

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSE PADILLA,)	
DONNA R. NEWMAN,)	
as Next Friend of Jose Padilla,)	
)	
Petitioners-Appellees,)	
)	
v.)	Nos. 03-2235 (L.);
)	03-2438 (Con.)
DONALD RUMSFELD,)	
)	
Respondent-Appellant.)	

**AFFIRMATION IN SUPPORT OF RESPONDENT'S
MOTION TO STAY THE MANDATE**

I, Paul D. Clement, under penalty of perjury, and pursuant to 28 U.S.C. 1746, hereby affirm as follows:

1. I am a Deputy Solicitor General of the United States and represent respondent Donald Rumsfeld, Secretary of Defense, in this case. I make this affirmation in support of respondent's motion to stay the issuance of the mandate while respondent seeks expedited review in the Supreme Court of the substantial statutory and constitutional questions presented by this case. Respondent intends to file a petition for certiorari with the Supreme Court today, January 16, 2004.

2. On December 18, 2003, a divided panel of this Court held that the President lacks authority to detain Jose Padilla as an enemy combatant. 2003 WL 22965085. On January 7, 2004, the United States filed in the Supreme Court a supplemental

brief in Hamdi v. Rumsfeld, No. 03-6696, in which the government represented that (1) it intended to file a petition for a writ of certiorari in this case by no later than January 20, 2004, and (2) it would propose expedited consideration so that this case, if review were granted, could be argued in April and decided by the end of the Supreme Court's Term in June 2004. Supplemental Brief For The Respondents, at 1.

3. Pursuant to Fed. R. App. P. 41(d)(2)(B), a stay of the mandate pending application to the Supreme Court for a writ of certiorari "must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition." Respondent intends to file a petition for certiorari today, and will notify the circuit clerk in writing once it is filed.

4. Rule 41(d)(2)(A) provides that a motion for a stay pending a petition for a writ of certiorari "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." For the reasons set forth herein, respondent submits that the petition for certiorari in this case will present a substantial question of federal law and that there is good cause for a stay.

5. In determining whether to grant a stay pending a petition for certiorari, courts look to three factors: (1) "a reasonable probability that certiorari will be granted (or probable jurisdiction noted)"; (2) "a significant possibility

that the judgment below will be reversed"; and (3) "a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the judgment is not stayed." Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers); White v. Florida, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers). The government here satisfies all three factors.

a. First, there is a "reasonable probability" that the Supreme Court will review this Court's decision. This Court's decision to overturn the President's order that Padilla be detained as an enemy combatant in the ongoing armed conflict with al Qaeda, notwithstanding the President's finding that holding Padilla in military custody "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States," JA 51, presents an issue of overriding public importance that is likely to prompt Supreme Court review. Indeed, the Supreme Court has already demonstrated its interest in resolving questions regarding the President's authority to detain enemy combatants by granting certiorari in the Hamdi case. Hamdi v. Rumsfeld, No. 03-6696 (cert. granted Jan. 9, 2004); see also Rasul v. Bush, No. 03-334 (cert. granted Nov. 10, 2003) (certiorari granted to review whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba); Al Odah v. Bush, No. 03-343 (cert. granted Nov. 10, 2003) (same).

Although the Hamdi case involves the President's authority to detain an enemy combatant seized in circumstances different from those presented in this case, there is substantial tension between the reasoning of this Court and the Hamdi opinion concerning, inter alia, the proper interpretation of 18 U.S.C. § 4001(a). Even independent of the Hamdi decision, this Court's decision restricting an exercise of authority by the President in the wake of the September 11th attacks self-evidently merits Supreme Court review. In the view of respondent, and Judges Wesley and Mukasey, the decision below also conflicts with the Supreme Court's decision in Ex parte Quirin, 317 U.S. 1 (1942), which satisfies another criterion for Supreme Court review. See S. Ct. Rule 10.

In addition, this Court's resolution of the jurisdictional question conflicts with the decisions of other courts of appeals, which have adhered to the longstanding principle under the habeas laws that, in a traditional habeas action challenging physical confinement, jurisdiction lies only in the district court with territorial jurisdiction over the detainee's immediate custodian. Robledo-Gonzalez v. Ashcroft, 342 F.3d 667, 673 (7th Cir. 2003); Vasquez v. Reno, 233 F.3d 688 (1st Cir. 2000), cert. denied, 534 U.S. 816 (2001); Monk v. Secretary of the Navy, 793 F.2d 364, 369 (D.C. Cir. 1986); Jones v. Biddle, 131 F.2d 853 (8th Cir. 1942). This jurisdictional question is of substantial and recurring importance and, independent of this Court's resolution of the merits of the petition for habeas corpus, establishes a "reasonable

probability" that the Supreme Court will grant certiorari in this case.

b. Second, there is a "significant possibility" that this Court's judgment will be reversed. As for the jurisdictional issue, the number of courts of appeals that have held that only the district court with territorial jurisdiction over the detainee's immediate custody has jurisdiction over a habeas action challenging present, physical confinement makes clear that there is a "significant possibility" that this Court's decision will be reversed.

