United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 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.

REPLY BRIEF OF RESPONDENT-APPELLANT-CROSS-APPELLEE

Argument

The district court's rulings err in two basic respects. First, the court incorrectly held that it has jurisdiction

over the amended petition. Second, the court erred in ordering that Padilla be afforded access to counsel to facilitate a factual challenge to the determination that he is an enemy combatant.

POINT I

The District Court Lacks Jurisdiction Over The Proper Respondent

Under established principles of habeas jurisdiction, the proper respondent to the amended petition is Padilla's immediate custodian, Commander Marr. Jurisdiction over the amended petition thus lies in the District Court for the District of South Carolina, the court with territorial jurisdiction over Commander Marr. There is no merit to petitioner's argument that those settled jurisdictional rules have given way to a flexible regime under which jurisdiction over the amended petition would lie essentially in any federal district court in the country.

A. The Proper Respondent To The Amended Petition Is Padilla's Immediate Custodian

1. As our opening brief elaborates (at 15-19), a long line of authority establishes that the proper respondent in a habeas action is the person with day-to-day control over the detainee, *i.e.*, the immediate custodian. That rule follows from the terms of the habeas statutes. See, *e.g.*, *Wales* v. *Whitley*, 114 U.S. 564, 574 (1885). The Seventh Circuit recently reiterated that the custodian under the habeas laws "is the person having a day-to-day control over the prisoner," *i.e.*, the "warden of the

facility," and held that a supervisory official's "involve[ment], in some manner, with the petitioner's detention" and "power to control some aspect of the petitioner's legal process does not render that official the petitioner's custodian for habeas purposes." *Robledo-Gonzalez* v. *Ashcroft*, No. 02-2475, 2003 WL 21715838, at *3-*4 (7th Cir. July 25, 2003) (internal quotation marks omitted); see also *Roman* v. *Ashcroft*, No. 02-3253, 2003 WL 21919266, at *4-*11 (6th Cir. Aug. 13, 2003) (holding that "immediate custodian rule effectuates section 2243's plain meaning and gives a natural, commonsense construction to the statute," and declining to name Attorney General as proper respondent) (internal quotation marks omitted); but see *Armentero* v. *INS*, No. 02-55368, 2003 WL 22004997 (9th Cir. Aug. 26, 2003) (not citing *Robledo-Gonzalez* or *Roman*, and finding that Attorney General is proper respondent in "circumstances specific to the situation of immigration detainees" (at *2)).

This Court's decision in *Billiteri* v. *United States Bd. of Parole*, 541 F.2d 938 (2d Cir. 1976), is to the same effect. *Billiteri* holds that the proper respondent in a challenge to the refusal of the Board of Parole to grant a release is the warden of the prison rather than the Board. *Id*. at 948. As the Court explained, "it would stretch the meaning of the term beyond the limits thus far established by the Supreme Court to characterize the Parole Board as the 'custodian' of a prisoner who is under the control of a warden and confined in a prison, and who is seeking, in a habeas action, to be released from *precisely that form of confinement*." *Ibid*. (emphasis added). "At that point," the Court observed,

"the prisoner's relationship with the Parole Board is based solely on the fact that it is the decision-making body which may, in its discretion, authorize a prisoner's release on parole." *Ibid*.

Here, as in *Billiteri*, Padilla is physically confined in a federal facility under the day-to-day control of the facility commander, and seeks release "from precisely that form of confinement." *Ibid*. Consequently, the proper respondent is the commanding officer of the facility rather than a supervisory official with "decision-making" authority (*ibid*.) such as Secretary Rumsfeld. See *Guerra* v. *Meese*, 786 F.2d 414, 416 (D.C. Cir. 1986) (relying on *Billiteri*).

2. Petitioner acknowledges (Pet. Rspns. Br. 9-10) that the immediate custodian rule controls in the "usual" habeas case, but argues (*id*. at 10-11, 22-23) that the rule is inapplicable here because Padilla is not serving a criminal sentence and because of Secretary Rumsfeld's perceived role in determining the conditions of confinement and the timing of eventual release. Petitioner's argument lacks merit.

a. First, as courts have repeatedly recognized, the immediate custodian rule is grounded in the terms of the habeas statutes, particularly the requirements that the detainee name as respondent "the person having custody" over him and that the respondent be situated to "produce * * * the body of the person detained" when appropriate. 28 U.S.C. 2243; see *Wales*, 114 U.S. at 574; *Robledo-Gonzalez*, 2003 WL 21715838, at *3; *Vasquez* v. *Reno*, 233 F.3d 688, 693 (1st Cir. 2000), cert. denied, 534 U.S. 816 (2001); *Guerra*, 786 F.2d at

416; *Jones* v. *Biddle*, 131 F.2d 853, 854 (8th Cir. 1942), cert. denied, 318 U.S. 784 (1943).

