UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 03-2235

DONALD RUMSFELD,

Respondent-Appellant-Cross-Appellee,

v.

JOSE PADILLA,

Petitioner-Appellee-Cross-Appellant.

Appeal from the United States District Court
for the Southern District of New York, The
Honorable Michael B. Mukasey
Chief Judge United States District Court

Brief of Proposed Amicus Curiae Public Defender Service for the District of Columbia In Support of Response of Petitioner-Appellee Jose Padilla Regarding Proper Habeas Respondent and Personal Jurisdiction Issues

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Public Defender Service for the District of Columbia (PDS) is a federally funded agency that represents indigent defendants in the District of Columbia. As a result of the National Capital Revitalization and Self-Government Improvement Act of 1997, codified in relevant part in D.C. Code § 24-101 (2003), District of Columbia felons serve their sentences in Federal Bureau of Prisons facilities outside the territorial confines of the District of Columbia. Accordingly, PDS is litigating similar habeas jurisdiction issues in a number of courts, including the United States Court of Appeals for the District of Columbia Circuit, *see Stokes v. United States Parole Commission*, No. 01-5432 (Rehearing granted, May 8, 2003).

INTRODUCTION

This case presents an extreme set of jurisdictional facts. The government argues that it can send United States officials into the district of a United States District Judge, seize prisoners held there on that judge's warrants, remove those prisoners from the district, and then be immune from defending the legality of its conduct before the same judge. This argument contradicts modern notions about the power of federal courts and, indeed, no other civil defendant could assert that a federal court lacked jurisdiction because the defendant successfully sent its agents into the district, removed the subject of the lawsuit, and fled into another location. Ever since the Supreme Court rejected the rigid territorial rule of *Pennoyer v. Neff*, 95 U.S. 714 (1877), in favor of a functional approach to jurisdiction exemplified by *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), such arguments are doomed to failure. The same holds true in habeas: Supreme Court habeas jurisprudence has abandoned an "inflexible jurisdictional rule," *Braden v. 30th Judicial District of Kentucky*, 410 U.S. 484, 500 (1973), in favor of explicit reliance on modern principles of personal jurisdiction and service of process, *Strait v. Laird*, 406 U.S. 341, 345 n.2 (1972).

The Supreme Court rejected archaic notions of territorial jurisdiction for important policy reasons that particularly apply in habeas. Modern rules recognize that a defendant's choice to remain outside the territory should not impose an

insurmountable jurisdictional barrier to litigating in the court most connected to the parties, the witnesses, and the subject matter of the lawsuit – unless requiring the defendant to litigate in a distant place would be fundamentally unfair. *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980). Those fairness concerns are entirely absent in habeas cases like this one because it cannot be "unfair" to make the United States government, which has its own "law firm" in every judicial district and which is the real party in interest, defend a case in a United States District Court.

Instead of invoking fairness concerns, the United States relies entirely on the specter of prisoner forum-shopping – that is, the concern that, if jurisdiction exists in every United States District Court, a prisoner could select any forum in which to litigate his habeas claims. But as many courts (including this one) have found, rigid jurisdictional rules are unnecessary, since venue rules provide ample authority to prevent prisoner forum-shopping, while ensuring that the choice of forum question is resolved not only by examining the prisoner's physical location, but also considerations of convenience, the subject matter of the lawsuit, and the interests of the court.

Ironically, the government's argument creates a substantial opportunity for forum-shopping by the United States. An inflexible jurisdictional rule focusing solely on the prisoner's physical location allows the government to control the

forum in every habeas corpus case – an unprecedented power enabling the government to force prisoners to conduct habeas corpus litigation in distant, inconvenient (and potentially hostile) forums uniquely within the defendant's control. Moving Mr. Padilla from a forum where he already had a pending court case and diligent representation by counsel, to a location with no connection to the subject matter of the lawsuit and where Mr. Padilla cannot communicate with anyone, including lawyers, might suggest to a reasonable observer that that is exactly what the government is trying to do here.

Such perceptions undermine the integrity of the judicial process. The government secured Mr. Padilla's initial capture and transport to New York by invoking Chief Judge Mukasey's judicial powers, and the timing of the government's declaration of Mr. Padilla as an enemy combatant was apparently triggered by approaching hearings on motions filed by Mr. Padilla's court-appointed lawyer. *Padilla v. Bush et al.*, 233 F.Supp. 2d 564, 571 (S.D.N.Y. 2002). The government thus intricately involved the district court in the process leading to Mr. Padilla's capture as an enemy combatant. The government provided the district court with a strong institutional interest in vindicating its own processes and in ensuring that it was not used for an improper purpose. This interest, as well as the fact that the Southern District of New York was the forum where Mr. Padilla was physically located at the time of his designation as an enemy combatant and

seizure by agents of Secretary Rumseld, and where Mr. Padilla had a relationship with counsel, all strongly support Chief Judge Mukasey's determination that he had jurisdiction to hear Mr. Padilla's case.

