belief included a belief in a Supreme Being; membership in the Methodist Church, previous active participation in the Presbyterian Church, and study of the teachings of the Catholic Church and Eastern and ancient religions.

Other circuits have held similarly. In United States v. Levy, 419 F.2d 360 (8th Cir. 1969), the government claimed that Levy could not be sincere because he listed "several literary sources for his beliefs, implying his beliefs must therefore be a product of logic and not faith." Id. at 367. Mr. Levy's CO application relied upon his religious Jewish upbringing, New Testament readings, and works by the

Paul Tillich, Bertrand Russell, Linus Pauling and Henry David Thoreau. The Court rejected the Government's argument:

> If we followed the Government's argument, only beliefs based solely on orthodox religious dogma or communion with God would survive the test of a religious source for a registrant's beliefs. Any literary sources, perhaps including the Bible, or any instruction from a human source could be viewed as merely contributing to the registrant's logical development of a personal philosophy. Furthermore, there seems to be no reason to make such a distinction.

Id. The court understood Seeger "to do away with the practice of drawing either abstruse or for that matter self-evident distinctions between various religious beliefs." Id.; see U.S. ex rel. Checkman v. Laird, 469 F.2d 773 (2d Cir. 1972) (rejecting Army's opposition to Mr. Checkman's CO beliefs, described as ethical and moral, and derived from "the humanistic teaching of Judaism" and "from the teachings of Christ"); Bohnert v. Faulkner, 438 F. 2d 747 (6th Cir. 1971) (reversing denial of habeas corpus to a conscientious objector raised with a Catholic education, and who credited a number of philosophical, ethical, religious and moral sources as the basis for his beliefs: "We think these statements indicate that the Board took a parochial view of religion and religious training inconsistent with the requirements of Seeger.").

Most recently, in Watson v. Geren, 569 F. 3d 115, 133 (2d Cir. 2009), the Second Circuit credited Dr. Watson's religious beliefs, based on diverse religious,

moral, and ethical sources, and rejected the Government's "grab-bag" argument that their diversity was itself a basis in fact for denying his CO application.

Thus, well-established authority confirms that a CO applicant's beliefs may be from diverse sources. Those sources may be religious, moral, and/or ethical in nature. Equally well-established authority confirms that the military may not require conscientious objectors come to their beliefs inspired by conventional religious beliefs or doctrine, through a traditional path of religious or spiritual development, or through a single tradition. See Peckat v. Lutz, 451 F. 2d 366, 369 (4th Cir. 1971) ("Neither conformity with orthodox religion nor church membership or attendance is a proper test here."); O'Brien v. Resor, 423 F.2d 594, 596-97 (4th Cir. 1969).

DACORB's scornful treatment of Mr. Kanai's religious and moral and ethical beliefs permeated its negative treatment of his application, and reflected an institutional preference for traditionally religious conscientious objectors, over those who choose to develop, express and explain their beliefs through a less traditional lens. The Supreme Court has made clear that no such preference may be countenanced. This double standard is inconsistent with established Supreme Court law, which has for decades required parity for religious and nonreligious conscientious objectors.

DACORB's vote against Mr. Kanai demonstrably undercuts the Army conscientious objector regulation, which we must presume to treat traditionally religious and nontraditionally religious applicants equally. Nontraditionally religious applicants are required to demonstrate that their beliefs derive from "training, study and contemplation" that is "comparable in rigor and dedication" to that achieved in the gaining of "traditional religious convictions." AR 600-43 ¶1-5a(5)(b). DACORB, contrary to Seeger, Welch, and Gillette, and to Army regulation, has shown a bias against the non-traditional conscientious objector. This bias ignores Supreme Court recognition for conscientious objectors who draw on multiple religious and other traditions for the source of their belief, and on ethical and moral conscientious objectors. After decades of settled law, DACORB has no basis, in law or regulation, to disparage less traditional CO applicants and set the bar higher. By concluding that CO applicants who offer multiple religious or ethical sources for their beliefs are less entitled to recognition as a conscientious objector, the DACORB ignores the Supreme Court's admonition to accord the highest respect to those who seek liberty of conscience. See Seeger, 380 U.S. at 169.

