To be argued by
DONNA R. NEWMAN
ANDREW G. PATEL

In The

UNITED STATES COURT OF APPEALS

For The Second Circuit

Docket No. 03-2235
03-2438

JOSE PADILLA, Donna R. Newman,
as Next Friend of Jose Padilla,

Petitioner-Appellee-cross-Appellant,

V.

DONALD RUMSFELD,

Respondent-Appellant-cross-Appellee.

On Appeal from the United States District Court
for the *Southern District of New York*

PETITIONER-APPELLEE-CROSS-APPELLANT RESPONSE BRIEF

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PRELIMINARY STATEMENT

Petitioner-Appellee-Cross-Appellant, Jose Padilla, by his next friend, Donna Newman, filed a petition for writ of habeas corpus in the United States District Court of the Southern District of New York seeking relief from his unlawful detention by the military and access to his attorneys to enable him to prosecute his habeas petition. The within is Padilla's Response Brief in support of his cross-interlocutory appeal of the Honorable Chief Judge, Michael B. Mukasey's order and decision of appeal December 4, 2002, reported at 233 F.Supp.2d 564, denying respondent's motions to dismiss the petition and the district court's order of March 11,2003, reported at 243 F.Supp. 2d 42, granting respondent's motion for reconsideration but adhering to the court's initial order. The district court, on April 9, 2003, entered an opinion and order, reported at 256 F.Supp.2d, 218, certifying six questions for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Padilla in his Opening Brief filed with this Court addressed questions numbered 3 and 4 in the court's April 9th order.2003 WL 1858157 *3. This Response Brief addresses the remaining questions.

Questions Presented

1. Is the Secretary of Defense, Donald Rumsfeld, a proper respondent in this case?
2. Does this court have personal jurisdiction over Secretary Rumsfeld?

3. Does petitioner have the right to present facts in support of his habeas corpus petition?

4. Was it a proper exercise of this court's discretion and its authority under the All Writs Act to direct that petitioner be afforded access to counsel for the purpose of presenting facts in support of his petition?

SUMMARY OF ARGUMENT

The Government's opening brief demonstrates with startling clarity the desperate lengths to which the Government is willing to go to evade judicial review of its decision to hold Jose Padilla in indefinite solitary confinement without hearing, without counsel, and without access to court. Rather than responding to Padilla's core claims of constitutional rights, the Government raises a number of red herrings in an attempt to postpone and delay the day in court that is Padilla's due under the Constitution. As the Supreme Court has said,

> "[t]he scope and flexibility of the writ [of habeas corpus] - its capacity to reach all manner of illegal detention - its ability to cut through barriers of form and procedural mazes - have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected."

Harris v. Nelson, 394 U.S. 286, 291 (1969). The Government attempts to defeat Padilla's habeas petition by erecting a procedural maze

of new and unduly technical rules on "next friend" status, jurisdiction and access to counsel, all of which have only one goal: to prevent this Court from hearing Padilla's side of the story and ruling on the merits of his case.

First, although the district court did not even certify for interlocutory appeal the question of Donna R. Newman's qualification to act as a "next friend", noting that there could be no serious dispute on that issue, the Government once again attempts to resurrect its rejected arguments on this score. It is the Government's own actions in keeping Padilla locked-up incommunicado that have created the incapacity that prevent him from filing a habeas petition on his own behalf. If the Government would allow Padilla to read and sign his own habeas petition, the issue would not even exist. But given that the Government insists on gagging Padilla himself, his attorney Donna R. Newman is the logical person to bring this suit; she had already spent many hours meeting and working with him in an attempt to get him released even before he was moved away to the Naval Brig. Under the circumstances this Court should not sanction the Government's attempt to thwart Padilla's best chance of access to court.

Second, the Government attempts to erect another layer in its procedural maze by arguing for new and rigid rules on the identity of the proper respondent, jurisdictional rules that would allow Government forum shopping at will, while defeating the prisoner's access to court. It bears recollection that the Government brought

Padilla into the Southern District of New York and held him there, only to move him away to another state on the eve of his hearing. Contrary to the Government's claim, under settled law a habeas petitioner's "immediate custodian" is not the only proper respondent, *Braden v. 30th Judicial Circuit Court*,410 U.S. 484 (1973); nor must a habeas respondent be physically present in the district where the federal court sits *see Strait v. Laird*, 406 U.S. 341 (1972). The Government's challenge to the district court's ruling that jurisdiction lies in this district rests upon a pair of rigid, formulary precepts which it says are binding edicts in all federal habeas corpus proceedings. Gov't Br. 15-31. Underlying these two purported precepts is a more basic conception: that federal habeas corpus practice is a creature of mechanistic, technical rules - of "stifling formalisms" and "arcane and scholastic procedural requirements," *Hensley v. Municipal Court*, 411 U.S. 345, 350 (1973), lacking equally in flexibility and practicality. Such a conception has been repeatedly rejected by the Supreme Court of the United States, *see, e.g., Jones v. Cunningham*, 371 U.S. 236, 243 (1963); *Harris*, 394 U.S. at 291 (1969), as have both of the Government's "rules" about the identity and location of a proper respondent in a habeas suit. The district court here properly held that Secretary of Defense Donald Rumsfeld is a proper respondent under the circumstances presented, and that under those circumstances the district court had personal jurisdiction over Secretary Rumsfeld.