ARGUMENT

The government advances two related arguments concerning jurisdiction. First, the government asserts that the habeas statutes, specifically 28 U.S.C. § 2243 (2003), mandate that the *only* proper respondent in a habeas action is the prisoner's immediate, physical custodian. Second, the government contends that, under 28 U.S.C. § 2241 (2003), a district court cannot exercise personal jurisdiction over a custodian located outside of its territorial district, and thus cannot exercise personal jurisdiction over the "only" proper respondent – Commander Marr.

We explain in detail below why the government's arguments cannot be squared with the controlling law. But the overarching flaw in the government's position is that its rigid formalism reflects a bygone era, incompatible with modern Supreme Court cases like *Braden v. 30th Judicial District of Kentucky*, 410 U.S. 484 (1973), which overruled and abandoned the "inflexible jurisdictional rule" set out in the earlier leading case, *Ahrens v. Clark*, 335 U.S. 188 (1948).

In *Ahrens*, 120 Germans detained at Ellis Island after World War II brought a habeas corpus action in the District of Columbia to challenge deportation orders issued by the Attorney General. Starting from the then "accepted premise that apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial," *id.* at 190, the Supreme Court construed the statutory habeas corpus phrase "within their respective jurisdictions" as limiting "the district courts

to inquiries into the causes of restraints of liberty of those confined or restrained within the territorial jurisdiction of those courts." *Id.* at 190-91.

A quarter-century later, the Supreme Court explicitly overruled *Ahrens*, concluding that, "[D]evelopments since *Ahrens* have had a profound impact on the continuing vitality of that decision." *Braden v. 30th Judicial Circuit Court*, 410 U.S. at 497. Modern notions about the ability of courts to exercise jurisdiction over persons beyond their territorial borders, as well as Congressional enactments expressly allowing other types of extra-territorial prisoner litigation, cast doubt on *Ahrens* by "recogniz[ing] the substantial advantages of having these cases resolved in the court which originally imposed the confinement or in the court located nearest the site of the underlying controversy." *Braden*, 410 U.S. at 497.

The Supreme Court thus rejected *Ahrens*' construction of the jurisdictional language in the habeas corpus statute:

> Read literally, the language of [28 U.S.C.] § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. *So long as the custodian can be reached by service of process*, the court can issue a writ "within its jurisdiction" requiring that the prisoner be brought before the Court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction.

Id. at 495 (emphasis added).[1]

[1] The government ignores this portion of *Braden* when it suggests that Chief Judge Mukasey somehow used the Rules of Civil Procedure to "extend" the jurisdiction of the habeas courts. Gov't at 31. Because *Braden* held that the

By extending a federal court's habeas jurisdiction to the limits of its ability to serve process, *Braden* shifted the focus in forum challenges to factors such as the convenience of the parties and witnesses and the connection of the underlying claim to the forum. Nonetheless, the government's interpretation of the habeas statutes depends on resurrecting the *Ahrens* formalism discarded in *Braden*. Chief Judge Mukasey was right to reject it and this Court should as well, just as it did in *Henderson v. I.N.S.*, 157 F.3d 106, 122 (2nd Cir. 1998).

A. THE SECRETARY OF DEFENSE, DONALD RUMSFELD, IS A PROPER RESPONDENT

1. Modern Rules Of Habeas And Civil Procedure Demonstrate That Secretary Rumsfeld Is A Proper Respondent.

Chief Judge Mukasey correctly determined that Secretary Rumsfeld is a proper respondent. "Section 2243 of Title 28 provides that the writ of habeas corpus 'shall be directed to the person having custody of the person detained,' but does not specify who the proper custodian is. 28 U.S.C. § 2243 (1994)."

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statutory language requires a district court to examine whether the custodian can be reached by service of process, Chief Judge Mukasey was required to look *somewhere* to resolve this question. The district court looked to the two most obvious places – the Federal Rules of Civil Procedure and the state long-arm statute – and correctly so. Indeed, it is difficult to understand how else Chief Judge Mukasey could have resolved the service of process question, and the government does not provide any answers.

Henderson, 157 F.3d at 122.[2] Other habeas corpus statutes and rules are similarly phrased broadly in terms of a "custodian,"[3] which can suggest someone with broader control and authority than a mere "turnkey," *Ahrens v. Clark*, 335 U.S. at 195 n. 3 (Rutledge, J., dissenting), and cannot reasonably mean that the "only" proper party in a habeas corpus case is the jailer to the exclusion of all others with substantially more authority and control over the prisoner's custody.

