No. 04-1342

In The Supreme Court of the United States

JOSE PADILLA,

Petitioner,

v.

COMMANDER C.T. HANFT,
U.S.N., COMMANDER,
CONSOLIDATED NAVAL BRIG,

Respondent.

On Petition For Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

JENNY S. MARTINEZ
Counsel of Record
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-2749

MICHAEL P. O'CONNELL
STIRLING & O'CONNELL
145 King Street, Suite 410
P.O. Box 882
Charleston, SC 29402
(843) 577-9890

ANDREW G. PATEL
111 Broadway, 13th Floor
New York, NY 10006
(212) 349-0230

DONNA R. NEWMAN
121 W. 27th Street, Ste. 1103
New York, NY 10001
(212) 229-1516

JONATHAN M. FREIMAN
WIGGIN AND DANA LLP
One Century Tower
P.O. Box 1832
New Haven, CT 06508
(203) 498-4400

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

ARGUMENT

The government cannot deny that this case "involves issues of extraordinary national significance." Gov't Pet. for Cert., *Rumsfeld v. Padilla*, at 11. The prolonged failure of the judicial system to give a definitive answer to the important question presented in this case creates an uncertainty that is damaging to public confidence in the rule of law. This Court should grant certiorari now to end that uncertainty.

I. Granting Certiorari Now Will Expedite Resolution of this Case

Contrary to the Government's assertion, it would expedite resolution of this case if the Court were to grant certiorari now and set the case down for argument in October. While Mr. Padilla is appreciative of the fact that the Fourth Circuit granted the parties' joint motion for expedited review and agreed to hear oral argument on July 19, 2005, waiting for the Fourth Circuit to decide the case will prolong the proceedings in this Court by six months at a minimum. Even if the Fourth Circuit issues a decision in the same amount of time it took to issue the *Hamdi* merits decision (ten weeks), *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), this Court is not likely to be able to review the petition for certiorari until late fall and the case is not likely to be argued until late next spring – a year from now, two years since this Court first heard full briefing and argument on the merits of the case, and nearly four years since Mr. Padilla was first unconstitutionally detained.[1] Given the extraordinary importance of the issues presented, and the fact that this litigation has

[1] Should the Fourth Circuit or this Court rule that the case should be remanded for further proceedings, the case could drag on for years longer, undermining public confidence in the capacity of the judiciary to provide timely protection for a citizen's constitutional rights in the context of the "war on terror."

already worked its way through the full appellate process to this Court once before, the costs of such delay far exceed any benefits.

II. There Has Been No Change Since 2004

A. The Government's "New" Facts are Immaterial to the Question Presented

1. There is no merit to the government's claim that "the record has changed substantially" since this case was last before this Court. Gov't Opp. Cert. at 10. As explained below in Part II.B, the government's "new" facts are not new at all, but simply represent a change in the emphasis the government has placed on various parts of the record. More fundamentally, however, the government's "new" facts are irrelevant because they have no bearing on the question decided by the district court and presented by this petition: whether the President has the power to seize American citizens in civilian settings on American soil and subject them to indefinite military detention without criminal charge or trial? This precise question was presented the last time this Court heard the case. The only fact that is material to the question presented is that Padilla was arrested unarmed in a civilian setting in the United States; that fact is undisputed, and has not changed.

2. Nor has the law changed. The government insists that there is no reason to distinguish between a military capture on a foreign battlefield and the kind of arrest at issue in this case, where a citizen was arrested in a civilian setting in the United States on the basis of information from confidential sources. To the contrary, basic constitutional principles, a wealth of case law, and common sense support the proposition that the President's powers in a foreign combat zone differ dramatically from his powers here at home where the courts and normal civilian processes are open and operating. Indeed this Court itself has already recognized as much, since its holding in *Hamdi v. Rumsfeld* was carefully limited to an individual who was "captured in a zone of active combat

operations" in a "foreign theater of war." 124 S.Ct. 2633, 2645 (2004); *id.* at 2643 (emphasizing that the "context of [Hamdi's] case" was that of a "battlefield capture" in a "*foreign* combat zone" (emphasis in original)).

This Court has long agreed with Alexander Hamilton that the powers conferred on the President by the Commander-in-Chief Clause "amount to nothing more than the supreme command and direction of the military and naval forces," and grant the President no sweeping authority to seize people or property within American borders even in times of war. *The Federalist* No. 69, at 418 (Clinton Rossiter, ed., 1961); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (holding that "cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war" are inapplicable to cases involving the President's exercise of powers domestically during wartime, notwithstanding the fact that " 'theater of war' be an expanding concept."); *cf. United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 315-19 (1936) (distinguishing between President's powers in internal and external affairs). Allowing detention of foreign battlefield detainees without charge until the end of the armed conflict does not effect a sea change in the constitutional life of this country. Allowing the detention without charge until the end of the "war on terror" of individuals arrested in the United States based on government claims of association with enemies of the state *would* represent a dramatic change.