Nothing in the relevant statutory terms suggests any pertinent distinction between confinement for a criminal sentence and confinement under some other authority. In either case, the detainee seeks release from actual physical confinement, the core application of the habeas remedy. See *Jones* v. *Cunningham*, 371 U.S. 236, 238 (1963) ("the chief use of habeas corpus has been to seek the release of persons held in actual, physical custody"). And in either situation, the habeas statutes direct attention to the person with day-to-day physical control. See *Al-Marri* v. *Bush*, slip op. at 5, No. 03-1220 (C.D. Ill. Aug. 25, 2003) ("while this case involves the somewhat unique circumstances surrounding al-Marri's detention as an enemy combatant, it nevertheless involves a classic use of the writ to challenge his physical custody in South Carolina").

Petitioner thus errs in relying on Secretary Rumsfeld's perceived involvement in overseeing Padilla's detention and determining when he may be released. The "Attorney General is designated, pursuant to statute, as the custodian of *all* federal prisoners, yet no one seriously suggests that [he] is a proper respondent in prisoner habeas cases." *Henderson* v. *INS*, 157 F.3d 106, 126 (2d Cir. 1998), cert. denied, 526 U.S. 1004 (1999). As for when Padilla may be released, the Parole Board in *Billiteri* could, "in its discretion, authorize a prisoner's release on parole," yet the Board's "decision-making authority" did not render it the proper respondent. 541 F.2d at 948.

b. Petitioner suggests (Pet. Rspns. Br. 19) that *Billiteri* is inapplicable because the Parole Board's discretionary authority, unlike that of Secretary Rumsfeld, was subject to certain procedural constraints. Petitioner does not explain how that distinction could be material. *Billiteri* holds that, when a detainee is "confined in a prison" and seeks "release[] from precisely that form of confinement," the proper respondent is the warden with day-to-day physical control instead of a "decision-making" authority with power to order release "in its discretion." 541 F.2d at 948. That holding controls here.

Petitioner also errs (Pet. Rspns. Br. 18) in invoking *dicta* in *Billiteri* suggesting that, "arguably, when the [Parole] Board itself has caused a parolee to be detained for violation of his parole," it might be appropriate to consider the Board as a proper respondent. 541 F.2d at 948. This Court has not relied on that dicta in any case to hold that someone other than the immediate custodian is a proper habeas respondent. And the *holding* of *Billiteri* is that, when a detainee seeks release from present physical confinement, the proper respondent is the person with day-to-day control. *Ibid*. Indeed, this Court took specific note of the *Billiteri* dicta in *Henderson*, 157 F.3d at 126 n.22, but went on to explain that "*Billiteri* appears to bar the designation of a higher authority * * * as a custodian when a habeas petitioner

is under the day-to-day control of another custodian (such as the prison warden)," *id*. at 126-127.[*]

3. Petitioner argues more generally (Pet. Rspns. Br. 13) that the immediate custodian rule has been displaced by a more flexible approach. That theory is unsupported by the decisions petitioner cites. Those decisions either: (a) support application of the immediate custodian rule; (b) involve exceptional circumstances in which the immediate custodian is unknown or unreachable by any court; or (c) arise in anomalous situations where the petitioner essentially has no immediate custodian.

a. Petitioner attaches particular significance (Pet. Rspns. Br. 3-4, 12-13) to *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973). As this Court recognized in *Billiteri*, however, *Braden* supports the immediate custodian rule. See 541 F.2d at 948 (relying on *Braden*).

The petitioner in *Braden* was confined in Alabama for an Alabama conviction, but also was subject to a detainer lodged by Kentucky officials based on an

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[1] Contrary to petitioner's argument (Pet. Rspns. Br. 14-15, 18-19), *Henderson* therefore does not afford a basis for avoiding *Billiteri* in this case. See Resp. Opg. Br. 21-23. The petitioners in *Henderson* did not seek release from present confinement. See 157 F.3d at 127 n.23. The opinion in any event ultimately reached no conclusion on whether the Attorney General could be considered a proper respondent in the immigration context. *Id*. at 128.

outstanding Kentucky indictment. The Court explained that habeas relief acts "upon the person who holds [the detainee] in what is alleged to be unlawful custody." 410 U.S. at 494-495. Because the petitioner challenged his legal custody under the Kentucky detainer rather than his present physical custody in Alabama, the Court upheld the filing of the petition in Kentucky, the location of the relevant custodian. *Id*. at 499-500; see *Hensley* v. *Municipal Court*, 411 U.S. 345, 351 n.9 (1973) (petitioner in *Braden* "was in the custody of Kentucky officials for purposes of his habeas corpus action").

Here, Padilla challenges his physical confinement in South Carolina. The relevant custodian under *Braden* thus is "the person who holds him" there (410 U.S. at 494-495), *i.e.*, Commander Marr. See *Billiteri*, 541 F.2d at 948 (quoting *Braden*); see also *Robledo-Gonzalez*, 2003 WL 21715838, at *3 ("warden of the facility" rather than Attorney General is "person who holds" petitioner within the meaning of *Braden*); *Monk* v. *Secretary of the Navy*, 793 F.2d 364, 369 (D.C. Cir. 1986) ("[n]othing in *Braden* supports" deviating from immediate custodian rule).