In his dissent in *Ahrens*, 335 U.S. at 199-200,[4] Justice Rutledge wrote that the statutory language is sufficiently elastic to allow even the Attorney General to be deemed the petitioner's custodian for statutory purposes: "In view of his all-pervasive control over [prisoners'] fortunes, it cannot be doubted that he is a

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[2]The Supreme Court in *Ahrens v. Clark*, 355 U.S. at 193, showed a "marked reluctance" to decide whether the Attorney General is a proper respondent in a habeas case even during a era marked by substantially more formalism than today. *Henderson*, 157 F.3d at 124. Indeed, *Henderson* suggested that *Braden* found that the Attorney General would have been a proper respondent in *Ahrens*, since the Supreme Court defended the result in *Ahrens* only on venue grounds. *Henderson*, 157 F.3d at 127 n. 24.

[3] 28 U.S.C. § 2242 (habeas application shall include "the name of the person who has custody over him and by virtue of what claim or authority, if known"); Fed. R. Civ. P. 81(a)(2) (providing that a "writ of habeas corpus, or order to show cause shall be directed to the person having custody of the person detained"); Fed. Rules Governing Habeas Corpus Cases 2 ("the application shall be in the form of a petition in which the state officer having custody of the applicant shall be named as respondent").

[4] This Court has recognized the importance of Justice Rutledge's dissent in *Ahrens* in light of the fact that *Braden* has essentially adopted Justice Rutledge's flexible approach to habeas jurisdiction questions. *Henderson*, 157 F.3d at 126 n. 20.

proper party to resist an inquiry into the cause of restraint of liberty in their cases." "Jurisdictionally speaking," wrote Justice Rutledge, "it is, or should be, enough that the respondent named has the power or ability to produce the body when so directed by the court pursuant to process lawfully issued and served upon him." *Id.* This sort of practical approach, Justice Rutledge wrote, is what courts have long followed in habeas cases, since in the 1800's it was "well known" that "the term 'jurisdiction' was often used in the sense of 'venue.'" *Id.*, 335 U.S. at 203 n. 18, *citing*, *In re Bickley*, 3 Fed. Cas. 332 (S.D.N.Y. 1865).

The Supreme Court's post-*Ahrens* jurisprudence has similarly explained that "custodian" is "sufficiently broad" to account for the practical realities of the case and the convenience of the parties and the witnesses. *Strait v. Laird*, 406 U.S. 341, 345-46 (1972). *Strait* concluded that a reservist seeking discharge as a conscientious objector whose commanding officer was stationed in Indiana could bring his habeas corpus in California, where he lived, on the theory that "Strait's commanding officer is 'present' in California through the officers in the hierarchy of the command who processed this serviceman's application for discharge." 406 U.S. at 345-46.

One year after *Strait*, *Braden* applied a similarly functional approach to the definition of "custody." Although the *Braden* petitioner was physically incarcerated in an Alabama prison, the habeas corpus action was filed in a United

States District Court in Kentucky and the *only* respondent named was the 30th Judicial District of Kentucky. 410 U.S. at 486-87. The Supreme Court nonetheless concluded that the district court in Kentucky possessed jurisdiction to hear the case. 410 U.S. a 499-501. Significantly, *Braden* says nothing about the failure to name the petitioner's immediate custodian, suggesting that, contrary to the government's assertion, the immediate, physical custodian is *not* the only proper (or even necessary) habeas respondent. Moreover, as *Braden* demonstrates, other respondents, such as the 30th Judicial District of Kentucky, *can* be named.

Braden explained that an expanding definition of "custody" in habeas doctrine required a more flexible approach to habeas jurisdiction, and to the question of the proper custodian-respondent. *Braden* reasoned that, "A . . . critical development since our decision in *Ahrens* is the emergence of new classes of prisoners who are able to petition for habeas corpus because of the adoption of a more expansive definition of the 'custody' requirement of the habeas statute." 410 U.S. at 498. With such an expanded definition of habeas "custody," *id*. at 498-99, it is not credible to claim that the *only* proper habeas respondent is *always* the prisoner's immediate, physical custodian.[5]

[5] The main case the government relies on to support its argument that the only proper respondent in a habeas case is the immediate, physical custodian is *Wales v. Whitney*, 114 U.S. 564, 574 (1885), Gov't at 16, which stands for the now-overruled proposition that a habeas petitioner admitted to bail is not "in custody" for the purpose of the habeas statutes. *Hensley v. Municipal Court, San*

In fact, the Supreme Court has decided many other habeas corpus cases involving named respondents besides the actual jailer, *e.g.*, *Garlotte v. Fordice*, 515 U.S. 39, 42 (1995) (Governor of Mississippi); *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995) (California Department of Corrections); *Wainwright v. Greenfield*, 474 U.S. 284 (1986) (Secretary of Florida Department of Corrections), and in particular armed forces secretaries. *E.g.*, *Middendorf v. Henry*, 425 U.S. 25 (1976) (Secretary of the Navy); *Strait v. Laird*, 406 U.S. 341 (1972) (Secretary of Defense); *Schlanger v. Seamans*, 401 U.S. 487 (1971) (Secretary of the Air Force); *Parisi v. Davidson*, 396 U.S. 1233 (1969) (Secretary of the Army); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (Secretary of the Air Force); *Burns v. Wilson*, 346 U.S. 137 (1953) (Secretary of Defense).