By disparaging Mr. Kanai's thoughtful and detailed expression of beliefs, DACORB insinuates a legally and constitutionally improper religious preference. Moreover, because Mr. Kanai belongs to no established formal church, and

therefore has no recognized religious leader vouching for him, DACORB claims his religious, ethical and moral beliefs are less credible. Religious beliefs, and, of course, moral and ethical beliefs "need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Thomas v. Employment Sec. Div., 450 U.S. 707, 714 (1981). In these circumstances, remand to DACORB is improper, and the decision of the district court should be affirmed.

II. REMAND WOULD BE IMPROPER WHERE DACORB FAILED TO ENGAGE IN REASONED DECISION-MAKING AND WHERE, AS HERE, THE ADMINISTRATIVE RECORD SUFFICIENTLY SUPPORTS THE GRANTING OF CONSCIENTIOUS OBJECTOR STATUS.

In Peckat v. Lutz, 451 F. 2d 366 (4th Cir. 1971), this Court articulated the requirement that the decision on an individual's conscientious objector application must be reached through a "rational process." Id. at 368. Underlying Peckat's "rational process" obligation is the expectation that it has, at its foundation, an impartial decision-maker. Mr. Kanai's conscientious objector administrative consideration lacked a "rational process," lacked reasoned decision-making, and lacked impartial decision-makers. Accordingly, remand is improper.

A. DACORB's Disregard of Its Obligation to Engage in Reasoned Decision-making with an Impartial Decision-maker Does Not Justify Remand and Is Unfair to Mr. Kanai.

In Goldberg v. Kelly, 397 U.S. 254 (1970), the Court considered the essential elements of a fair hearing as required by principles of procedural due process, and identified several basic ingredients of a fair hearing, including "an impartial decision maker," id. at 271, and reasoned decision-making in "which the decision maker should state the reasons for the determination and indicate the evidence . . . relied on," id.

As a matter of public policy, moreover, the value of reasoned decision-making cannot be denied. The requirement that "the decision maker state the reasons for the determination and indicate the evidence . . . relied on," Goldberg, 397 U.S. at 271, both forces the decision-maker to defend its decision with facts and facilitates subsequent judicial review of the decision, and importantly provides the individual whose liberty may be at stake with a sense that the administrative decision-maker is behaving fairly and is basing its decision on the law and on facts rather than caprice and bias. In this respect, as well, reasoned decision-making generates the perception of fairness and an important element of legitimacy to the process.

The quest for consistency, reliability, and predictability in the law through the development of administrative and judicial precedent also advances interests in

equal treatment under the law. Thus, if adjudicatory authorities do not respect precedent or fail to defend their adjudications with reasoned decision-making, the risks of favoritism, discriminatory treatment, and subversion of long-term policies to a short-sighted perception of exigency increase significantly.

Moreover, where there is an absence of a just system of decision-making, society loses faith in its adjudicatory institutions. In his influential essay, The Path of the Law, Justice Holmes defined law simply as "the prediction of the incidence of the public force through the instrumentality of the courts." Oliver Wendell Holmes, Jr., 10 Harv. L. Rev. 457, 457 (1897); see Benjamin N. Cardozo, The Nature of the Judicial Process 34 (1921) ("[A]dherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts.").

This is not to insist upon blind adherence to precedent at the expense of all other values that we cherish in our search for justice. See generally Planned Parenthood v. Casey, 505 U.S. 833, 854-55 (1992) (plurality op). But it is to suggest that when administrators ignore their obligation to engage in reasoned and impartial decision-making, they diminish the capacity of the adjudicative process to operate with consistency, predictability and reliability, and deprive future applicants of the guidance that would be provided by an adjudication grounded in the factual record. DACORB's failure to engage in reasoned and impartial

decision-making deprives subsequent decision makers of the benefit of the administrative reasoning employed in this and other cases.

Here, as set forth below, DACORB failed in its obligation to engage in reasoned and impartial decision-making in several ways discussed in Mr. Kanai's moving brief, as well as in at least one very specific action: the Declaration submitted by the DACORB President to the district court.

B. The DACORB President's Partisan Declaration Is Strong Evidence of Bias, Precluding Remand.

In the district court, the DACORB President submitted a Declaration on behalf of the Army, which states in relevant part:

> A search of the DACORB records reveals that there have been prior CO applications from USMA cadets, including an approved CO application as recently as 2003. The DACORB's records also reveal that there have been prior applications by recent graduates of the USMA who were still serving their original active duty service obligation, including an approved CO application as recently as 2007.