Third, the Government relies on inapposite cases and vague references to the "Law of War" to support its claims that Padilla should have no access to counsel and no right to present facts in support of his petition. Not only were the prisoners in most of the cases cited by the government given access to counsel, and the opportunity to contest their treatment, these cases also involve fundamentally different circumstances of persons either in the armed forces of a sovereign state or captured on the field of battle. The district court's decision that Padilla has the right to submit facts in support of his habeas petition and that he has the right to consult with counsel should be affirmed.

ARGUMENT

Point I

DONNA R. NEWMAN IS AN APPROPRIATE "NEXT FRIEND"

In the Order certifying this matter for interlocutory appeal the district court correctly refused to certify the "next friend" issue noting that its finding that Ms. Newman could act as "next friend" was "a ruling that I cannot imagine will be open to serious question" *Padilla v. Rumsfeld, 256 F.Supp. 2d 221,(S.D.N.Y. 2003)(hereinafter, Padilla III).*

A habeas petition must be "signed and verified by the person for whose relief it is intended or by someone acting in his behalf." 28 U.S.C. § 2242 (2003). When the detained person is unable to sign the petition himself the statute permits "someone acting in his behalf" to sign and verify the writ as "next friend".

The "next friend" may bring the petition on behalf of the party seeking relief if the "next friend" can show why the true party in interest is unavailable and that the "next friend" has a significant relationship with the true party in interest. *Whitmore v. Arkansas*, 495 U.S. 149 (1990)[1]. "These limitations on the 'next friend' doctrine are driven by the recognition that it was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves "next friends". *Id.* at 164(internal citations omitted). The "next friend" brings the suit on behalf of the true party in interest and "resembles an attorney, or a guardian ad litem, by whom a suit is brought or defended in behalf of another." *Morgan v. Potter*, 157 U.S. 195, 198 (1895).

It is undisputed that Ms. Newman was assigned to represent Padilla when he was first brought into the Southern District of New York on a Material Witness Warrant. It is also undisputed that pursuant to the constitutionally protected attorney-client relationship, Ms. Newman met for many hours with Padilla, prepared and filed motions on his behalf, met with his family and appeared in court for Padilla.

In light of these undisputed facts, the Government's objection to Ms. Newman acting as "next friend" lacks merit. The Government

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[1] The Government does not dispute that the first *Whitmore* prong is satisfied by its incommunicado detention of Padilla making him unavailable to personally sign and verify the petition.

argues that Ms. Newman's representation of Padilla was of insufficient duration to permit her to act as "next friend." Gov't Br. at 31. No case cited by the Government, or that counsel is aware of, requires that an attorney-client relationship exist for a specified period of time before the attorney is qualified to act as "next friend" for a client who is unable to or is prevented from signing a petition. Such a requirement misconstrues the need for a "next friend" to have significant relationship which is required, not to limit this role to family members or long term associates, but to insure that valid matters were zealously litigated and to prevent a flood of litigation in the guise of habeas petitions by those interested in a particular issue or cause but who had no real tie to the person whose rights were at stake. *Whitmore* at 495 U.S. 164.

The Government does not dispute that Ms. Newman had an attorney-client relationship with Padilla. "It is difficult to conceive of more intimate human relationships which must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme than attorney-client relationships." *Johnson v. City of Cincinnati,* 119 F. Supp. 2d 735, 742 (S.D.Ohio,2000)(internal quotations omitted). The effectiveness of the attorney-client relationship is immediate. "Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes

effect." *Patterson v. Illinois,* 487 U.S. 285, 290 (1988).

The existence of an attorney-client relationship is the basis for Ms. Newman's "next friend" status. In *Hamdi v. Rumsfeld*, 294 F.3d 598 (4th Cir. 2002)*(Hamdi I)* the Public Defender was found not to be an appropriate "next friend" because "[i]n seeking to be appointed as Hamdi's next friend, the Public Defender conceded that he had no prior relationship or communication with the detainee." *Hamdi I* at 601. The critical issue in *Hamdi I* was the complete lack of a prior attorney-client relationship. The Fourth Circuit stated: "We are not saying that an attorney can never possess "next friend" standing, or that only the closest relative can serve as next friend." *Hamdi I* 294 F. 3d at 607. *See*, *also Warren v. Cardwell*, 621 F.2d 319 (9th Cir. 1980)(an attorney who had never met the client was nonetheless permitted to file a habeas petition as "next friend" and was not an uninvited meddler). Ms. Newman by contrast, did have a pre-existing attorney-client relationship with Padilla before he was taken away to the Naval Brig, and the Government cannot destroy that relationship by locking Padilla up incommunicado.

The Government speculates that a family member could serve as "next friend" in Ms. Newman's place. Govt' Br. at 35. The fact that some other person, who has not yet come forward, might also qualify as a "next friend" does not mean that Ms. Newman is not qualified to serve as "next friend." No court has established a hierarchy of potential "next friends." There is no best "next friend."

The *Whitmore* court explained that a significant relationship was required between the "next friend" and the true party in interest to insure that the matter would be zealously litigated and to ensure that intruders or uninvited meddlers do not clog federal courts with litigation over pet causes. There has been no suggestion that Ms. Newman has not prosecuted this matter vigorously or that she is intruding on this matter for any reason other than the defense of her client's right to be free from unlawful detention. Ms. Newman has undertaken this matter as "next friend" only because she believes it is in her client's best interest to do so. Under the specific facts of this case, Ms. Newman is a perfectly appropriate "next friend", and the district court's ruling to that effect should be affirmed.