In other words, "[h]istorically, the question of who is 'the custodian', and therefore the appropriate respondent in a habeas suit, depends primarily on who has the power over the petitioner and . . . on the convenience of the parties and the court." *Henderson*, 157 F.3d at 122. Although "the custodian for habeas purposes has generally been the party in direct control of the petitioners," *Henderson* explained, "the concept of 'in custody' for habeas purposes has broadened in recent years." 157 F.3d at 124. "As a result," this Court continued, "the rules treating the immediate custodian as the only proper respondent and that person's

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Jose Milpitas Judicial District, 411 U.S. 345, 350 n. 8 (1973) (expressly overruling *Wales*).

situs as the sole correct venue have not been applied consistently or in a rigid fashion." *Id.*

Henderson's practical, flexible approach leads to the same result as an analysis under Rules 17, 19, 20 & 21 of the Federal Rules of Civil Procedure. The "Federal Rules of Civil Procedure [are] applicable as a general matter to habeas [corpus] cases," *Slack v. McDaniel*, 529 U.S. 473, 489 (2000) (applying Fed. R. Civ. P. 41 to habeas corpus cases),[6] unless applying the federal civil procedure rules would be "inconsistent with the Habeas Corpus Rules." *Woodford v. Garceau*, 123 S.Ct. 1398, 1402 (2003). The government has shown no such inconsistency here.[7]

Rules 17, 19, 20 & 21 govern the determination of the proper parties and "eliminate formalistic labels that restricted many courts from an examination of the practical factors of individual cases." Wright & Miller, *Federal Practice and*

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[6] *Miranda v. Bennett*, 322 F.3d 171, 175 (2d Cir. 2003) (reciting rule and applying Fed. R. Civ. P. 52); *Ralls v. Manson*, 503 F.2d 491, 496 n.5 (2d Cir. 1974) (concurrence) (applying Fed. R. Civ. P. 8).

[7] The Supreme Court's jurisprudence increasingly applying the Federal Rules of Civil Procedure in habeas cases stems largely from the adoption, in 1976, of Rule 12 of the Rules Governing Habeas Corpus Cases, which expressly authorizes resort to the Federal Rules of Civil Procedure whenever "appropriate." The government ignores this jurisprudence and Rule 12, relying instead on *Harris v. Nelson*, 394 U.S. 286, 295 (1969), a pre-habeas rules case, as creating some sort of presumption that the civil procedure rules should have a "very limited application to habeas corpus proceedings." Gov't at 31. This portion of *Harris* has clearly been undermined both by the adoption of Rule 12 as well as Supreme Court cases like *Slack* and *Woodford*.

Procedure § 1601 at 6 (3d ed. 2001)(discussing Rule 19). These rules ensure that persons with a meaningful stake in the litigation will be brought before the court when possible, Fed. R. Civ. P. 17 & 19, and permit the liberal joinder of parties. *Society of European Stage Authors and Composers, Inc. v. WCAU Broadcasting Co.*, 1 F.R.D. 264, 266 (E.D. Pa. 1940). Indeed, this Court rejected pre-rules cases to the contrary as products "of a formalism which we had thought long dead and interred." *Kerr v. Compagnie de Ultramar*, 250 F.2d 860, 862-63 (2d Cir. 1958).

Applying the Supreme Court's interpretation of the habeas statutes and the Federal Rules of Civil Procedure, Secretary of Defense Rumsfeld was properly named as a respondent. Secretary Rumsfeld participated personally and substantially in directing the actions that are the subject of the lawsuit, and he has ultimate control over petitioner's custody. This case originated from Secretary Rumsfeld's conduct within the Southern District of New York, and thus his conduct in that district has made it the appropriate one with respect to the location of the witnesses and evidence. Nor can Secretary Rumsfeld, who is ably represented in New York by both United States Attorneys and the Department of Justice, identify any sort of inconvenience, to himself or to the United States, from defending his conduct in the judicial district his agents entered (at his direction) in order to remove Mr. Padilla.

