03-2235(L)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

03-2235(L), 03-2438(CON)

JOSE PADILLA, DONNA R. NEWMAN,
as Next Friend of Jose Padilla,

Petitioner-Appellee/Cross-Appellant,

v.

DONALD RUMSFELD,

Respondent-Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF *AMICUS CURIAE* OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF PETITIONER-APPELLEE/CROSS-APPELLANT

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INTEREST OF *AMICUS CURIAE*[1]

The New York Council of Defense Lawyers ("NYCDL"), established in 1986, is a not-for-profit professional association whose membership consists of approximately 200 lawyers, many of them former federal prosecutors, who devote a substantial part of their practices to the defense of those investigated or prosecuted for criminal offenses. The NYCDL's principal mission is to engage the Bench and Bar, including government attorneys, in a continuing collegial dialogue – through symposia, retreats, lectures, testimony, amicus briefs, and special events – concerning the legal, ethical and practical issues confronting attorneys and judges in the criminal justice system, particularly in the federal courts of New York.

Because of the wide experience and expertise of its members, the NYCDL has been invited by federal and state appellate courts, including this Court, to appear as *amicus curiae*. *See, e.g., United States v. Thomas*, 248 F.3d 76 (2d Cir. 2001) (en banc). Representatives of the NYCDL have also testified before Congress and the United States Sentencing Commission.

NYCDL members deal virtually every day with issues of personal liberty in various contexts, including federal habeas corpus proceedings. As a result, the NYCDL is in a particularly good position to express an informed view of

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1. The parties have consented to the filing of this *amicus* brief. *See* Rule 29(a), F.R.A.P.

the importance of counsel to detainees like petitioner, and the similarly important role that counsel can play in assisting the Court to arrive at a fair and just determination of the issues.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT PETITIONER NEEDED, AND WAS ENTITLED TO, ACCESS TO COUNSEL TO CONTEST HIS CONTINUED, INDEFINITE AND INCOMMUNI-CADO DETENTION

These appeals raise many interesting and important issues. Whether petitioner, an American citizen detained indefinitely and incommunicado on American soil, has a right of access to his highly reputable, court-appointed counsel to challenge the legality of his continued detention is *not* such an issue.[2] The reasons advanced by the government for stripping petitioner of that fundamental right cannot withstand scrutiny. Depriving petitioner of access to counsel may be pragmatically right — although we doubt it — but as Judge Posner has recently written:

> **There is value distinguishing what is right from what is legal in order to avoid creating precedents that subsequent presidents might invoke in less exigent circumstances. One wouldn't want presidential**

2. The NYCDL takes no position on the other issues raised by petitioner and the government on these appeals.

suspensions of the writ of habeas corpus to become a habit.

Richard Posner, "Desperate Times, Desperate Measures," Sunday New York Times Book Review (Aug. 24, 2003) at 10 (reviewing Farber, *Lincoln's Constitution* (University of Chicago Press 2003)).

This Court should speedily affirm that portion of Chief Judge Mukasey's order which upheld petitioner's access to counsel, and remand the case to the District Court for further, lawyer-like proceedings, holding the other issues in abeyance until a full factual record is developed with counsel's assistance.[3] Until petitioner has consulted counsel, and counsel is able to fully enter the fray below, the other issues, including the applicability and meaning of the "some evidence" standard, and the President's power to classify petitioner as an "enemy combatant" and thereby deprive him of the rights with which he would normally be cloaked in an Article III court, are little more than sound and fury, and not ripe for determination.

I.

3. The issues are discussed fully in Chief Judge Mukasey's decision in *Padilla ex rel Newman v. Bush,* 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (*"Padilla I"), rehearing granted but adhering to original decision sub nom Padilla ex rel Newman v. Rumsfeld,* 243 F. Supp. 2d 42 (S.D.N.Y. 2003 (*"Padilla II").*

Since this is a federal habeas corpus proceeding, and not a criminal case — indeed, the government has apparently represented that petitioner will never be prosecuted — we make no claim that petitioner has a Sixth Amendment right to counsel. Nevertheless, petitioner surely has a right to be heard, at least in writing, and it has long been recognized that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). Thus, the counsel issue in this case implicates due process values, if not due process rights. *Id.* (arbitrary refusal to hear a party through counsel employed by him "would be a denial of a hearing, and, therefore, of due process in the constitutional sense").

II.

The NYCDL rejects the government's contention that an "enemy combatant" whose continued confinement is governed only by a "some evidence" standard has less right and need for access to counsel than other habeas petitioners. The opposite is true. The importance of counsel's role in this case is enhanced precisely because petitioner has not previously been represented by counsel in criminal proceedings, as most federal habeas petitioners have been, and because the standard of proof that the government

must satisfy is, according to the government, so low. No one could quarrel with the validity or persuasiveness of Chief Judge Mukasey's reasoning that petitioner has at least as great, if not a greater, need for counsel's advice and guidance than uncounseled criminal defendants pursuing post-judgment habeas relief:

> **Although it is not uncommon for habeas corpus cases to be pursued by petitioners *pro se,* such cases, usually involving challenges to either state convictions under 28 U.S.C. § 2254 or federal convictions under 28 U.S.C. § 2255, almost always are filed after the petitioners already have had the benefit of completed criminal proceedings, and appeals, in which they were represented by counsel. Padilla has had no such benefit here. *It would frustrate the purpose of the procedure Congress established in habeas corpus cases, and of the remedy itself, to leave Padilla with no practical means whatever for following that procedure.*"**

***Padilla I*, 233 F. Supp. 2d at 602. While neither the Constitution nor the habeas statute may explicitly provide a right of access to counsel, the District Court correctly found that the need for counsel's guidance is a necessary corollary of the statutory framework , "which makes clear that Congress intended habeas corpus petitioners to have an opportunity to present and contest facts." *Id.* at 601-02. The District Court also correctly recognized that Fifth and Sixth Amendment values are surely relevant in determining whether**

and to what extent petitioner is entitled to counsel to contest his continued, indefinite and incommunicado detention. *Id.* at 603 ("Although . . . the right-to-counsel jurisprudence developed in cases applying the Sixth Amendment does not control this case, there would seem to be no reason why that jurisprudence cannot at least inform the exercise of discretion here").