Point II

THE DISTRICT COURT'S RULING THAT SECRETARY OF DEFENSE, DONALD RUMSFELD, IS A PROPER RESPONDENT IN THIS CASE SHOULD BE AFFIRMED

The habeas corpus statute states: "The writ, or order to show cause shall be directed to the person having custody of the person detained." 28 U.S.C. § 2243(2003). In the run of the mill case where the federal petitioner is incarcerated in a federal prison and is challenging something other than his conviction or sentence, the appropriate respondent is the warden of the penitentiary in which the petitioner is housed.[2] *Guerra v. Meese*, 786 F.2d 414, 416

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(D.C. Cir. 1986). This general rule, commonly referred to as the "immediate custodian"[3] rule is not a hard-and-fast rule and does not apply to Padilla whose case falls outside the norm. Padilla is a civilian citizen detained by the military. He has not been convicted or even charged with a crime. He is being detained pursuant to the President's Order and his detention continues at the whim of Secretary of Defense Rumsfeld.

The district court recognized that this case is not the usual habeas corpus case, and found that the "immediate custodian" rule does not control who is an appropriate named respondent. *Padilla v. Bush*, 233 F. Supp.2d 564,578-582(S.D.N.Y. 2002)(*Padilla I).* The particular facts presented here are not merely "very special" *id.* at 582-583, but practically unique.. The court observed that in the usual case where the federal petitioner is serving a sentence and his contacts with those authorities responsible for his incarceration has ended, the proper respondent is the warden. *Id.* at 579. Here, Padilla is not serving a sentence and the

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Among the "usual" prison cases falling within this category are: challenges to parole board decisions, challenges to the conditions of confinement, military cases(including challenges to court-martial convictions and petitions by services members for discharge from the military), extradition cases, immigration cases and interstate detainer cases.

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The Government in their brief also uses the phrase, "person in charge of the detainee on a day-to-day basis" for the "immediate custodian." *See* Gov't Br. at 20.

authorities, responsible for his incarceration, including Secretary of Defense Rumsfeld, have a substantial and ongoing role in his continued incarceration. *Id*. at 581. Based on the Secretary of Defense's own statements,[4] the district court found that it was Secretary Rumsfeld who determined where Padilla was to be held, and who would determine whether or when Padilla could be released or even charged with a crime. As the court observed: "This level of personal involvement by a Cabinet-level officer in the matter at hand is, so far as I can tell, unprecedented." *Id*. at 581. The district court noted that a more flexible approach has been suggested by courts, including the Second Circuit examining the issue of who is an appropriate respondent based on consideration of the direct involvement of a custodian other than the jailer or where the facts presented are unique. *Id*. at 579-581, *citing, Henderson v. INS,* 157 F.3d 106 (2d Cir. 1998)(*cert. denied*, 526 U.S. 1004 (1999)*); Eisel v. Sec'y of the Army*, 477 F.2d 1251, 1254 (D.C. Cir. 1973); *Demjanjuk v. Meese*, 784 F.2d 1114(D.C. Cir. 1986)(Bork, J. in chambers)).“Historically, the question of who is 'the custodian', and therefore the appropriate respondent in a

[4] The district court referenced a June 12, 2002 news briefing of Secretary Rumsfeld in which the Secretary explained the interest in Padilla was for intelligence and went to great lengths to distinguish the way he intends to handle Padilla from the usual case, i.e. Padilla would not be charged and brought to trial but rather, all efforts would be made to extract information from him. *Padilla I* at 573-74.

habeas suit, depends primarily on who has the power over the petitioner and ... on the convenience of the parties and the court." *Id*. at 580 *(quoting*, *Henderson* 157 F. 3d *at* 122).

According to the Government, the only appropriate respondent in this case is Commander S.A. Marr, the commander of the United States Navy Consolidated Brig at Charleston, where Padilla was brought under the order of Secretary Rumsfeld. Gov't Br. at 15. The Government also argues that the district court improperly relied on factual considerations in ruling that Secretary Rumsfeld is Padilla's actual custodian. Gov't Br. at 15, 23-24. The Government insists section 2243's phrase to the "person having custody" must be read as the "immediate custodian" and that there can be only one custodian, no one higher in the chain of command. Gov't Br. at 15-24.

Nowhere does the statute speak of an "immediate custodian" or intimate that an action must be instituted in the location of such an "immediate custodian." *Eisel*, 477 F.2d at 1261.("Th[e] search for the proper 'custodian' is not merely unproductive, it is not required by law.") Section 2243 does not define 'custody' or specify who the person having 'custody' will be." *Nwankwo v. Reno*, 828 F.Supp. 171, 174 (E.D.N.Y. 1993); *see also* Advisory Committee Notes, section 2254 Rule 2 (indicating that the concept of "custody" has been enlarged significantly and suggesting a variety of situations which might arise and who should be named as

respondents for each). In *Braden,*[5] petitioner's immediate custodian was not within the territorial border of the forum court and the court did not consider whether petitioner's jailer was the proper respondent or some other official in Kentucky.

The Government's formalistic approach to questions of habeas jurisdiction has been consistently rejected by the Supreme Court in favor of a flexible approach. *See, e.g., Braden* 410 U.S. at 499-500 ("In view of the[se] developments since *Ahrens v. Clark* [335 U.S. 188 (1948)], we can no longer view that decision as establishing an inflexible jurisdictional rule, dictating the choice of an inconvenient forum even in a class of cases which could not have been foreseen at the time of our decision.)*; Jones*, 371 U.S. at 243. (The writ "is not now and never has been a static, narrow, formalistic remedy..."); *Harris* 394 U.S. at 291("The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.)"; *Carbo v. United States*, 364 U.S. 611,621(1961) [w]ithin the modern attitude adopted in *Ex parte Endo*, 323 U.S. 283 (1944), rigid formulae, even as to the

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The petitioner in *Braden* was confined in an Alabama state prison under an Alabama state felony conviction. He sought habeas corpus relief in the Kentucky federal court attacking a three year old Kentucky indictment. Thus, his immediate custodian was the warden of the Alabama state prison, although clearly an alternative custodian was an official in Kentucky.

issuance of the Great Writ, may be tempered by factual considerations ..."); *Wade v. Mayo*, 334 U.S. 672, 681 (1948)(warning that "the flexible nature of the writ of *habeas corpus* counsels against erecting a rigid procedural rule that has the effect of imposing a new jurisdictional limitation on the writ.").