In addition, because this case arises out of unique, forum-related conduct, a conclusion that Secretary Rumsfeld is a proper respondent will neither increase the number of habeas petitions generally filed in the Southern District of New York nor encourage forum-shopping by habeas petitioners with little connection to the forum. By contrast, refusing to allow Secretary Rumsfeld to be named as a proper party would encourage forum-shopping by the government, which has exclusive control of who a habeas petitioner's "jailer" will be. *See Vasquez v. Reno*, 233 F.3d 688, 696 (1st Cir. 2000) (noting that Attorney General might properly be considered a respondent in a habeas corpus case if the government "spirited [the petitioner] from one site to another in an attempt to manipulate jurisdiction."). It is not coincidental that the government is seeking to transfer this action to the only circuit in which it has prevailed so far on similar issues, in *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003). Indeed, the government is pursuing a strategy of seeking to transfer many such enemy combatant cases to the same circuit. *See, e.g., Al-Marri v. Bush , et al.,* 2003 WL 21789542 (C.D. Ill. 2003) (dismissing habeas petition after petitioner transferred to naval brig in South Carolina). The government cannot have failed to realize that if it succeeds in trying *all* of these cases in one circuit, it will never create a circuit split, thereby making Supreme Court review less likely, *see* Sup. Ct. R. 10.

This case may not be fully resolved if Mr. Padilla names only his immediate physical custodian. Mr. Padilla's immediate warden is not holding him pursuant to the order of a court, but pursuant to the determination of the executive. She could thus be faced with conflicting orders – from the court and from her superior officer. It is not clear that Cmmdr. Marr could or would release Mr. Padilla even if ordered to do so by a court, because she is legally obligated to obey the orders of her superior officers. *See* 10 U.S.C. § 892 (2003). To conclude that Commander Marr is the *only* proper respondent, when, in fact, she is simply a link in the chain of command that holds Mr. Padilla, is to "exalt fiction over reality." *Strait*, 406 U.S. at 345.

2. The Case Law Advocating A More Rigid Definition Of "Custodian" Arises Out Of Concerns About Forum-shopping By Federal Prisoners In Run-Of-The-Mill Habeas Cases.

Amicus acknowledges the authority for the government's narrow definition of "custodian." In the 30 years since *Braden*, some federal courts have reverted to the formalistic jurisdictional rules of *Ahrens v. Clark*, with the District of Columbia courts leading the way. *See, e.g.*, *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 813 (D.C. Cir. 1988)(en banc)(dicta); *Meese v. Guerra*, 786 F.2d at 414 (D.C. Cir. 1986); *Monk v. Secretary of the Navy*, 793 F.2d 364, 369 (D.C. Cir. 1986). In

the early years after *Braden*, the D.C. Circuit recognized *Braden's* import,[8] perhaps most notably in *Eisel v. Secretary of the Army*, 477 F.2d 1251, 1254 (D.C. Cir. 1973), which explained that the proper forum in a habeas corpus should be determined "by analyzing the policies for and against allowing an action in a particular jurisdiction, rather than by the *blind incantation of words with magical properties, such as 'immediate custodian.'" Eisel*, 477 F.2d at 1254 (emphasis added).

Later, however, it became increasingly clear that the District of Columbia Circuit possessed unique reasons for returning to the *Ahrens* regime. As the facts of *Ahrens* demonstrate, virtually every habeas corpus case can claim some District of Columbia connection because every federal prisoner in the country is formally in the custody of the Attorney General, 18 U.S.C. § 4001(b), and the Attorney General has delegated day-to-day control over virtually every federal prisoner to the Federal Bureau of Prisons. 18 U.S.C. §§ 4001(b)(1) & 4041, 4042. Because every federal prisoner can allege some nominal D.C. connection to his habeas case, the District of Columbia courts have been especially sensitive to potential problems of caseload and prisoner forum-shopping.

[8] *See also McCall v. Swain*, 510 F.2d 167, 175-76 (D.C. Cir. 1975); *Reese v. United States Board of Parole*, 498 F.2d 698, 700 (D.C. Cir. 1974); *Wren v. Carlson*, 506 F.2d 131, 133-34 (D.C. Cir. 1974).

The District of Columbia courts have thus exploited *Ahrens*' formalistic jurisdictional analysis as a bright-line way of stopping the potentially unlimited flow of federal prisoner habeas petitions lacking any real connection to the District of Columbia. *E.g.*, *Meese v. Guerra*, 786 F.2d at 415-17; *Monk v. Secretary of the Navy*, 793 F.2d at 369. This same result should have been reached through a venue analysis. *Braden* focused on considerations of convenience to the parties and witnesses, and counseled that "in many instances the district in which petitioners are held will be the most convenient forum for the litigation of their claims." *Braden*, 410 U.S. at 500.

Courts advocating rigid jurisdictional rules, *see Vasquez v. Reno*, 233 F.3d 688, have ignored the controlling precedent in *Strait* and *Braden*, which requires a flexible assessment of jurisdictional forum rules that is "sufficiently broad" to ensure litigation in the most convenient forum. *Strait v. Laird*, 406 U.S. at 345-46; *Braden v. 30th Judicial Circuit Court*, 410 U.S. at 498-500. In addition, to the extent that these lower court cases suggest that no authority exists for allowing any party other than the warden to participate in a habeas case, they are demonstrably wrong, as shown above.