JA 492-494 ¶ 9 (emphasis added).

On information and belief, amici believe that the DACORB President refers, in the highlighted language, to the CO application of then-Captain Peter Brown. The DACORB President does not provide full and complete information about DACORB's response to Peter Brown's CO application. This omission from the DACORB affidavit leads a reader to conclude that DACORB at all times fully

endorsed Peter Brown's CO application. This is not correct. We provide the additional information here.[4]

Peter Brown, a West Point graduate then serving as a First Lieutenant in Iraq, applied for CO recognition in 2006. DACORB voted 2-1 to deny his application, by memorandum dated 29 January 2007. The DACORB President, the author of the Declaration here, recommended disapproval and signed the Brown disapproval memorandum. JA 73. Then-Captain Brown thereafter filed a habeas corpus petition in the federal district court in Washington, D.C. The Army then chose to reconsider its decision on his CO application. DACORB thereafter issued a second decision, by memorandum dated 28 August 2007, approving Peter Brown's application for CO status.

Contrary to the impression created by the DACORB President's Declaration, DACORB's first action towards this West Point graduate in 2007 was negative, not positive. Its first decision did not grant him recognition as a conscientious

[4] Peter Brown was in 2007 a client of the ACLU of the National Capital Area and the NYCLU, represented by one of the amicus attorneys herein. The DACORB Declaration may refer to a USMA graduate other than then-Captain Brown. If so, then the DACORB President's Declaration is misleading for omitting the information regarding its actions on Peter Brown's CO applications.

objector. DACORB's second, favorable decision was issued only after habeas litigation was filed and was not the result of a judicial remand.[5]

The DACORB President's Declaration was thus substantially incomplete. Rather than engaging in neutral decision-making, the DACORB President was advocating for DACORB's track record with regard to USMA graduates. And, the DACORB President was doing so while, apparently, omitting key facts. The DACORB President submitted a declaration on behalf of the Government intending to demonstrate DACORB's neutrality. Instead, its omission of information, in failing to report the initial unfavorable action on Peter Brown's CO application by DACORB, further calls into question DACORB's impartiality and reasoned decision-making. In such circumstances, remand is improper.

C. Remand Is Improper where there Is Evidence of Adjudicators' Bias.

In general, the Supreme Court has recognized a "presumption of honesty and integrity in those serving as adjudicators" in the administrative context. Withrow v. Larkin, 421 U.S. 35, 47 (1975). It is difficult to overcome this presumption based solely on an agency actor exercising both investigative and

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[5] The Appendix to this Brief includes: (1) DACORB's 29 January 2007 disapproval of CO status; and (2) the Government's consent motion for an enlargement of time in Brown v. Geren, CV 07-1250 (ESH) (D.D.C.), affirming that "DACORB reviewed and approved CPT Brown's CO Application. (Exhibit A.)."

adjudicative functions. Id. Where, however, the agency actor is serving as an advocate and an adjudicator, a reviewing court is more likely to find bias. "By definition, an advocate is a partisan for a particular client or point of view. The role is inconsistent with true objectivity, a constitutionally necessary characteristic of an adjudicator." Botsko v. Davenport Civil Rights Comm'n, 774 N.W.2d 841, 849-50 (Iowa 2009).

In Trans World Airlines, Inc. v. Civil Aeronautics Bd., 254 F.2d 90, 91 (D.C. Cir. 1958), the D.C. Circuit determined that the "fundamental requirements of fairness in the performance of [an administrative board's quasi-judicial] functions require at least that one who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or briefs, take no part in the decision of that case by any tribunal on which he may thereafter sit." Id.; see Nightlife Partners v. City of Beverly Hills, 108 Cal.App.4th 81, 93 (Cal.App. 2 Dist. 2003); Am. Gen. Ins. Co. v. F.T.C., 589 F.2d 462 (9th Cir. 1979); Am. Cyanamid Co. v. F.T.C., 363 F.2d 757 (6th Cir. 1966).