This Court has likewise recognized that a flexible approach to habeas jurisdiction is warranted where the "immediate custodian" rule does not practically fit within the circumstances of the case. *E.g., United States ex rel. Sero v. Preiser*, 506 F.2d 1115(2d Cir. 1974)(habeas jurisdiction found to lie in the Southern District of New York although some members of the class of juvenile petitioners were no longer in custody or had not been convicted within the Southern District of New York); *Arlen v. Laird*, 451 F.2d 684 (2d Cir. 1971)(habeas jurisdiction found to lie in New York for unattached inactive reservist although his nominal "commanding officer" was not physically present within the jurisdiction.).

In *Henderson* this Court carefully considered whether in alien removal cases the appropriate respondent should generally not be the "immediate custodian". *Henderson,* 157 F.3d 106. Although this Court declined to decide the issue, in *dicta* the Court made particular note of the pervasive role the Attorney General plays in immigration matters and found this to be a persuasive factor weighing in favor of finding the Attorney General as a proper

respondent.[6] *Id.* at 126. The Court considered significant that the Attorney General makes the ultimate determination as to an alien's detention and removal and that it is within the Attorney General's power to direct subordinates to carry out an order to produce or release the alien. *Id.* In recognizing the need for flexibility when considering who is the proper respondent, and therefore which court should assert jurisdiction, the Court stated:

> While ... the custodian for habeas purposes has generally been the party in direct control of the petitioners, it is also true that the concept of "in custody" for habeas purposes has broadened in recent years. *See Billiteri*, 541 F.2d [938],948 [(2d Cir. 1976)]. This appears to have occurred, at least in part, because of increasing practical problems that allegedly attach to the traditional approach. As a result of these concerns, the rules treating the immediate custodian as the only proper respondent and that person's situs as the sole correct venue have not been applied consistently or in a rigid fashion.

Henderson, 157 F.3d at 124. There can be little doubt that Secretary Rumsfeld's intimate involvement in this unique case is much greater than the Attorney General's involvement in run-of-the-mill immigration cases.

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[6] The majority of the district courts in this district which have considered the issue have determined that the Attorney General is a proper respondent in an alien detainee case for the reasons espoused in *Henderson*. *See*, e.g., *Mojica v.* Reno, 970 F.Supp. 130, 166 (E.D.N.Y. 1997); *Nwankwo v.* Reno, 828 F.Supp. 171, 174 (E.D.N.Y. 1993);*Wilson v. Reno*, 2003 U.S.Dist. LEXIS 8691,*10 (S.D.N.Y., May 16, 2003) Cinquemani *v. Ashcroft*, 2001 U.S.Dist.LEXIS 12163*8 (E.D.N.Y., August 16, 2001).

It has also long been recognized that there can be more than one custodian and that an appropriate respondent can be a cabinet member or the highest officer in the chain of command.[7] *See, e.g.*, *Ex parte Endo*, 323 U.S. at 304-305(the writ can be directed to Secretary of the Interior or any official of the War Relocation Authority, including any assistant to that agency)*; Strait,* 406 U.S. at 346(commanding officer present through the officers in the hierarchy of the command)*;Ex Parte Hayes*, 414 U.S. 1327, 1328 (1973)(jurisdiction may be based upon the location of the petitioner's commanding officer or others within the commanding officer's chain of command);Lee *v. United States*, 501 F.2d 494, 501 (8th Cir. 1974)(both the warden of the penitentiary in Indiana and the Board of Parole in Washington, D.C. are petitioner's custodians);*Carney v. Sec'y of Defense*, 462 F.2d 606, 607 (1st Cir. 1972)(Secretary of Defense and Secretary of the Navy); *Mojica,* 970 F.Supp. at 166 (E.D.N.Y. 1997)(petitioner has several custodians, including the Attorney General).

In the military context because of legal "chain of command" issues it is customary to name as respondent the Secretary of

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[7] The Government argues that custodian is singular. However, the use of the word custodian in other contexts, e.g., "custodial parents" has been interpreted to describe either of two (or even more) parents. *Chavez-Rivas v. Olsen,* 194 F.Supp. 2d 368, 375 (D.N.J. 2002), (citing to eleven cases).

Defense or applicable Service Secretary.[8] *See, United States ex rel. Toth v. Quarles,* 350 U.S. 11 (1955)(Secretary of the Air Force); *Burns v. Wilson*, 346 U.S. 127 (1953)(Secretary of Defense); *Lantz v. Seamans*, 504 F.2d 423, 424 (2d Cir. 1974) (Secretary of Air Force), *Middendorf v. Henry*, 425 U.S. 25 (1976) (Secretary of the Navy); *Schlesinger v. Councilman*, 420 U.S. 738 (1975) (Secretary of Defense); *Secretary of the Navy v. Avrech*, 418 U.S. 676 (1974); *Strait v. Laird, 406 U.S. 341 (1972)(Secretary of Defense).* When it has suited the Government, they have argued in favor of having a member of the executive branch named as a respondent. *See e.g., Parisi v. Davidson*, 396 U.S. 1233, 1234 (1969)*; see also, Gill v. Imundi*, 715 F.Supp. 592 (S.D.N.Y 1989)(Government argued against the "immediate custodian" *rule.).* Also, in *Hamdi v. Rumsfeld*, 316 F.3d 450(4th Cir. 2003), Secretary Rumsfeld has been named as a respondent without objection raised by the Government.