Most of the results in the government's cases can be justified under the practical approach required by *Strait* and *Braden*, and adopted in *Henderson*. *See Braden*, 410 U.S. at 500. Many of the cases invoking these formalisms involve

lawsuits in which the underlying facts have nothing to do with the desired forum, where the named respondent is only a nominal actor in the case. We know of no court that has adopted a rigid formalistic analysis on jurisdictional facts like these, in which the district court possessed a substantial connection to both the subject matter and the parties to the lawsuit. Thus, courts claiming that exercising jurisdiction in cases like this one would rewrite the habeas statutes, *see Vasquez*, 233 F.3d at 693-96, are out of step with the Supreme Court.

B. THE TRIAL JUDGE PROPERLY EXERCISED PERSONAL JURISDICTION OVER SECRETARY RUMSFELD

The lower court properly exercised personal jurisdiction over Secretary Rumsfeld. Although the government insists that the language of 28 U.S.C. § 2241 limits federal courts' ability to exercise both subject matter and personal jurisdiction, the Supreme Court rejected comparable formalistic arguments by habeas corpus respondents in cases beginning with *Schlanger v. Seamans*, 401 U.S. 487 (1971), continuing through *Strait v. Laird*, 406 U.S. 341, and culminating in *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484. The decisions in *Strait*, 406 U.S. at 345 n. 2 and *Braden*, 410 U.S. at 495, specifically, demonstrate that, far from interpreting § 2241 as a statutory limit on habeas courts' ability to exercise personal jurisdiction, the Supreme Court applies general principles of personal jurisdiction in the habeas context.

The Supreme Court's personal jurisdiction doctrine has graduated from a territorial concept of jurisdiction, *Pennoyer v. Neff*, 95 U.S. 714 (1877), to a more flexible analysis of a defendant's "minimum contacts" with the forum and whether the exercise of jurisdiction, in light of these contacts, would be consistent with "traditional notions of fair play and substantial justice," *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945). Under this framework, the Court has "consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction", *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985), looking instead to whether the defendant has "purposefully established minimum contacts in the forum State," *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 108-09 (1987) (internal quotation marks omitted).

Whether a court can exercise personal jurisdiction has become intertwined with the question of whether a defendant is reachable by service of process under Fed. R. Civ. P. 4. Wright & Miller, *supra,* § 1063 at 327. This is because Fed. R. Civ. P. 4(k)(1) provides in part that, "Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant . . . who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located." Fed. R. Civ. P. 4(k)(2) goes yet further, stating that, in a case "arising under federal law," service of a summons or an effective waiver of services is effective to establish personal jurisdiction even over

the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state "[i]f the exercise of jurisdiction is consistent with the Constitution and laws of the United States."

The Supreme Court's habeas jurisprudence makes clear that its modern doctrine of personal jurisdiction is applicable in the habeas context. As early as 1944, the Supreme Court indicated that a district court could exercise personal jurisdiction over a custodian located outside of its territorial district, provided that the custodian was reachable by service of process. In *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944), the Supreme Court explained that, "[t]he decree of the court [may be] made effective if a respondent who has custody of the prisoner is within reach of the court's process even though the prisoner has been removed from the district since the suit was begun." 323 U.S. at 307.

In *Strait*, decided one year before *Braden*, the Supreme Court reaffirmed this point. After concluding that Strait's commanding officer was "present" in California through the hierarchy of the chain of command, the *Strait* court invoked modern principles of personal jurisdiction, explaining "[t]hat such 'presence' may suffice for personal jurisdiction is well settled. *McGee v. Int'l Life Ins. Co.*, [355 U.S. 220]; *Inter'l Shoe Co. v. Washington*, [326 U.S. 310]." 406 U.S. at 345 n2. "In *Ex parte Endo* . . . we said that habeas corpus may issue 'if a respondent who has custody of the prisoner is within reach of the court's process,'" wrote the *Strait*

Court. "Strait's commanding officer is 'present' in California through his contacts in that State; he is therefore 'within reach' of the federal court in which Strait filed his petition." *Id*.

In *Braden*, the Supreme Court confirmed once again that the personal jurisdiction analysis in the habeas context is no different than in any other civil case. "So long as the custodian can be reached by service of process," wrote the *Braden* Court, "the court can issue a writ 'within its jurisdiction' requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction." *Braden*, 410 U.S. at 495.

Indeed, if, as the government claims, the language of the habeas statute, which states that district courts may grant writs "within their respective jurisdictions," 28 U.S.C. § 2241 (a), means that the reach of district courts' habeas jurisdiction is limited to their territorial districts, Gov't at 27, *Braden*'s holding that district courts possess jurisdiction to decide habeas petitions on behalf of prisoners located outside of their territorial districts would be meaningless. If the prisoner is located outside of the court's district, he will quite often, as was true in *Braden*, be in the custody of an immediate, physical custodian. At the same time, the habeas petition may test the lawfulness of the "custody" imposed by another, legal custodian, as it did in *Braden*, in which a detainer was at issue. If the district court

deciding the petition lacks jurisdiction to direct the immediate, physical custodian whether he should give effect to the challenged legal custody, then *Braden* would be meaningless.