As the district court correctly found, Congress clearly and necessarily intended to authorize detention of persons captured on overseas battlefield when it authorized the use of "necessary and appropriate" military force in the AUMF. But Congress did *not* clearly indicate that it viewed the indefinite military detention of persons arrested in the United States based on information from secret informants as a "necessary and appropriate" use of force. This Court has consistently recognized that the Constitution requires that Congress speak clearly when it authorizes the infringement of citizens' liberties. *See, e.g., Georgia v. Ashcroft*, 501 U.S. 452, 461 (1991); *Gutknecht v.*

United States, 396 U.S. 295, 306-07 (1970) ("Where the liberties of the citizen are involved . . . we will construe narrowly all delegated powers that curtail or dilute them.") (citation omitted); *Ex parte Endo*, 323 U.S. 283, 300 (1944). Congress reinforced this clear statement requirement in 18 U.S.C. § 4001(a), guaranteeing that "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Congress has not yet spoken with the necessary clarity to authorize such a radical erosion of Americans' freedom.

Common sense also supports a distinction between domestic arrests and battlefield captures. Individuals captured on a foreign battlefield may be more likely than not to be who the government claims they are. That is simply not the case with individuals arrested in civilian settings in the U.S. based on hearsay tips from confidential informants.

Nothing makes that clearer than the government's changing version of the "facts" in this case. The government initially emphasized its allegation that Mr. Padilla had conspired to set off a radiological dispersion device or "dirty bomb" in the United States at some unspecified point in the future. Mobbs Decl. at para. 8. The Government later claimed that Mr. Padilla had been part of a different plot to blow up apartment buildings with natural gas. Rapp Decl. at para. 8. Most recently the government has chosen to highlight the details of Padilla's alleged conduct in Afghanistan prior to his return to the United States. Gov't Opp. Cert. at 10. These factual flip-flops demonstrate the danger of allowing the government to imprison citizens indefinitely on the basis of hearsay from confidential informants[2] – and reinforces the importance of

[2] Although the government provides no information about the sources of the hearsay allegations contained in the Mobbs and Rapp declarations, voluminous press reports suggest that they were obtained under conditions that are illegal (perhaps criminal) and unlikely to produce reliable evidence. *See, e.g.,* David Johnston & James Risen, "Aides Say Memo Backed Coercion for Qaeda Cases," *N.Y. Times* (June 27, 2004) (reporting government officials acknowledging that Khalid

(Continued on following page)

testing the government's factual allegations through the well-honed procedures of criminal trial. Although the watered-down procedures suggested by the *Hamdi* plurality – including a possible presumption in favor of the government's evidence and reliance on hearsay[3] – might be sensible in the *Hamdi*-type situation of battlefield captures, such procedures are constitutionally inadequate for domestic arrests in civilian settings. Criminal procedure is what the Constitution requires.[4]

B. The Government's "New" Facts are Not New

In addition, the government's "new" facts are also not really new, further undermining the government's argument that review by the Fourth Circuit is necessary. In its appellate briefing, the government now claims that the principal basis for Padilla's detention is his alleged presence in Afghanistan during the fighting there in 2001 and 2002. Gov't Opp. at 10. Although the government's emphasis has changed, the facts have not.[5]

The Mobbs Declaration – the single piece of evidence on which the government relied three years ago during litigation before the Southern District of New York – alleged that Padilla met with an al Qaeda leader in Afghanistan in 2001 and at his direction traveled to Pakistan in 2002. Mobbs Decl. paras. 6, 9. The government

---

Shaikh Mohammed was "waterboarded" – i.e., strapped to a board and submerged in water – in order to make him think he was being drowned during interrogations and reporting government officials' concerns that interrogations of Mohammed and Abu Zubaydah may have violated federal criminal law prohibiting torture.").

[3] *See Hamdi*, 124 S.Ct. at 2649 (plurality op.)

[4] It would make little sense, moreover, for the courts to create numerous different categories of enemy combatant, each entitled to slightly different, but equally ad hoc, procedural protections.