Indeed, the Government concedes courts have found the "immediate custodian" rule inapplicable in certain circumstances.[9]

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[8] *Monk v. Sec'y of the Navy,* 793 F.2d 364 (D.D.C. 1986), concerns a member of the prisoner's challenge to his court-martial conviction and thus, in that respect falls within the general category. For that reason, it is unavailing here and the Government's reliance is misplaced.

[9] Even in those cases which the Government relies upon for a holding of a strict application of the "immediate custodian" rule, the Court has recognized exceptions to the rule exist. Gov't Br. at

Gov't Br. at 20-23; fn at 30. The Government claims those cases are fact-sensitive and thus, do not establish an exception to the "immediate custodian" rule. The fact-sensitive nature of the inquiry demonstrated by those cases actually lends support to the district court opinion.

The Government also points to this Court's decision in *Billiteri* as precedent for a clear statement that the "immediate custodian" rule must be followed in all prison cases. Gov't Br. at 20. In *Billiteri*, this Court applied the "immediate custodian" rule when the petitioner's habeas claim was made while he was incarcerated on an underlying sentence imposed by a court but the relief sought concerned the Parole Board's calculation of his release date. *Billiteri*, 541 F.2d at 948. The *Billiteri* Court, however, limited its holding to the specific facts before it, acknowledging that there may be other circumstances, such as "when the Board itself has caused a parolee to be detained for violation of his parole," in which the parole board would be the proper respondent. *Id*. The Supreme Court in *Jones*, endorsed a similar notion, remanding the case to the district court with directions that it grant petitioner's motion to add the members of the Parole Board as respondents because "they can be required to do all things necessary to bring the case to a final adjudication." 371 U.S. at

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24, citing to *Guerra v. Meese*, 786 F.2d 414, 417 (D.C. Cir. 1986) and *Vasquez v. Reno,* 233 F.3d 688,696 (1st Cir. 2000).

244. Other Circuits have followed this sort of flexible approach. In *Bennet v. Soto*, the Third Circuit held that "[t]he custodian is the person responsible for the prisoner's incarceration and that term is not limited to the warden of the prison where the prisoner is located" 850 F.2d 161 (3d Cir.1988). Further the Bennet Court stated that where petitioner's challenge is to the Board's revocation of his parole, the chair of the Board of Parole is the appropriate respondent. *Id.* The Eighth Circuit and Tenth Circuit have held that the Parole Commissioner is the proper respondent even in cases where the challenge is to the determination of the parole date. *McCoy v. United States Bd. Of Parole,* 537 F.2d 962, 964-65 (8th cir. 1976); *Dunne v. United States Parole Comm'n*, 818 F.2d 742, 744 (10th cir. 1987).

Furthermore, contrary to the Government's assertion, *Billiteri* simply does not enact a hard-and-fast rule about who is the proper custodian. The *Henderson* Court observed that *Billiteri* did not detract from its suggestion that the Attorney General may in fact be the appropriate respondent in alien removal cases because this suggestion was in accord with *Billiteri's* observation that the "immediate custodian" rule must bend to reality and practicality. *Henderson* 157 F. 3d at 126 n.22. In any event, the facts of this case are not within the compass of the *Billiteri* holding. The parole board's power to continue or terminate detention is subject to carefully crafted procedures: no such procedures constrain

Secretary Rumsfeld's disposition of Padilla's fate.

The Government also relies heavily upon the 1885 Supreme Court case *Wales v. Whitney*, 114 U.S. 564, 574 (1885). Gov't Br. at 16. Their reliance is misplaced. First, the *Wales* Court's mention of the "immediate custodian" rule was based on an out-dated concern with the individual's ability to "produce the body of such party before the court". Gov't Br. at 16, 24 (quoting *Wales* at 574). This concern has not been relevant since the Supreme Court determined the physical presence of the prisoner in the courtroom was no longer necessary in most habeas petitions. *See, Walker v. Johnston*, 312 U.S. 275 (1941). Second, the language in *Wales* cited by the Government as the basis for the "immediate custodian" rule: "All these provisions [the habeas statute] contemplate a proceeding against some person who has the immediate custody of the party detained," *Wales*, 114 U.S. at 574, read in context, does not support the Government's interpretation. The petitioner in *Wales* was a navy surgeon who brought a writ of habeas corpus seeking release from the Secretary of the Navy's order that he remain in Washington, D.C. The Supreme Court concluded the surgeon was not in "custody" for purposes of the habeas statute because he was free to roam the streets of Washington. *Id*. The reference to "immediate custody" was to the temporal nature of the custody as opposed to the physical custody or the identity of the custodian. *Wales* never addressed the question of the identity of the respondent and,

significantly, nowhere suggested that had Wales been in custody the Secretary of the Navy would not be the proper respondent. *See*, *Custodian of an INS Detainee? Personal Jurisdiction the 'Immediate Custodian' Rule in Immigration-Related Habeas Actions*." 27 N.Y.U. Rev. L. & Soc. Change 543, 573(2001/2002).[hereinafter "*Rosenbloom Article*"].