Petitioner's reliance (Pet. Rspns. Br. 15) on *Ex parte Endo*, 323 U.S. 283 (1944), is likewise misplaced. There, a Japanese American detained in a California internment camp filed a habeas petition in a California district court. The Court permitted the action notwithstanding that the government later moved her to Utah. *Id*. at 306-307. The basis of the Court's ruling was "that the government could not sidetrack a properly-filed habeas petition by changing the petitioner's place

of detention after the court's jurisdiction had attached." *Vasquez*, 233 F.3d at 695. *Endo* does not assist petitioner in this case because the detainee there sought relief in the jurisdiction in which her immediate custodian was located, which is precisely what the immediate custodian rule requires, and precisely what petitioner failed to do here. See *Ibid*. (*Endo* is "at a considerable remove from cases * * * in which the petitioner file[s] for habeas relief in a jurisdiction where neither he nor his immediate custodian [is] physically present").

b. Petitioner invokes cases involving exceptional circumstances in which the immediate custodian is unknown or unreachable by any court. In *Ex parte Hayes*, 414 U.S. 1327 (1973) (Douglas, J., in chambers), for instance, the petitioner and his immediate commanding officer were stationed in Germany, "outside the territorial limits of any district court," *id*. at 1328. Justice Douglas permitted the petition to be filed against others in the chain of command—otherwise, the petitioner would have been deprived of any forum for seeking relief. Petitioner errs in relying on *Hayes* (Pet. Rspns. Br. 15), because here, relief is fully available in the District of South Carolina. See *Monk*, 793 F.2d at 369 n.2 (*Hayes* "is inapposite" when court with territorial jurisdiction over immediate custodian is "at all times available as a forum").

For the same reason, petitioner gains no support (Pet. Rspns. Br. 11) from *In re Demjanjuk*, 784 F.2d 1114 (D.C. Cir. 1986) (Bork, J., in chambers). That case involved a petitioner detained in a confidential location, and the immediate custodian therefore was unknown.

Because it was "essential that [the] petitioner not be denied the right to petition for a writ," Judge Bork found it "appropriate, in these very limited and special circumstances, to treat the Attorney General * * * as the custodian." *Id*. at 1116; see *Roman*, 2003 WL 21919266, at *8-*9 (*Demjanjuk* involves "extraordinary circumstances" in which it is "necessary to depart from the immediate custodian rule in order to preserve a petitioner's access to habeas corpus relief"). *Demjanjuk* affords no authority for filing against someone other than the immediate custodian when the latter's location and identity are known. *Vasquez*, 233 F.3d at 696; *Monk*, 793 F.2d at 369 n.2 (recognizing that court would have lost jurisdiction in *Demjanjuk* if location became disclosed).[*]

c. Petitioner also errs in relying (Pet. Rspns. Br. 4, 12-15, 18) on cases involving unattached military

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[2] Petitioner relies (Pet. Rspns. Br. 14) on certain district court rulings that the Attorney General is a proper respondent in habeas challenges to deportation orders. Those decisions turn on a concern that, under the immediate custodian rule, a handful of district courts would be flooded with the majority of petitions, conceivably impeding the ability to obtain relief. See *Henderson*, 157 F.3d at 127. That concern does not justify departing from the immediate custodian rule, see *Roman*, 21919266, at *10; *Vasquez*, 233 F.3d at 694; but see *Armentero*, 2003 WL 22004997, at *11, but is inapposite in any event. Relief is fully available here in the District of South Carolina.

reservists, such as *Strait* v. *Laird*, 406 U.S. 341 (1972), and *Eisel* v. *Secretary of the Army*, 477 F.2d 1251 (D.C. Cir. 1973), or involving persons released on parole, such as *Jones* v. *Cunningham*, 371 U.S. 236 (1963). There is no traditional immediate custodian in those situations. An unattached reservist "is as mobile as any other member of our society," and "is in 'custody' only in a highly metaphysical sense." *Eisel*, 477 F.2d at 1261-1262; see *Strait*, 406 U.S. at 345 (treating keeper of records as custodian of every reservist would "ignore reality"). Likewise, a parolee has been "release[d] from immediate physical imprisonment" and generally lives free from day-to-day physical control. *Jones*, 371 U.S. at 243. In those contexts, the petitioner "conceivably can be 'in custody' anyplace he happens to be at the time." *Eisel*, 477 F.2d at 1261.

By contrast, in a traditional habeas action seeking relief from present physical confinement—as in this case and *Billiteri*—identifying the immediate custodian does not "exalt fiction over reality." *Strait*, 406 U.S. at 344. The immediate custodian rule thus applies with full force. See *Vasquez*, 233 F.3d at 695-696 (*Strait* involved "highly unusual facts" and "cannot plausibly be read * * * to consign to the scrap heap the substantial body of well-reasoned authority holding that a detainee must name his immediate custodian as the respondent").