Braden's recognition of the existence of concurrent habeas jurisdiction also undermines the government's claim that "there is only *one* district court with territorial jurisdiction in any given case." Gov't at 27. In *Braden*, while concluding that the petitioner's habeas corpus claim *could* be litigated in the district that had issued the detainer that he challenged, the Supreme Court nonetheless expressly recognized that, "Nothing in this opinion should be taken to preclude the exercise of concurrent habeas corpus jurisdiction over the petitioner's claim by a federal district court in the district of confinement." 410 U.S. at 499 n.15. The Court recognized that the choice among districts possessing jurisdiction could be made on traditional venue grounds, stating, "Where a prisoner brings an action in the district of confinement . . . the court can, of course, transfer the suit to a more convenient forum." *Id.*

Contrary to the government's claim that *Braden* only "partially" overruled *Ahrens*, leaving intact the requirement that the custodian be present in the court's territorial district, Gov't at 29, *Braden*'s discussion of how traditional venue considerations could have been applied to reach the same result in *Ahrens* also reaffirms that district courts *must* be able to reach custodians outside of their

territorial districts, because the Court describes *both* the District of Columbia and the Eastern District of New York as potential venues for the habeas case. "On the facts of *Ahrens* itself, for example," wrote the *Braden* Court, "petitioners could have challenged their detention by bringing an action in the Eastern District of New York against the federal officials who confined them in that district." 410 U.S. at 500. "No reason is apparent," the Court continued, "why the District of Columbia would have been a more convenient forum . . . ." *Id.*

Decisions of the Courts of Appeals recognizing "exceptions" to ostensibly jurisdictional rules also demonstrate that, when those courts speak of "jurisdiction," they are actually discussing bright-line venue rules. *See, e.g., McCall v. Swain*, 510 F.2d 167, 175-77 (D.C. Cir. 1975) (U.S. District Court for the District of Columbia possessed jurisdiction to determine habeas claims filed by prisoners incarcerated at Lorton, Virginia); *Demjanjuk v. Meese*, 784 F.2d 1114, 1115-1116 (D.C. Cir. 1986) (D.C. Circuit can exercise jurisdiction to determine habeas petition filed by prisoner held in undisclosed location). "If absence of the body detained from the territorial jurisdiction of the court having jurisdiction of the jailer creates a total and irremediable void in the court's capacity to act, what lawyers call jurisdiction in the fundamental sense," Justice Rutledge wrote in *Ahrens*, "then it is hard to see how that gap can be filled by such extraneous considerations as whether there is no other court in the place of detention from

which remedy might be had . . . ." 335 U.S. at 209 (Rutledge, J., dissenting). As Chief Judge Mukasey put it in the hearing on this matter on July 31, 2002, the government's jurisdictional theory "doesn't hold all the time. It holds when it's convenient; it doesn't hold when it's inconvenient." A75. Accordingly, these limiting principles cannot truly be *jurisdictional*.

In *Henderson*, this Court recognized the principles announced by the Supreme Court, explaining that under *Braden*, "a court has personal jurisdiction in a habeas case so long as the custodian can be reached by service of process." *Henderson*, 157 F.3d at 122, *quoting in part*, *Braden v. 30th Judicial Circuit Court*, 410 U.S. at 495. This Court then identified the pertinent jurisdictional question as being whether the federal courts in New York could serve process under the New York long-arm statute, N.Y. C.P.L.R. § 302(a)(1),[9] on the District Director of the Immigration and Naturalization Service, whose office was located in New Orleans, Louisiana, based on his contacts with an alien residing in the state of New York. *See Henderson*, 157 F.3d at 123-24. The Court indicated that the District Director may well have "purposely availed himself" of the privilege of conducting business

[9] That section provides, in pertinent part:

"(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domicilliary, or his executor or administrator, who in person or through an agent: (1) transacts any business within the state . . . ."

in New York, but then certified this question concerning the long-arm statute to the New York Court of Appeals.[10] *Id.* at 124.