[5] Indeed, to the extent that the government is, in fact, relying on genuinely new facts and a new theory of the case to justify Padilla's detention, principles of waiver, estoppel and due process should preclude it from switching positions two years into the litigation.

made the same allegation to the Second Circuit, *see Padilla v. Rumsfeld*, 352 F.3d 695, 701 (2003) (noting government allegation that "[w]hile in Afghanistan in 2001, Padilla became involved with a plan to build and detonate a 'dirty bomb' within the United States, and went to Pakistan to receive training on explosives from al Qaeda operatives.") and this Court, *see* Petr. Br. at 32, *Rumsfeld v. Padilla*, 2004 WL 1066082, 41 U.S.L.W. 3687 (Transcript of Supreme Court Oral Argument, Apr. 28, 2004) ("Padilla was in Afghanistan and Pakistan after the attacks of September 11."). Indeed, the government's current position is puzzling in light of the fact that Acting Solicitor General Paul Clement argued before this Court a little over a year ago that Padilla's and Hamdi's cases presented identical questions in terms of presidential authority. *See id.* ("The Court: . . . [I]s Padilla just the same as someone you catch in Afghanistan? Mr. Clement: I think that for the purposes of the question before this Court, the authority question, he is just the same."). All that has really changed is that the government has now strategically chosen to emphasize certain facts rather than others in an attempt to shoehorn Padilla's case into the precedent set by this Court's decision in *Hamdi*.

C. The Government's "New" Facts Need Not Be Accepted as True

Contrary to the government's assertions, Gov't Opp. Cert. at 7, Padilla has never accepted that all of the government's factual allegations must be accepted as true for purposes of summary judgment. Rather, Padilla has consistently argued that because the government's legal position is flawed, he is entitled to judgment as a matter of law "*even if* all of the facts pleaded by the Executive Branch are assumed to be true." Petr. Mem. in Support of Motion for Summary Judgment at 1 (emphasis added); *id.* at 2 n.1; Petr. Reply (Traverse) to Resp. Answer at 2-3. But as Padilla made clear in the trial court, *see* Petr. Reply at 15, it is also a basic aspect of summary judgment practice that a party "may not rest on the mere allegations" of his pleadings when responding to a motion for summary

judgment, but rather "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Proc. 56(e); Petr. Reply at 15 (citing same). Affidavits opposing summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Id.* As Padilla pointed out in the trial court, the only affidavit submitted by the government was *not* "made on personal knowledge," *not* "admissible in evidence," and does *not* show "that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. Proc. 56(e); *see* Answer 4-7; Petr. Reply at 15. The affiant (a senior government official) plainly has no first-hand knowledge of his allegations regarding Padilla, and the government has provided no information to suggest that its putative facts were obtained in any manner that would permit their introduction into evidence. The government could have tried to cure this defect in the trial court, but did not.[6] The district court did not reach this alternative basis for summary judgment because it resolved the legal issue of authority in Padilla's favor. But this argument was raised clearly below and provides an alternate ground for affirmance. *See, e.g., Smith v. Phillips*, 455 U.S. 209, 215, n.6 (1982) ("Respondent may, of course, defend the judgment below on any ground which the law and the record permit. . . .").

[6] It is immaterial that no discovery has been conducted. *Cf.* Gov't Opp. Cert. at 7. The government does not need discovery to obtain evidence that it maintains is already within its control. Even if the government needed discovery to properly oppose the motion – and it is hard to imagine what evidence in Padilla's control it could seek to compel through civil discovery – it could have asked for it under Fed. R. Civ. Proc. 56(f). While the parties certainly contemplated that no evidentiary hearing would be held until after the summary judgment motion was resolved, it is a basic aspect of civil procedure that a party opposing summary judgment must, at a minimum, demonstrate that it has sufficient admissible evidence to create a genuine issue of fact and make an evidentiary hearing worthwhile. That is the very nature of summary judgment, and the government has not met its burden.

D. A Fourth Circuit Decision Would Not Make it Unnecessary for this Court to Pass on Important Constitutional Questions

The Fourth Circuit's decision is not likely to remove the need for this Court to decide constitutional questions of fundamental importance in this case. Contrary to the government's assertions, the current posture of the case is not interlocutory but arises from a final judgment on the merits against the government. Even were the Fourth Circuit to reverse the district court and find that the President did have authority to detain persons arrested in the U.S. as enemy combatants, that would not in any way diminish the fundamental importance of the question presented.

Moreover, any fact hearing on a remand from the Fourth Circuit would generate numerous constitutional questions about the permissibility of deviating from constitutional and statutory safeguards established in the areas of discovery, evidence, and burdens of persuasion and proof. Because it would be fundamentally unfair to require Padilla to try to prove his innocence without definitive guidance from this Court on these procedural questions,[7] the district court's resolution of these preliminary issues would likely necessitate an interlocutory appeal to this Court involving not only the current question presented, but also a raft of other complicated and novel constitutional questions. Judicial economy is best served by resolving the threshold question of Executive authority now.