The "primary purpose of separating prosecutorial from adjudicative functions is to screen the decision-maker from those who have a will to win-a psychological commitment to achieving a particular result because of involvement on the agency's team." Bostko, 774 N.W.2d at 850 (internal quotation marks & citation omitted). The "risk of impartiality is thought to be too great when an

advocate with the 'will to win' also has a role in the adjudication of the dispute." Id. "Just as in a judicial proceeding, due process in an administrative hearing also demands an appearance of fairness." Nightlife, 108 Cal.App.4th at 90. Here, of course, DACORB already demonstrated its bias, separate and apart from the DACORB President's participation in the appeal.

III. JURISDICTION WAS PROPER HERE.

A. Jurisdiction Must Be Broadly Interpreted to Protect Servicemembers' Access to the Courts.

The district court had the authority to review Mr. Kanai's CO application and habeas petition, and to grant the requested relief both on the merits and because of the errors in the Army's process, which are described above and in Mr. Kanai's brief.

This Court, approvingly quoting the Supreme Court, affirmed the purpose of the right of habeas corpus to protect fundamental liberties: "It (the Great Writ) is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose--the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." U.S. ex el. Brooks v. Clifford, 409 F.2d 700, 706 n.3 (4th Cir. 1969) (quoting Jones v. Cunningham, 371 U.S. 236, 243 (1963)). To protect Mr. Kanai and others from a wrongful restraint on their liberties and consistent with precedent, the Court should

reject the Government's belated argument that the district court lacked subject matter jurisdiction over the petition, confirm that the Government waived any objection to any alleged jurisdictional defect, and affirm that jurisdiction was proper in Maryland, the district of Mr. Kanai's domicile and most significant recent contacts with the Army.

The habeas statute should be interpreted expansively so that servicemembers seeking judicial relief can have access to the courts. Servicemembers may move around the country and overseas, serving at the pleasure of their Service at different military locations. Their movements may be limited by their commands, or their duties. Their nominal custodians may be located far from the servicemembers' physical locations. If servicemembers were required to bring suit in a district away from their physical location, they could as a practical matter be unable to access a court. Servicemember petitioners would unnecessarily incur expenses and lose time while having to pursue a proceeding that could be a matter fundamental importance for them, far from families, friends and witnesses.

To provide a practical and effective administration of justice for servicemember conscientious objectors, courts ought not exalt procedure over substance, and should allow servicemember petitioners to file habeas petitions in the districts where they are domiciled or they have any meaningful contact with the military. This approach would be consistent with that taken by Vietnam War-era

courts. See, e.g., Eisel v. Sec'y of Army, 477 F.2d 1251 (D.C. Cir. 1973); Lantz v. Seamans, 504 F.2d 423 (2d Cir. 1973); Carney v. Laird, 462 F.2d 606 (1st Cir. 1972); Arlen v. Laird, 451 F.2d 684 (2d Cir. 1971); Jones v. Watkins, 422 F. Supp. 1268 (N.D. Ga. 1976); U.S. ex rel. Applebaum v. Seaman, 365 F. Supp. 1177 (S.D.N.Y. 1973).

B. The Government's Characterization of the Jurisdictional Question as One of "Subject-Matter" Is Wrong.

Rumsfeld v. Padilla, 542 U.S. 426 (2004), disposes of the Government's main argument that subject matter jurisdiction is lacking. Subject matter jurisdiction is simply not raised under 28 U.S.C. § 2241, on which the government bases its belated challenge. In Padilla, all nine Justices agreed that jurisdiction under 28 U.S.C. §§ 2241-2243 does not raise a question of subject matter jurisdiction. See id. at 434 n.7 (2004) (Rehnquist, C.J., writing for five Justices) ("The word 'jurisdiction,' of course, is capable of different interpretations. We use it in the sense that it is used in the habeas statute, 28 U.S.C. § 2241(a), and not in the sense of subject-matter jurisdiction of the District Court."); id. at 451) (Justices O'Connor and Kennedy, concurring) ("These rules, however, are not jurisdictional in the sense of a limitation on subject-matter jurisdiction . . . . That much is clear from the many cases in which petitions have been heard on the merits despite their noncompliance with either one or both of the rules."); id. at 455 (Stevens, J.,

dissenting, with Justices Souter, Ginsberg and Breyer) ("It bears emphasis that the question of the proper forum to determine the legality of Padilla's incarceration is not one of federal subject-matter jurisdiction."). Thus, even if Mr. Kanai had not complied with these statutes (though he did comply), that would not deprive the District Court of Maryland of the power to hear the petition and issue the writ of habeas corpus.