4. Petitioner argues incorrectly that special jurisdictional rules govern in the military context. For instance, petitioner identifies (Pet. Rspns. Br. 16-17) a number of cases in which the Secretary of Defense or a Service Secretary was included among the named respondents. None of those decisions addresses any

question concerning the proper respondent. See *Lewis* v. *Casey*, 518 U.S. 343, 352 n.2 (1996) ("we have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect"). When the Secretary of the Navy *did* challenge the propriety of naming him as a respondent, the D.C. Circuit agreed, holding that "jurisdiction is proper only in the district in which the immediate, not the ultimate, custodian is located." *Monk*, 793 F.2d at 369.[*]

Petitioner contends (Pet. Rspns. Br. 20-21) that Commander Marr would risk violating various military directives if she complied with an order to produce Padilla. Petitioner even suggests that Commander Marr's commanding officers would instruct her to disobey any such court order. Petitioner's concerns about Commander Marr's ability to produce Padilla are unfounded; and they are difficult to square with the fact that petitioner specifically named her a respondent. Commander Marr, like all immediate custodians—military or otherwise—is fully able to comply with a court order issuing the writ. Because she lies beyond the district court's jurisdiction, the amended petition must be dismissed.

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[3] Petitioner stresses (Pet. Rspns. Br. 17) that Secretary Rumsfeld was named in *Hamdi* v. *Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (*Hamdi III*). But the petition also named the commanding officer of the facility of confinement, and was properly filed in the district with territorial jurisdiction over that officer.

B. The District Court Cannot Reach Beyond Its Territorial Jurisdiction

Even if Secretary Rumsfeld were a proper respondent, he is located in the Eastern District of Virginia and lies beyond the district court's habeas jurisdiction. The habeas statutes confine district courts to issuing the writ "within their respective jurisdictions," 28 U.S.C. 2241(a), such that "habeas corpus jurisdiction does not extend to officials outside the court's territorial limits." *Malone* v. *Calderon*, 165 F.3d 1234, 1237 (9th Cir. 1999); accord, *Monk*, 793 F.2d at 369. Petitioner nonetheless argues that a district court's habeas jurisdiction ranges far beyond the district's territory to reach any person subject to service under the forum state's long-arm statute. That argument lacks merit.

1. Under petitioner's view that habeas jurisdiction is defined by state long-arm statutes and that Secretary Rumsfeld is a proper respondent, jurisdiction would lie in this action wherever the Secretary conducts business, encompassing virtually every federal district court. Petitioner does not explain how that outcome could be squared with the statutory restriction confining district courts to "their *respective* jurisdictions." 28 U.S.C. 2241(a) (emphasis added). As our opening brief explains (at 25, 27), Congress added that language precisely to prevent a habeas court from issuing process beyond its territorial boundaries. That constraint therefore is incompatible with extending habeas jurisdiction to the reach of a state long-arm law.

Petitioner submits (Pet. Rspns. Br. 26-27) that selecting the proper habeas forum presents a question of venue rather than jurisdiction, and that there thus is no jurisdictional constraint against district courts possessing far-reaching and overlapping habeas jurisdiction. But the statute speaks in terms of "respective jurisdictions," not "respective venues," and it is clear that the territorial limits on habeas authority are jurisdictional. See *Schlanger* v. *Seamans*, 401 U.S. 487, 491 (1971) ("absence of [the] custodian is fatal to * * * jurisdiction"). Indeed, the D.C. Circuit, in ruling that "jurisdiction lies * * * only in the judicial district in which [the] immediate custodian is located," squarely rejected the argument that its ruling "confuse[d] *jurisdiction* with *venue*." *Monk*, 793 F.2d at 368 (internal quotation marks omitted).[*]

In addition, the habeas laws specifically assume that only one district court has jurisdiction in any case, providing that the "Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer it to *the* district court having *jurisdiction* to entertain it." 28 U.S.C. 2241(b) (emphasis added); see 28 U.S.C. 2242 (application "addressed to the Supreme Court, a justice thereof or a circuit judge * * * shall state the

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[4] See also *Roman*, 2003 WL 21919266, at *5 (rejecting approach that would permit petitioner to "choos[e] among several different districts" and would leave identification of proper forum to venue considerations).

reasons for not making application to the district court of the district in which the applicant is held"). When Congress intends to vest "concurrent jurisdiction to entertain [a habeas] application" in more than one district court, it does so explicitly. 28 U.S.C. 2241(d). Petitioner makes no attempt to reconcile the terms of the habeas statutes with his argument for wide-ranging and overlapping jurisdiction under state long-arm laws.