Beyond the numerous factors which weigh against the application of the "immediate custodian" in this case, is the inability of Commander Marr to deliver "the body,"[10] the primary basis for the Government's argument that Commander Marr must be the named respondent. Gov't Br. at 13,24. Commander Marr has sworn to follow the orders of her commanding officer, to do otherwise is to risk of her own court-martial.[11] *See,* 10 U.S. C. § 892, Article 92 & Article 96[12]. Historically, the military has refused to obey court

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[10] The Government's emphasis on delivery of the body is an antiquated interpretation of the habeas statute. *Braden* was not concerned with who had actual physical custody of the "body" but rather who could free the petitioner. *Braden*, 410 U.S. at 495. The reference was constraint in a legal rather than a physical sense and citations to the older cases about the "jailer" must be read as merely metaphorical. *Rosenbloom Article*, at 575.

[11] Petitioner adopts the arguments of amici curiae National Association of Criminal Defense Lawyers et al at 11-17.

[12] Article 92-Failure to obey order or regulation
Any person subject to this chapter who-
(1) violates or fails to obey any lawful general order or regulation;
(2) having knowledge of any other lawful order issued by a

orders which conflict with orders received from their commanding officer. *See Ex parte Merryman*, 17 F.Cas. 144 (1861)(Taney,C.J.)(commander of Fort McHenry refused to comply with writ of habeas corpus directing him to produce military detainee, Merryman, on the grounds that he acted under order of President Lincoln); *see also*, *Mounce v. Knighten*, 503 F.2d 967, 969 (5th Cir. 1974)(remanding for a factual investigation of whether named custodian "has the authority to produce [petitioner] in court or to release him should the court so order".).

Finally, it is interesting to note that the Government contends that the *Braden* court did nothing more than adopt the dissenting opinion of Justice Rutledge in *Ahrens.* Gov't Br. at 30. The *Ahrens* petitioners were aliens held at Ellis Island in New York pending deportation and they filed a habeas petition in the District Court of the District of Columbia, naming the Attorney General as respondent. *Ahrens,* 335 U.S. 188 (1948). The *Ahrens* court dismissed the petition finding jurisdiction lacking because petitioner were not physically within the forum state. *Id*. Justice Rutledge,

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member of the armed forces, which is his duty to obey, fails to obey the order; or
..... shall punished by as a court-martial may direct.

Article 96-Releasing prisoner without proper authority
Any person subject to this chapter who without proper authority, releases any prisoner committed to his charge,... shall be punished as a court-martial may direct, whether or not the prisoner was committed in strict compliance with law.

speaking to the specific situation of the petitioners said: "in view of [the Attorney General's] all-pervasive control over their fortunes, it cannot be doubted that he is a proper party to resist 'an inquiry into the cause of restraint of liberty' in their cases.'" *Id.* at 200. Justice Rutledge's opinion foreshadowed the the *Henderson* Court's observations and clearly demonstrate that in this case the Secretary of Defense is the appropriate respondent.

In sum, the settled case law support the district court's ruling that in this unique case, the commander of the brig is not necessarily the proper respondent, and that Secretary Rumsfeld is the appropriate respondent. The district court was correct to consider both the nature of the case and the nature of Secretary Rumsfeld's pervasive involvement. It was the Secretary of Defense to whom the President directed his Order of June 9, 2002, and it was the Secretary of Defense who the President directed" to receive Padilla from the Department of Justice and to detain him." (JA 51). Not only did Secretary Rumsfeld seize Padilla as directed but he determined the facility at which Padilla would be detained, the conditions of Padilla's detention i.e. incommunicado, and ultimately if Padilla will ever be released. Padilla's placement in the brig is due to the Secretary's intervention and it is the Secretary's intervention which will release him from the brig. The Secretary is Padilla's custodian for habeas corpus purposes. The district court's ruling should be affirmed.

POINT III

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IS A PROPER FORUM FOR THE CASE.

A. Jurisdiction is Proper in the Southern District of New York

The district court ruled that, consistent with settled Second Circuit authority and by application of New York's Long Arm statute, N.Y. C.P.L.R. § 302(a)(1)(McKinney 2003),the district court could assert personal jurisdiction over Secretary Rumsfeld. *Padilla I,* 233 F.Supp. 2d 583-87. The Government erroneously reads the statute to require the physical presence of the custodian within the territory in which the court sits, Gov't Br. at 27,[13] but that is simply not the rule. As the district court stated, the Government's reading of the statute is inconsistent with governing authority. *Padilla I,* 233 F.Supp. 2d at 583.

In *Ahrens v. Clark*, 335 U.S. 188 (1948), the Supreme Court

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[13] The Government misleads the Court by its reference to statements made by Senator Trumbulls during the debate on the 1867 habeas corpus statute. Gov't Br. at 27. At that time there was concern about the security and cost transporting petitioners to the jurisdiction from which the conviction was imposed from a far away jurisdiction. *Braden*, 410 U.S. at 496, *citing*, Cong. Globe, 39th Cong., 2d sess., 730. These concerns, in part, underlie the Supreme Court's decision in *Ahrens. Ahrens*, 335 U.S. at 191. However, the Ahrens inflexible approach proved unworkable and Congress amended the statute to require collateral attacks to be brought in the sentencing court but not to require the production of the prisoner where the petition could be resolved without the need of a hearing. *See, Braden*, 410 U.S. at 5997-98 & n.12 & 13; 28 U.S.C. 2255, 2243. These amendments undercut the earlier version of the statute and therefore, the Senator's comments no longer have any relevance to habeas jurisprudence. *See Braden* at 498-500.

held, as the Government here argues, that habeas jurisdiction lies only in the district where the petitioner is physically imprisoned. But in *Braden*, the Court expressly overruled Ahrens stating:

> § 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.