For a non-custodial habeas petitioner such as Mr. Kanai, the jurisdiction question is answered by reference to the habeas jurisdiction statutes, 28 U.S.C. §§ 2241-2243. Under 28 U.S.C. § 2241, habeas writs may be granted by various federal courts or judges "within their respective jurisdictions." 28 U.S.C. § 2242 refers to the respondent to a Section 2241 petition as "the person who has custody" of the petitioner; and 28 U.S.C. § 2243 refers to "the person having custody." Together, these provisions are read to concern the courts' jurisdiction over both the petitioner and the petitioner's custodian.

Here, where the Government did not have physical control over Mr. Kanai's body, the jurisdiction question is directed, separately, to the court's jurisdiction over (1) the petitioner and (2) the legal custodian. In determining how to assess these two requirements, this Court should apply an approach that is consistent with the judiciary's history of having "favored a more functional approach that focuses on the person with the power to produce the body." Padilla, 542 U.S. at 462

(Stevens, J., dissenting). The Padilla concurrence observed that the habeas rules are akin to both personal jurisdiction rules and to venue rules, but stated that it would not decide in Padilla if they are more like one or the other. Id. at 453 (Kennedy, J., concurring); see also id. at 463 (Stevens, J., dissenting) (habeas jurisdiction rules may be analyzed under traditional venue rules).

Rather than choosing between venue and subject matter jurisdiction rules as suggested by Justice Kennedy in Padilla, this Court need only apply the two general principles guiding both venue and personal jurisdiction questions. These principles are, first, that non-subject matter jurisdictional objections are waived if not timely raised; and, second, that jurisdiction is found, under traditional venue and personal jurisdiction principles, based on the military petitioner's contacts with the military custodian in that jurisdiction. This permits, consistent with precedent, a flexible and practical approach to determining whether a servicemember's petition satisfies the statute's jurisdictional requirements and is properly brought in a given district. See Hayes v. Sec'y of Army, 465 F. Supp. 646, 647 (W.D. Pa. 1979) (denying Government's motion to dismiss petitions, stating, "[B]eginning with Strait [] and Schlanger [], the courts have displayed a sensitivity to other factors besides the location of the Petitioners' immediate custodian (which has great weight in cases involving prisoners) in determining the proper jurisdiction by habeas corpus actions brought by service men.").

C. The Government Waived Its Objections.

Any non-subject matter objections to jurisdiction are waived if not raised in the district court early in the proceeding. See Padilla, 542 U.S. at 451 (Kennedy, J., concurring) (Government can waive objections to habeas jurisdiction); see, e.g., U.S. v. Cotton, 535 U.S. 625 (2004); Moore v. Olson, 368 F.3d 757 (7th Cir. 2004); Blackstock v. U.S., No. 1:93cr350 (JCC), 2008 U.S. Dist. LEXIS 66985 (E.D. Va. Sept. 2, 2008) ; cf. Kontrick v. Ryan, 540 U.S. 443 (2004).

Affirming that the non-subject matter jurisdictional requirements of 28 U.S.C. §§ 2241-2243 are waivable by the Government protects petitioners' access to the courts. So holding prevents the Government from using jurisdiction as an after-the-fact stumbling block to the proper grant of habeas relief to a petitioner. It discourages the Government from first submitting itself to a court's jurisdiction and then later challenging that jurisdiction on appeal. It allows petitioners security and certainty that the court hearing their case has the authority to grant the relief sought, and prevents the undue delay that would likely result from the Government's belated jurisdictional challenge.

D. Traditional Venue and Personal Jurisdiction Principles Support Jurisdiction, Based on the Military Petitioner's Contacts with the Military in that Jurisdiction.

To the extent military petitioners have any meaningful contact with their military custodian from or in the district of their domicile, jurisdiction over both

the petitioner and the military custodian should be found within that district. This is consistent with traditional venue and personal jurisdiction principles, and requires rejection of the Government's statement that there were no "meaningful contacts between the Army and Kanai in Maryland." App. Mem. at 25. Because Mr. Kanai was domiciled in and had significant contacts with the military in the District of Maryland, and because he had minimal contacts with military personnel in his nominal chain of command located outside of Maryland, the District of Maryland was an appropriate district for his petition.