Relying on *Henderson*, Chief Judge Mukasey also looked to § 302(a)(1) in deciding whether the Court could exercise personal jurisdiction over Secretary Rumsfeld. As the district court concluded, 233 F.Supp.2d at 587, the statutory analysis is "not complex": Section 302(a)(1) authorizes jurisdiction "over any non-domicilliary . . . who in person or through an agent . . . transacts any business within the state." N.Y. C.P.L.R. § 302(a)(1). This language "take[s] advantage of the new jurisdictional enclave opened up by *International Shoe* where the nonresident defendant has engaged in some purposeful activity in this State in connection with the matter in suit." *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc*., 261 N.Y.S. 2d 8, 18 (N.Y. 1965). The "'transacts business' clause of the long-arm statute gives New York personal jurisdiction over a non-domiciliary if two conditions are met: first, the non-domiciliary must 'transact business' within the state; second, the claims against the non-domiciliary must arise out of that business activity." *CutCo Industries v. Naughton*, 806 F.2d 361, 365 (2d Cir. 1986). Moreover, under § 302(a)(1), "proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities [in New York] were purposeful and

[10] The long-arm question was never finally resolved during the *Henderson* litigation. *See Yesil v. Reno*, 175 F.3d 287, 288-89 (2d Cir. 1999).

there is a substantial relationship between the transaction and the claim asserted." *Kreutter v. McFadden Oil Corp.*, 527 N.Y.S. 2d 195, 198-99 (N.Y. 1988). Chief Judge Mukasey was correct in applying this legal standard.

These rules provide jurisdiction over Secretary Rumsfeld because his agents entered the Southern District of New York to take custody of Mr. Padilla, and that conduct forms the subject matter of this lawsuit. Chief Judge Mukasey accordingly was undoubtedly correct when he found that jurisdiction existed under the long-arm statute over Secretary Rumsfeld and that, "There is no denial of due process in finding personal jurisdiction under the circumstances." *Padilla v. Bush et al.*, 233 F.Supp.2d at 587.

The district court would have been correct in finding personal jurisdiction over Commander Marr as well. Commander Marr took a prisoner into custody knowing that, to secure that custody, Department of Defense agents entered into the Southern District of New York and captured the prisoner, who was being held on a federal warrant there. Through this contact, Commander Marr "purposely thrust [herself] into the Southern District of New York" within the meaning of the New York long-arm statute, in such a way as to make her "present" in New York for the purpose of this lawsuit, which focuses entirely on the legality or illegality of petitioner's capture and arrest in New York.

The district court could also have reached either Secretary Rumsfeld or Commander Marr with service of process without resort to the New York long-arm statute. Among the "alternative possibilities for obtaining jurisdiction" in cases like this one, *Yesil v. Reno*, 682 N.Y.S. 2d 663, 663-64 (N.Y. 1998) (on certification from *Henderson*), is Rule 4(i) of the Federal Rules of Civil Procedure. Rule 4(i) provides specifically for the service of process upon "officers or employees of the United States" in their official capacities, and permits such service to be effected in part by "delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought . . . ." *See Zankel v. United States*, 921 F.2d 432, 434 (2d Cir. 1990); *Gargano v. Internal Rev. Service*, 207 F.R.D. 22, 22-23 (D. Mass. 2002). This provision reflects the reality that requiring the government to defend governing officials throughout the country is both fairer to citizens and not a burdensome imposition on the government. Wright & Miller, *supra,* § 1107 at 20-21 & 26 n. 23.

In other words, Rule 4(i) simply recognizes that United States officials, when sued in an official capacity, are different from private litigants, who often have tangible personal interests at stake and for whom it is more difficult to mount defenses in locations far outside their district of residence. Personal jurisdiction doctrine arises from the limits that due process places on state courts' personal

jurisdiction over individuals and corporations, and addresses concerns about the fairness of haling individual people and private corporations into courts in far-distant states. *See, e.g., Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987); *Kulko v. Superior Court of California*, 436 U.S. 84 (1978). Such fairness concerns have no force where the defendants are federal officers being summoned into a federal court to defend a case arising under federal law.

These jurisdictional facts demonstrate the wisdom of provisions like Rule 4(i). Respondents are being sued in their official capacities and cannot claim any hardship in defending themselves in New York because, as noted above, the United States is ably represented in every federal judicial district. By contrast, this case has absolutely no connection to South Carolina; indeed, the government's proffers to the district court indicate that South Carolina was selected as a place to confine Mr. Padilla precisely because he has no connections (and no lawyers) at all there. The United States is thus invoking personal jurisdiction rules here in way that seems designed to force Mr. Padilla to bring his habeas corpus case in the most inconvenient forum possible – an obviously inappropriate use of rules that were designed precisely to prevent this sort of unfairness.

CONCLUSION

Modern Supreme Court jurisprudence and this Court's decision in *Henderson* make clear that Chief Judge Mukasey's authority under 28 U.S.C. § 2241 is sufficiently broad and flexible to allow him to require Secretary Rumsfeld to defend the legality of having directed his agents to enter the district and forcibly remove a prisoner for transfer to a military prison.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6957 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B). This brief complies with the type-face requirements of Fed. R. App. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced type-face program using Word 2000 in Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

This is to certify that on the ___ day of August, 2003, a copy of the foregoing was sent postage pre-paid by Federal Express to all of the counsel of record as follows:

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