---

[7] *Cf. Rafeedie v. INS*, 880 F.2d 506, 517 (D.C. Cir. 1989) (holding that requiring immigration detainee to exhaust remedies by participating in summary exclusion proceeding when he was entitled to hearing with greater due process protections would irreparably harm him).

III. This Case is of Imperative Public Importance that Justifies Immediate Review in this Court

As noted in Padilla's opening brief, delaying consideration of this case would impair the ongoing administration of criminal justice by leaving the government free to wield the threat of enemy combatant status in all domestic terror prosecutions. The government is quite correct that many of the cases involving criminal plea agreements based on threats of enemy combatant status involve defendants who are alleged to have engaged in different conduct than Padilla. But because the enemy combatant category as defined by the government is so far-ranging and variable, it is unlikely that *any* case brought before this Court on certiorari will present a "typical" enemy combatant. Moreover, challenges from such individuals are unlikely to reach this Court directly, Petn. for Cert. at 13, making this case the best vehicle for review of the President's power to designate persons arrested in the United States, rather than on a foreign battlefield, as enemy combatants.

Moreover, further delaying final resolution of this case will irreparably harm Padilla. The Government responds to Padilla's contention that continuing to hold him in solitary confinement for a fourth year will cause irreparable psychological harm by arguing he "has never challenged the conditions of his confinement in any judicial proceeding, or otherwise contended that he has been treated inhumanely." Gov. Opp. at 16 n.3. That is patently untrue. Padilla has clearly asserted that his conditions of confinement "have had a serious and harmful effect on Petitioner's psychological well-being"[8] and moreover stated

[8] *See also* Petn. for Writ of Habeas Corpus at ¶ 32 (stating that "[t]he interrogation of a prisoner throughout two years of incommunicado detention shocks the conscience and violates fundamental principles of justice that are implicit in ordered liberty" and asserting that the government's treatment of Padilla – not merely the fact of his military detention – violated his rights under the Fifth, Sixth, and Eight Amendments). It is worth noting that the government did not allow Mr. Padilla to speak to his attorneys for the first two years of his confinement, making it difficult for him to raise such issues until

(Continued on following page)

that "[s]hould [the district court] be inclined to grant a stay of its ruling pending appeal, Petitioner requests that the Court hold a hearing on the conditions of his confinement and make the issuance of the stay contingent on a modification of those conditions." Petr. Opp. to Stay Pending Appeal at 7 (March 28, 2005).[9]

In addition to clear court filings, Padilla's attorneys have sought to improve the conditions of his confinement through negotiations with military personnel responsible for the Naval Brig and attorneys in the Office of the Solicitor General. In light of the Office of Solicitor General's active involvement in these ongoing negotiations (a meeting with Padilla's attorneys on this topic was held in the Solicitor General's own conference room on March 31, 2005), the government's assertion that Padilla has never raised these claims properly is somewhat astonishing. Whether committed in error or abuse, these misstatements underscore the need for the checks and balances that the Framers established to prevent an Executive without bounds.[10]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari before judgment should be granted.

---

recently. When the government eventually permitted access, it required Padilla's attorneys to sign agreements prohibiting them from asking Padilla about "information concerning the internal operations of the Brig" and "intelligence sources and methods," Access Agreement para. 2(e) and (f).

[9] The district court did not address this issue when it granted the stay pending appeal. Order Granting Respondent's Motion to Stay Pending Appeal (April 6, 2005).

[10] *Compare Rumsfeld v. Padilla*, 2004 WL 1066129 at *18 (oral argument transcript) ("our executive doesn't" torture detainees) and *Hamdi v. Rumsfeld*, 2004 WL 1066082 at *41, 41 U.S.L.W. 3687 (Transcript of Supreme Court Oral Argument, Apr. 28, 2004) ("I wouldn't want there to be any misunderstanding about this. It's also the judgment of those involved in these processes that the last thing you want to do is torture somebody or to do things along those lines.") *with* photographs broadcast hours later on *60 Minutes II* of Abu Ghraib detainees.

Respectfully submitted,

JENNY S. MARTINEZ
Counsel of Record
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-2749

MICHAEL P. O'CONNELL
STIRLING & O'CONNELL
145 King Street, Suite 410
P.O. Box 882
Charleston, SC 29402
(843) 577-9890

ANDREW G. PATEL
111 Broadway, 13th Floor
New York, NY 10006
(212) 349-0230

DONNA R. NEWMAN
121 W. 27th Street, Ste. 1103
New York, NY 10001
(212) 229-1516

JONATHAN M. FREIMAN
WIGGIN AND DANA LLP
One Century Tower
P.O. Box 1832
New Haven, CT 06508
(203) 498-4400