2. Petitioner grounds his argument for reliance on state long-arm statutes principally in *Braden* and *Strait*. See Pet. Rspns. Br. 24-25. That reliance is misplaced.[*]

a. In *Braden*, because the relevant custodian was the Kentucky official who lodged the detainer, the custodian was within the territorial jurisdiction of the Kentucky district court where the petition was filed. While *Braden* says that habeas jurisdiction lies "[s]o long as the custodian can be reached by service of process," 410 U.S. at 495, the Court went on to explain that "the respondent was properly served *in that district*," *i.e.*, within the district's territorial borders, *id*. at 500 (emphasis added). Proper service under *Braden* thus entails service within the district court's territorial jurisdiction. The decision had no occasion to consider service against custodians located elsewhere, and gives no indication of an intention to revisit the settled

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[5] Petitioner also relies (Pet. Rspns. Br. 25) on this Court's decisions in *Henderson* and *United States ex rel. Sero* v. *Preiser*, 506 F.2d 1115 (2d Cir. 1974), cert. denied, 421 U.S. 921 (1975), but those decisions rely on *Braden*. See Resp. Opg. Br. 28-29.

territorial jurisdiction rule. As the D.C. Circuit explained, "[t]he *Braden* decision in no way stands for the proposition * * * that federal courts may entertain a habeas corpus petition when the custodian is outside their territorial jurisdiction." *Guerra*, 786 F.2d at 417; accord, *Monk*, 793 F.2d at 369 ("[n]othing in *Braden*" supports jurisdiction outside "district in which the immediate * * * custodian is located").

b. *Strait* involved an unattached reservist not subject to the day-to-day control of any custodian. He resided in California, "where he had had his only meaningful contact with the Army." 406 U.S. at 343. The Court found that it would "exalt fiction over reality" to require him to seek relief in Indiana, the location of the "nominal custodian" who held his records, and where he had never been. *Id*. at 344. Because the effects of his custody were felt exclusively in California, the Court upheld his filing for relief there. *Id*. at 345.[*]

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[6] The Court stated at one point that "the commanding officer in Indiana, operating through officers in California in processing petitioner's claim, is in California for the limited purposes of habeas corpus jurisdiction." 406 U.S. at 346. As the First Circuit explained, that statement "is not intended to be a rule of general application, but, rather, to explain the fact-specific holding in the case itself, a case in which the petitioner had never been nor ever been 'assigned to be' in the state where his 'nominal custodian' was stationed." *Vasquez*, 233 F.3d at 695 n.6 (quoting *Strait*, 406 U.S. at 344-345).

Because *Strait* supports filing where "custody" in fact exists, the decision provides no authority for extending jurisdiction beyond the district of custody, particularly in a case involving physical confinement rather than a mere "nominal" custodian. In fact, *Strait* makes clear "that the presence of the 'custodian' within the territorial jurisdiction of the District Court [is] a sine qua non." *Id*. at 343.

c. Petitioner does not explain how his reading of *Braden* and *Strait* could be compatible with the Supreme Court's treatment of 28 U.S.C. 1391(e), which provides for nationwide service of process on federal officers. In *Schlanger*, the Court held that Section 1391(e) affords no relief from the rule that habeas "jurisdiction over the respondent [is] territorial." 401 U.S. at 490 & n.4. If the territorial constraints on habeas courts remain unaffected by a federal *statute* providing for nationwide service, those constraints necessarily remain unaffected by a federal *rule* providing for service under state long-arm statutes. Indeed, the federal rules make clear that they "shall not be construed to extend or limit the jurisdiction of the United States district courts." Fed. R. Civ. P. 82; cf. *United States ex rel. Corsetti* v. *Commanding Officer of Camp Upton*, 3 F.R.D. 360, 362 (E.D.N.Y. 1944) (holding under previous version of rules that Rule 4 does not permit service in habeas case beyond district's territory).

Accordingly, Secretary Rumsfeld is not subject to the district court's jurisdiction.[*]

POINT II

Attorney Newman Lacks Next-Friend Standing

As our opening brief elaborates (at 32-36), a next friend must demonstrate a "significant relationship" with the detainee to establish standing to seek relief. Petitioner argues (Pet. Rspns. Br. 6-8) that the existence of an attorney-client relationship necessarily establishes standing. That is incorrect.

No decision suggests that the presence of an attorney-client relationship, without more, confers next-friend standing. The purpose of the significant relationship test is not to ensure zealous advocacy, but

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[7] The suggestion (Pet. Rspns. Br. 29-30) that Padilla was transferred to military control as an exercise in forum-shopping is groundless. The President made a determination as Commander in Chief that Padilla should be detained as an enemy combatant, including because "Padilla possesses intelligence * * * about personnel and activities of al Qaeda that * * * would aid U.S. efforts to prevent attacks by al Qaeda." JA 51. The decision where to detain Padilla upon his transfer to military control was made by military officials based on military considerations. Cf. *Hamdi III*, 316 F.3d at 476 (explaining that no "purpose would be served by second guessing the military's decision with respect to the locus of detention").

rather to ensure a personal stake in the controversy, thus promoting Article III principles predicated on "experienc[ing] the real party's injury in fact in a personal way." *Hamdi* v. *Rumsfeld*, 294 F.3d 598, 605 (4th Cir. 2002); see *Lenhard* v. *Wolff*, 443 U.S. 1306, 1312 (1979) (Rehnquist, J., in chambers) ("'next friends' * * * inevitably run the risk of making the actual defendant a pawn to be manipulated on a chessboard larger than his own case"). Although attorneys can develop the requisite relationship over time, no decision accords next-friend standing based on an attorney-client association as brief as the one in this case.[*]

POINT III

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[8] Petitioner relies (Pet. Rspns. Br. 8) on *Warren* v. *Cardwell*, 621 F.2d 319 (9th Cir. 1980). But that decision involved an attorney retained by the prisoner's wife "upon reasonably construing her husband's expressions." *Id*. at 321 n.1. In essence, then, the wife was the next friend and she retained an attorney. That sort of direct family involvement is absent here. See Resp. Opg. Br. 35, 44 n.*.