Similarly, as for this Court's holding that the President lacks the authority to detain Padilla as an enemy combatant, the very fact that the panel was divided on the question of the President's legal authority to detain Padilla is itself an indication that reversal is a realistic outcome.¹ Indeed, when Judge Mukasey's opinion is taken into account, JA 136-144, half of the judges who have addressed the President's legal authority in these circumstances have concluded that he may exercise it against an American citizen enemy combatant seized inside the United States outside of a traditional battlefield. Moreover, as the opinions of Judges Wesley and Mukasey reflect, respondent has a substantial argument that the decision below is inconsistent with the Supreme Court's decision in Ex parte Quirin. Given the differences in opinion already evident among

¹ Judge Wesley concluded that the President has both the inherent authority and congressional authorization to detain Padilla. See 2003 WL 22965085, at *26.

members of the federal judiciary, the possibility of reversal here cannot be dismissed as insignificant.

Although the government's contentions did not persuade the panel majority, there are, at a minimum, "plausible arguments * * * for reversing the [panel's opinion]," California v. American Stores Co., 492 U.S. 1301, 1306 (1989) (O'Connor, J., in chambers), and those arguments, in fact, persuaded Judges Wesley and Mukasey. Accordingly, "there is at least a fair prospect that a majority of the [Supreme] Court may vote to [reverse]," ibid.

c. Finally, the government will suffer irreparable harm if the mandate is not stayed. The President, in the exercise of his Commander-in-Chief power during wartime, has determined that Padilla's detention as an enemy combatant "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States"; that Padilla possesses valuable intelligence information concerning al Qaeda that "if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States"; and that Padilla's detention by the military "is in the interest of the United States." JA 51. This Court's decision declaring unlawful the President's determination to detain Padilla as an enemy combatant and ordering his release from military custody not only overturns the President's determination that Padilla's custody by the military is necessary to protect the Nation's security and to prosecute the war, but also eliminates a

critical aspect of the President's Commander-in-Chief authority -- namely, the power to order the military to capture and detain enemy combatants, including United States citizen enemy combatants, that enter the United States determined to conduct hostile and war-like acts against this Nation and its citizens - - at a time when the United States remains vulnerable to future attacks by al Qaeda terrorists. That decision, if the mandate is not stayed, would preclude the President from exercising a power he believes is both well-established and necessary to prevent future terrorist attacks. In the event the Supreme Court vindicates the President's authority and reverses this Court's decision, any lapse in the President's ability to exercise his constitutional authority would clearly amount to irreparable injury. More broadly, the unprecedented nature of the intrusion into the President's authority as Commander in Chief during wartime alone justifies a stay pending resolution of the petition for certiorari.²

² Rule 23(c) of the Federal Rules of Appellate Procedure provides under certain circumstances that a prisoner that obtains an order of release in a habeas proceeding may be entitled to be "released on personal recognizance, with or without surety," pending review by a higher court. That rule does not apply here, because this Court's decision does not order Padilla's "release" from federal custody in the traditional sense, but rather resembles an order to transfer Padilla from one form of federal custody to another. See 2003 WL 22965085, at *23 ("The government can transfer Padilla to appropriate civilian authorities who can bring criminal charges against him. Also, if appropriate, Padilla can be held as a material witness[.]"). In any event, to the extent that this Court determines that Rule 23(c) applies, respondent hereby moves for an order permitting continued detention under Rule 23(c). The same factors that justify a stay of the mandate under Rule 41(d)(2)(B) would also justify an order permitting

6. For the reasons stated above, respondent respectfully requests that this Court issue an order staying the mandate pending the Supreme Court's final disposition of this case.

Respectfully submitted,

Justice

Paul D. Clement
Deputy Solicitor General
Office of the Solicitor General
United States Department of
Washington, D.C. 20530

DATED: January 16, 2004

continued detention under Rule 23(c). See Hilton v. Braunskill,
481 U.S. 770, 774 & n.4 (1987)