Certainly the experience of the NYCDL membership strongly supports Chief Judge Mukasey's conclusions concerning the importance of counsel in this case. One of experienced counsel's most valuable skills is the ability to analyze and structure facts, sifting the wheat from the chafe, to marshal the facts in the most persuasive fashion and to recognize logical gaps in an adversary's proof. Those skills and abilities are particularly important where, as here, they may be the limit of counsel's role if the government's "some evidence" standard is adopted.

III.

We believe that Chief Judge Mukasey also correctly rejected the government's contention that vindicating Padilla's ability to consult with counsel would interfere with government efforts to obtain important intelligence information from him. As Chief Judge Mukasey recognized:

> **[A]ccess to counsel need be granted only for purposes of presenting facts to the court in connection with this**

> **petition if Padilla wishes to do so; no general right to counsel in connection with [government intelligence agents'] questioning [of Padilla] has been hypothesized here, and thus the interference with interrogation would be minimal or nonexistent.**

***Padilla I,* 233 F. Supp. 2d at 603. While Chief Judge Mukasey appropriately deferred to the Defense Intelligence Agency's expertise (as reflected in an affidavit of Vice Admiral Jacoby) in intelligence matters, he correctly drew the line when it came to forecasting petitioner's own reaction to interrogation:**

> **[W]hen it comes to [Admiral Jacoby's] forecast about how Padilla might react to even a brief interruption in his interrogation, it is important to recognize that that forecast is speculative . . . absent any information about either Padilla's actual interrogation or information about interruptions in past interrogations that would suffice to show whether they are truly analogous to the case at hand. Moreover, the forecast speculates not about an intelligence-related matter, in which Admiral Jacoby is expert, but about a matter of human nature — Padilla's in particular — in which, most respectfully, there are no true experts.**

***Padilla II* at 51-52.**

Indeed, with all due respect to Vice Admiral Jacoby, the NYCDL membership, as a result of dealing daily with the Sentencing Guidelines and lopsided plea negotiations, have a great deal more experience with the likely reactions of detainees facing long odds and grim consequences. Thus, the District Court correctly pointed out the "distinct possibility," known to all experienced defense lawyers, that

> **if Padilla consulted with counsel, made whatever submission he was inclined to make, if any, and lost in**

> **short order, as he well might under a "some evidence" standard, the assured hopelessness of his situation would quickly become apparent to him, particularly in view of his "extensive experience in the United States criminal justice system" . . . and he might then seek to better his lot by cooperating with his captors.**

Padilla II **at 52. Indeed, Chief Judge Mukasey trenchantly noted the "paradox of the government 's own making" that "what prevents Padilla from becoming aware of the possibility that his avenues of appeal could be swiftly foreclosed is that he is not permitted to consult with a lawyer."** ***Id.*** **at 53.**

IV.

Finally, the government's "hail Mary" contention that "counsel might become the unwitting conduit for the transmission of information damaging to national security" was quickly and correctly rejected by the District Court. ***Padilla I*** **at 603. The argument plainly proves too much, for it would mean that any al Qaeda member prosecuted by the government in an Article III court would have to go unrepresented, which was plainly not the government's thinking in the case of John Walker Lindt, the so-called "American Taliban," but who was actually associated with of al Qaeda. Despite Lindt's representation by reputable counsel (who presumably recommended that his client plead guilty and accept the 20-year prison term he is now serving), the sky did not fall in.**

Indeed, the government's claim that counsel could be turned into unwitting tools of sophisticates like petitioner should be offensive to the reputable and experienced counsel who were appointed pursuant to the Criminal Justice Act to represent petitioner.[4] Certainly the membership of the NYCDL, which includes many members of the CJA Panels for the Southern and Eastern Districts of New York, would find such a view offensive if applied to one of them. In any event, the District Court articulated numerous reasons why the government's argument "proves too much," including that a walled-off government agent could monitor the conversations between petitioner and counsel to insure that counsel was not duped by the quick-witted petitioner into passing on messages to terrorists. ***Id.*** **at 603-04.**

V.

In sum, whether petitioner should have access to counsel to contest his continued detention is surely the least interesting and most obvious of issues raised by these appeals, and should not detain this Court long. As Chief

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4. According to Judge Mukasey, petitioner's counsel had appeared before the Court on numerous occasions, had always complied with their responsibilities as officers of the Court, and had nothing in their past to suggest that they would ever knowingly act as conduits. *Padilla I* at 604.

Judge Mukasey found, the balance "weighs heavily in Padilla's favor" on the limited right to counsel at issue here. *Id.* at 604.

CONCLUSION

For the above-stated reasons, the NYCDL urges this Court to affirm that portion of the District Court's order that granted petitioner access to counsel to contest his continued and indefinite detention, remand the case to the District Court for further proceedings, and hold the other issues raised by these appeals in abeyance.

Dated: New York, New York
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Respectfully submitted,

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