The District Court Erred In Ordering That Padilla Be Afforded Access To Counsel

As our opening brief explains (at 36-53), Padilla has no entitlement to meet with counsel for the purpose of challenging the factual basis for his detention. There is no necessity for granting access to counsel under the constitutionally appropriate standard of review, and recognizing a right of access to counsel for enemy combatants to challenge their detentions risks critically compromising the military's efforts to obtain vital intelligence.

A. The Laws Of War Recognize No Right Of Access To Counsel For Persons Detained As Enemy Combatants

As we have explained (Br. 37-38), the laws of war do not afford enemy combatants any entitlement to meet with counsel to challenge their wartime detention. Petitioner asserts that: (i) Padilla cannot be considered an enemy combatant under the laws of war; and (ii) past practice and certain international documents show that the laws of war recognize a right to counsel. Those arguments are erroneous.

1. Petitioner mistakenly contends (Pet. Rspns. Br. 40-46) that the laws of war do not apply to a person who is not a member of the armed forces of a sovereign state and was not captured in a zone of battlefield combat. As our response brief elaborates (at 25-28), the laws of war apply to conflicts involving non-state entities. The President has explicitly determined that the United

States is engaged in an armed conflict with al Qaida, and Congress has supported the President's use of force against "organizations" and "persons" that he determines were responsible for the attacks of September 11, 2001, 115 Stat. 224. Those actions are conclusive in establishing the existence of an armed conflict against al Qaida to which the laws of war apply. See *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862). Indeed, it is well-settled under the laws and customs of war that those laws encompass conflicts involving non-state entities. See, *e.g.*, *id*. at 666; I. Detter, *The Law of War* 134 (2d ed. 2000) ("It is thus indisputable that today not only States can be war-waging machines: internal groupings and non-State entities have acquired this quality," and "non-recognition of groups, fronts or entities has not affected their status as belligerents nor the ensuing status of their soldiers as combatants.").[*]

It is immaterial that Padilla is not an official member of an enemy army or that he was captured outside a zone of traditional battlefield combat. See Resp. Rspns.

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[9] Petitioner's argument concerning whether the laws of war could apply to a narcotics trafficking network (Pet. Rspns. Br. 44) is a red herring. The President has not declared the existence of an armed conflict—and Congress has not supported the President's use of military force— against such a criminal network. And such a network presumably would not declare itself an enemy of the United States or perpetrate acts of war against the United States on the scale of the September 11 attacks.

Br. 20-25. The Supreme Court has made clear that the laws of war treat as enemy combatants any individuals who "associate themselves with" with the enemy's forces, regardless of whether they have "entered the theatre or zone of active military operations." *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942). Moreover, conceptions of membership in the armed forces and of battlefield combat are ill-suited to the present conflict: al Qaida does not fight using conventional forces with formal membership ranks and insignia, but seeks to mask its combatants among the general population to facilitate surprise attacks against civilian targets far from any traditional battlefield. Under petitioner's argument, an enemy that *violates* the most basic tenets of the laws of war would enjoy a *preferred* status under those laws. There is no merit to that approach.

2. Petitioner and his amici emphasize (Pet. Opg. Br. 63-64; ABA Br. 17; Ret. Jdg. Br. 16-17) that, in previous cases including *Ex parte Quirin*, enemy belligerents were afforded counsel. Counsel was provided in those cases, however, to defend against criminal charges brought before a military commission.[*]

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[10] The sole exception is *In re Territo*, 156 F.2d 142 (9th Cir. 1946). But that case raised no issues concerning access to counsel. The government is certainly free to allow an enemy combatant who is without intelligence value, or whose intelligence value has been exhausted, to confer with counsel. Doing so as a matter of discretion creates no right to such consultations in circumstances in which doing so would undermine the intelligence-gathering that is one of the

As *Quirin* makes clear, and as we have explained (Rspns. Br. 22-23, Opg. Br. 38), the Executive is free to take the lesser step of detaining a combatant in the course of the conflict. See 317 U.S. at 31 ("Unlawful combatants are * * * subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals"); *Hamdi III*, 316 F.3d at 465 ("the precautionary measure of disarming hostile forces for the duration of a conflict is routinely accomplished through detention rather than the initiation of criminal charges"). Combatants detained as such and not made subject to charges have no right to counsel to challenge their detention.