410 U.S. at 495.

The Government cites *Schlanger* v. *Seamans,* 401 U.S. 487 (1971) for the requirement that "the absence of [the] custodian is fatal to jurisdiction." Gov't Br. at 26. The Government's reliance on *Schlanger* is misplaced. One year after deciding *Schlanger,* the Supreme Court explicitly held in *Strait* that"[t]he jurisdictional defect in *Schlanger*, however, was not merely the physical absence of the Commander of Moody AFB from the District of Arizona, but the total lack of formal contacts between *Schlanger* and the military in that district." *Strait*, 406 U.S. at 344. The *Strait* Court went on to explain the importance of a contact analysis has previously been stressed by the Court.

> In *Ex parte Endo*, 323 U.S. 283, 307, we said that habeas corpus may issue if a respondent who has custody of the prisoner is within the reach of the court's process. 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. at 346 n.2 (internal citations omitted). The Supreme Court reiterated this point two years later in *Braden*, finding that so long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction." *Braden*, 410 U.S. at 495. *Braden* thus reinforced the service of process rule from *Strait* which does not require the custodian's actual physical presence to be within the territorial jurisdiction of the court.

This Court has consistently interpreted *Braden* to require only that the custodian be reachable by the state's long-arm statute. In *Ex rel Sero*, this Court stated: "We think it clear, from both the [*Braden*] Court's language and the language of § 2241(d), that it makes more sense to read this section [§ 2241(a)] as a provision fixing venue and aimed at problems of judicial administration whose solution lie in the balance of convenience among various courts. 506 F.2d at 1128, *citing Developments in the law – Federal Habeas Corpus*, 83 Harv. L. Rev. at 1161-65 (1970); see also *Chavez-Rivas*, 194 F.Supp.2d 368, 374 (D.N.J. 2002). This Court in *Henderson* likewise read *Braden* to extend jurisdiction to the extent of the state's long arm statue. 157 F.3d at 122-123,128. Courts in this Circuit and others have obtained habeas jurisdiction over out-of-state habeas respondents through the state's long-arm statute. *See, e.g., Perez v. Reno*, 2000 U.S. Dist. LEXIS 7228 (S.D.N.Y. May 25,

2000)(New York Long Arm statute); *Farah v. INS*, 2002 WL 31828309 at *2 (D.Minn. Dec 11, 2002)(Minnesota long-arm statute); *Barton v. Ashcroft*, 152 F.Supp. 2d 235, 238-39 (D.Conn. 2001); *Roman v. Ashcroft*, 162 F.Supp. 2d 755, 759 (N.D. Ohio 2001)(Ohio long-arm statute); *Santiago v. INS*, 134 F.Supp. 2d 1102, 1104 (N.D. Cal. 2001)(California long-arm statute).

The scope of process in the federal courts is determined pursuant to the law of the state in which the district court is located and within the constitutional limits of *due process*. *Henderson, 157 F.3d at 123;* Fed. R. Civ. P. 4(e); *Int'l Shoe Co. v. Washington* , 326 *U.S. 310, 316 (1945)*. New York law establishes that personal jurisdiction exists over non-residents who, in person or through an agent,"transacts any business with the state." N.Y.C.P.L.R. § 302(a)(1)(McKinney 2003). 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 are purposeful and there is a substantial relationship or an articulable nexus between the transaction or activities which occurred in New York and the claim asserted. *See, Henderson*, 157 F.3d at 157 (citations omitted); *see also, Parke Benet Galleries v. Franklyn*, 26 N.Y.2d 13 (1970); *Refiner & Co. v. Schwarz*, 41 N.Y.2d 648 (1977).

The Government suggests this interpretation must be incorrect because it allows "any district in which Secretary Rumsfeld

conducts business and is subject to process to have jurisdiction" over the Padilla petition. Gov't Br. at 27-29. The argument demonstrates a lack of understanding of the relationship between jurisdiction and venue rules. *Braden* distinguished jurisdiction from venue, both of which are also concerned with the contact of the parties to the forum state. *Braden* 410 U.S. at 500. Braden replaced the inflexible jurisdictional rule of *Ahrens* with a more flexible venue rule. *Id*. at 493-94 ("finding traditional venue considerations are adequate to ensure that habeas suits will not proceed in an inconvenient or inappropriate forum"). Similarly, in *Strait v. Laird*, the Supreme Court adopted the forum contact analysis espoused in *Arlen v. Laird,* 451 F.2d 684. *Strait* 406 U.S. at 344. The *Strait* Court concluded that the petitioners *contacts* with the army were limited to California and thus, his commanding officer in Indiana was present through the chain-of-command in California. 406 U.S. at 345.

In short, jurisdiction for Padilla's petition lies in the Southern District of New York because Secretary Rumsfeld can be served under New York's long-arm statute. The Government has not argued, nor could it, that service of New York process upon Secretary Rumsfeld violates due process, in light of his pervasive general contacts with the district as well as his specific contacts related to this case. As discussed below, the district court

correctly found that with the application of the New York long-arm statue, personal jurisdiction is obtained over Secretary Rumsfeld.