Here, the Government severed the connection between Mr. Kanai and New York and voluntarily interacted with him in Maryland. On the recommendation of the USMA Superintendent, Mr. Kanai had been separated from the USMA, JA 185, 241; he was relieved of duty as a USMA cadet by the Army, JA23; and based on orders dated June 1, 2009, his transfer to the Reserve Control Group in St. Louis was effectuated, JA23. Thus, the record does not support the Government's argument that New York was a more appropriate forum than Maryland. The pre-petition contacts between the parties in Maryland include: (a) in May 2008, the Army placed Mr. Kanai on indefinite leave with duty at Silver Spring, Maryland, his home; (b) on June 9, 2009, the St. Louis-based Group sent Mr. Kanai orders to his home in Maryland; (c) on June 15, 2009, Mr. Kanai received orders from an Army human resource command in St. Louis, Missouri, at his Maryland home to

report for active duty as an enlisted soldier; and (d) the June 15 orders required him to report in a week from Maryland to Fort Jackson in South Carolina, JA 23-25. The record does not show that Mr. Kanai performed military service in Missouri or South Carolina. Thus, the USMA, on behalf of the Army, had relinquished its control over Mr. Kanai well before the habeas proceeding was commenced, and established Maryland as the district within which the military interacted with him. See, e.g., Emma v. Armstrong, 473 F.2d 656 (1st Cir. 1976); Donigian v. Laird, 308 F. Supp. 449, 453 (D. Md. 1969) (holding "that [petitioner]'s commanding officer . . . is subject to the jurisdiction of this court by virtue of the contacts he has had with this district while exercising control over the plaintiff. It would seem manifestly unfair to impose the expense and inconvenience upon petitioner of pursuing his remedy under these circumstances in either Indiana, or Texas where he was ordered to report.").

Strait v. Laird, 406 U.S. 341, 343 (1972), supports amici's position. An inactive reservist's petition filed in California where he was domiciled was allowed – even though his "nominal" custodian was in Indiana – because he had had meaningful contacts with the military in California. Strait favorably considered Arlen v. Laird, 451 F.2d 684, 687 (2d Cir. 1971), where the Second Circuit found jurisdiction over a New York-filed petition where the petitioner had meaningful contacts in New York but his commanding officer was at an Indiana reservist

center. The Court quoted Arlen: "To give the commanding officer of the Center 'custody' of the thousands of reservists throughout the United States and to hold at the same time that the commanding officer is present for habeas corpus purposes only within one small geographical area is to ignore reality." Id. at 345 (quoting Arlen, 451 F.2d at 687); see also id. at 345-46 (citing Donigian favorably). In Donigian, the court focused on the Army's goal in reaching out to a petitioner in Maryland and found habeas jurisdiction proper in Maryland where a Johns Hopkins student and inactive reservist petitioner received orders in Maryland from his commanding officer in Indiana: "The effect on the plaintiff is no different, however, than it would be if his orders were issued to him directly from a local headquarters. The Army seeks to exert control over [petitioner] in Maryland. It cannot, then, avoid the jurisdiction of this court merely because such control is exercised from a point located outside of this state." 308 F. Supp. at 453; see U.S. ex rel. Armstrong v. Wheeler, 321 F. Supp. 471 (E.D. Pa. 1970) (citing Donigian); U.S. ex rel. Lohmeyer v. Laird, 318 F. Supp. 94 (D. Md. 1970).

The Government without objection submitted itself to the jurisdiction of the District Court in Maryland. The United States military maintains a strong presence in the District of Maryland. The Army operates the Aberdeen Proving Ground, Fort George G. Meade and Fort Detrick. The Court should reject the Government's argument that there is any inconvenience for the military to appear

in court in Maryland. See Donigian, 308 F. Supp. at 453 ("The overpowering factor in this inquiry is that the Army, regardless of where its physical command is located, is such a pervasive force that its effects are felt wherever those under its command are stationed.").

Here, applying precedent, Maryland, as the district of Mr. Kanai's residence, service location and place of contacts with the Army, was a proper district to hear his petition.

CONCLUSION

For all of these reasons, the district court's decision should be affirmed.

Respectfully submitted,

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