The international conventions invoked by petitioner (Pet. Opg. Br. 64-65) do not support his argument. Protocol I to the Geneva Conventions, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977), has not been transmitted to the Senate for ratification, because it is "fundamentally unfair and irreconcilably flawed" and "would undermine humanitarian law and endanger civilians in war." S. Treaty Doc. 2, 100th Cong., 1st Sess. iii-iv (1987). In any event, it incorporates by reference (art. 44(4)) the protections accorded by the Third Geneva Convention, which are unavailable to unlawful combatants like al Qaida fighters, and which, even as to lawful combatants, confer no right to counsel except in the event of formal charges. See Resp. Opg. Br. 38.

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principal purposes of detaining enemy combatants in the first place.

The International Covenant on Civil and Political Rights (ICCPR), 6 I.L.M. 368 (1967), is inapposite. The ICCPR is not self-executing and thus creates no judicially-enforceable rights. *E.g.*, *Hain* v. *Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002), cert. denied, 123 S. Ct. 993 (2003); *Buell* v. *Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001). In any event, the ICCPR pertains by its terms to "civil and political rights," or rights between the government and the governed, rather than rights under the laws of war, a separate body of international law specifically regulating the wartime relationship between governments and those associated with the enemy. Indeed, the ICCPR contemplates (art. 14(3)) an entitlement to counsel only "in the determination of any criminal charges."[*]

B. The Constitution Does Not Afford Padilla Any Right Of Access To Counsel

Petitioner and his amici argue (Pet. Opg. Br. 66-69, Rspns. Br. 37-38; ABA Br. 18-24; Ret. Jdg. Br. 14-18) that the Fifth Amendment's Due Process Clause affords a right of access to counsel in this case. That contention lacks merit.

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[11] Petitioner also relies on the "Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment," U.N. Gen. Ass. Res. 43/173 (1988). That document is neither a legally binding international instrument nor enforceable in United States courts. And it, like the ICCPR, does not purport to affect the laws of war.

1. There simply is no basis in historical tradition or practice for recognizing a right of access to counsel for persons detained as enemy combatants. That should be dispositive in establishing the absence of any such right under the Due Process Clause. See *Quirin*, 317 U.S. at 27-28 ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of * * * enemy individuals"); cf. *Herrera* v. *Collins*, 506 U.S. 390, 407-408 (1993); *Medina* v. *California*, 505 U.S. 437, 445-446 (1992).

Recognizing any due process right would be particularly unwarranted in view of the constitutionally appropriate standard of review. As we have explained (Opg. Br. 44-49, Rspns. Br. 39-43), the President's determination that an individual is an enemy combatant constitutes a quintessential exercise of the Commander-in-Chief power. That determination thus commands great deference, especially when it enjoys the full backing of Congress, which supported the President's exercise of Commander-in-Chief authority against "nations, organizations, or persons *he determines*" were associated with the September 11 attacks. 115 Stat. 224 (emphasis added).

Under the "some evidence" standard dictated by the applicable principles of deference and separation-of-powers, there is no basis or necessity for affording access to counsel. See Resp. Opg. Br. 47-49. It follows that there is no cause for establishing a general due process right of access to counsel to enable enemy combatants to challenge the President's core Article II

judgments in wartime. Cf. *Quirin*, 317 U.S. at 45 ("the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission"). None of the due process decisions raised by petitioner and his amici arises in a comparable constitutional context.

2. Recognizing any due process entitlement to access counsel also would seriously compromise the military's ability to obtain actionable intelligence from detained enemy combatants. See Resp. Opg. Br. 50-53. The Jacoby Declaration (JA 55-63) explains that granting detained enemy combatants a right of access to counsel would undermine development of the relationship of trust and dependency essential to productive interrogation. The gathering of intelligence is particularly vital in the current conflict, waged against an enemy that operates in secret and aims to launch surprise attacks against civilians. "Impairment of the interrogation tool—especially with respect to enemy combatants associated with al Qaida— would undermine our Nation's intelligence gathering efforts, thus jeopardizing the national security of the United States." JA 60.

Petitioner's attempt to attack (Pet. Rspns. Br. 49-50) the conclusions in Vice Admiral Jacoby's declaration concerning Padilla's potential intelligence value reveals a fundamental misunderstanding about the deference owed basic military judgments in this proceeding. Petitioner also contends (Pet. Rspns. Br. 50) that the military lacks legal authority to engage in intelligence-gathering efforts against Padilla. Insofar as petitioner's

argument hinges on Padilla's citizenship, the argument is foreclosed by the settled rule that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency." *Quirin*, 317 U.S. at 37. Insofar as petitioner argues that the military generally lacks authority to gather intelligence from detained enemy combatants, the argument is baseless. See, *e.g.*, Int'l Comm. of the Red Cross, Commentary III, Geneva Convention Relative to the Treatment of Prisoners of War 163-164 (Jean S. Pictet & Jean de Preux eds. 1960) ("[A] State which has captured prisoners of war will always try to obtain information from them. Such attempts are not forbidden * * * .") (footnote omitted).

Indeed, a central purpose of detaining enemy combatants is to gather intelligence about the enemy. See JA 58 (describing importance of interrogations in World War II and Operation Desert Storm). Accordingly, the significant and adverse implications for intelligence-gathering that would result from granting a right of access to counsel for enemy combatants to challenge their detentions should preclude recognizing any such right under the Due Process Clause.[*]

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[12] The district court's order requiring access to counsel is subject to plenary review (see Resp. Opg. Br. 41 n.*), but in any event constitutes an abuse of discretion because of the implications for intelligence-gathering and national security.

C. The Habeas Statutes Do Not Afford An Entitlement To Present Facts

1. Petitioner contends (Pet. Rspns. Br. 34-37) that the habeas statutes grant Padilla an absolute entitlement to present facts and a resulting entitlement to access counsel. As our opening brief explains (at 40-44), the habeas provisions that allow for introduction of facts only come into play if a factual presentation by the petitioner is material to resolving the petition. See *Walker* v. *Johnston*, 312 U.S. 275, 284 (1941).

In *Hamdi*, for instance, the Fourth Circuit ruled that, "despite his status as an American citizen currently detained on American soil, Hamdi is not entitled to challenge the facts presented in the Mobbs declaration." *Hamdi III*, 316 F.3d at 476. To be sure, *Hamdi* reasoned that further factual development was unnecessary because Hamdi was captured in Afghanistan. *Id*. at 473. But the decision confirms that there is no absolute entitlement to present facts, and that the propriety of further factual development turns on the applicable legal standards. Moreover, while *Hamdi* denies a factual challenge when the place of capture is known to be within a zone of combat operations, see *ibid*., the concerns that drove the court's resolution also apply here.

The crux of the court's reasoning was that review of the "accuracy of the executive branch's determination that a person is an enemy combatant" would risk encroaching on the President's core Article II authority in wartime. *Id*. at 474. The same separation-of-powers concerns dictate adopting an approach in this case that

turns exclusively on the sufficiency of the facts presented by the Executive. See Resp. Opg. Br. 46-49. Indeed, given the nature of the attacks of September 11, there is in a fundamental sense *greater* cause for deference to the President's determinations concerning enemy combatants who operate secretly within the nation's borders. Significantly, moreover, the *Hamdi* court declined to permit any factual presentation by the petitioner despite giving no consideration to the consequences for intelligence-gathering, 316 F.3d at 466 n.4, a consideration that should weigh heavily in this case against allowing for factual development by Padilla through counsel.

2. Petitioner and his amici argue (Pet. Rspns. Br. 36-37; Ret. Jdg. Br. 25-27; ABA Br. 11; NYC Bar Br. 36-37) that review of the President's enemy-combatant determination is analogous to review in other contexts of "jurisdictional facts" forming the predicate for executive action. That argument lacks merit.

Several of the cited decisions involve applications of the Alien Enemy Act, 50 U.S.C. 21 *et seq*., which grants the President authority to take action against enemy aliens in wartime. Courts have reviewed the "jurisdictional fact" of whether the petitioner is in fact a citizen of a hostile power and therefore subject to the President's authority under the Act. See, *e.g.*, *United States ex rel. Schwarzkopf* v. *Uhl*, 137 F.2d 898, 900 (2d Cir. 1943); cf. *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) (reviewing citizenship in immigration context). Here, however, the question whether an individual is an enemy combatant is *itself* constitutionally committed to the Executive. See *Hamdi III,* 316 F.3d at 466

("designation of * * * an enemy combatant * * * bears the closest imaginable connection to the President's constitutional responsibilities"). Congress recognized as much in supporting the President's exercise of Commander-in-Chief authority against organizations and persons "he determines" were associated with the September 11 attacks. 115 Stat. 224.

There is no comparable commitment to Executive discretion under the Alien Enemy Act of the question whether an individual is a citizen of a hostile country. Instead, the determination whether an individual is an enemy combatant is more akin to the determination under the Alien Enemy Act whether an alien is dangerous and should be removed. The accuracy of that determination falls outside judicial review. See *Ludecke* v. *Watkins*, 335 U.S. 160, 164, 170 (1948); *Uhl*, 137 F.2d at 900; see also *Hiatt* v. *Brown*, 339 U.S. 103, 108-109 (1950) (reviewing propriety of appointment of court-martial only for "gross abuse of * * * discretion" because determination committed to Executive). Here, likewise, there is no warrant for requiring that Padilla be permitted to present facts challenging the President's determination that he is an enemy combatant.

CONCLUSION

This Court should vacate the district court's orders and remand the case with instructions to dismiss the amended petition for lack of jurisdiction. In the alternative, this Court should vacate that portion of the district court's orders requiring that Padilla be afforded access to counsel and remand the case with instructions to dismiss the amended petition on the merits.

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September 2, 2003

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word-processing system used to prepare this brief, there are 6,987 words in this brief.

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