The New York long-arm statute,[14] as stated above, reaches a non-resident who has conducted business in the state. N.Y.C.P.L.R. § 302(a)(1)(McKinney 2003). Not surprisingly, the Government does not contest Secretary Rumsfeld's contact to this forum or that there is a nexus between his contact with the forum and this litigation. First of all, as Secretary of Defense, Rumsfeld has pervasive contact with the State of New York through all the military outposts and personnel located in the district[15]. Moreover, Secretary Rumsfeld had contact with the district specifically related to this case. He directed others in his chain of command to enter this jurisdiction, to enter the Metropolitan Correction Center and seize Padilla, thereby, taking over the

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[14] The Government suggests that the application of the state's long-arm statute can not be squared with the Supreme Court's holding in *Harris*, 394 U.S. at 295. *Harris* held that 28 U.S.C. § 1391(e), which provides for nationwide service of process on federal officers, is not applicable to the habeas statute. Gov't Br. at 31. Judge Korman, in *Nwanko v. Reno* addressed this very question: "Because Rule 4(e) is applicable in a federal question subject matter jurisdiction context, and because the habeas corpus statute, 28 U.S.C. § 2241 et seq., does not provide a means for service of process, a federal court may exercise personal jurisdiction over a non-resident of the state in which the court sits to the extent authorized by the law of that state". 828 F.Supp. at 175 (internal citations omitted).

[15] *See,* N.Y. C.P.L.R. § 301 (McKinney 2003).

custody and control of Padilla from the Department of Justice. Prior to this transfer, agents of Secretary Rumsfeld, pursuant to his directions, communicated with the United States Attorney's Office of the Southern District of New York Department to arrange for the transfer of Padilla, including instructing members of the United States Attorney's office to withdraw the previously issued grand jury material witness warrant. *Padilla I,* 233 F.Supp.2d at 571. There is no doubt that Secretary Rumsfeld, personally and through his agents, conducts business in the Southern District of New York.

The Government's opposition to the jurisdiction of the Southern District of New York must be seen in the light of the Government's transfer of all alleged enemy combatants to a district court within the Fourth Circuit's jurisdiction: Yaser Esam Hamdi(habeas application pending in district court in Virginia); Ali Saleh Kahlah al-Marri(recently transferred to the Consolidated Naval Brig in Charleston from the district of Illinois, despite Mr. al-Marri's residence in Illinois and his awaiting trial on charges brought in the District Court of the Central District of Illinois). In addition, the Government brought charges against Zacarias Moussaoui and John Phillip Walker Lindh in the district of Virginia. What all these cases have in common is the total absence of any nexus to the Government's chosen district to the charges or the defendants and detainees.

Commenting upon the Government's argument for a *per se* jurisdiction rule in cases of military reservists, the D.C. Circuit in *Eisel* stated: "Such a rule would also permit the military to select a jurisdiction thought to be favorable to the Government by designating it as the place to report. This rule would be both inconvenient and unfair." 477 F.2d 1257. The conclusion to be drawn, based on the cases and circumstances referenced above, is that the Government engaged in forum shopping.

Also bearing on choice of forum is the Government's application before the Chief Judge in this district for a grand jury material witness warrants which permitted Padilla's arrest in Chicago and his presence in the Southern District of New York. *See Padilla I*, 233 F.Supp.2d at 571. The declaration of Michael H. Mobbs clearly shows that the information and/or conduct Padilla is alleged to have done and/or possessed was learned or done outside the United States and prior to his arrival in Chicago. (JA 44-51). Thus, by bringing Padilla to the Southern District of New York, the Government established jurisdiction in that district. *18 U.S.C. § 3238*; *United States v. Yousef*, 327 F.3d 56, 114-15 (2d Cir. 2003)(holding that jurisdiction for extraterritorial offenses "shall be in the district in which the offender ... is first brought"). Having elected to give the Southern District of New York original jurisdiction, the Government should not be argue that the Southern District of New York lacks jurisdiction, unless it

offends the doctrine barring forum shopping. *Ojeda Rios v. Wigen,* 863 F.2d 196, 202 (2d Cir. 1988)(noting that, had the prosecuting officials selected petitioner's location of confinement, his case for the district court to assert jurisdiction would have been stronger); *see also Ex parte Endo,* 323 U.S. at 306(holding that removal of petitioner from the jurisdiction of the original court does not prevent it from ruling on habeas petition). To deny the district court jurisdiction would encourage the Government to continue in its machinations and forum shopping. For this reason, and the reasons stated above, the district court's ruling that it had jurisdiction over Secretary Rumsfeld under New York's long-arm statute should be affirmed.

In the alternative, if this Court finds that Commander Marr rather than Secretary Rumsfeld is the proper respondent, the district court's ruling that jurisdiction in the Southern District of New York should still be affirmed. The alternative ground for jurisdiction over Commander Marr is her contact with this forum, through the actions of her superior officers and other agents in the chain of command. *See Strait,* 406 U.S. at 344.

B. Venue Is Properly Laid In The Southern District of New York.

As *Braden* suggests, venue is the proper doctrine to address the Government's concerns about allowing habeas cases to proceed in an inconvenient or inappropriate forum with no connection to the case. The district court correctly concluded that venue was proper

in the Southern District of New York.[16] Because the Government has not raised an objection to venue on appeal, they have waived their right to contest the district court's ruling that venue lies in the Southern District of New York. See *Padilla I,* 233 F.Supp.2d at 587. The district court's conclusion is, moreover, amply supported by the facts.

The party challenging venue bears the burden of establishing, by a preponderance of the evidence, that a transfer is warranted. *See In re Manville Forest Prod. Corp.*, 896 F.2d 1384, 1390-91(2d Cir. 1990). The Government does not claim venue is improper nor could it assert a viable challenge in light of the contacts to Southern District Court. Further, Padilla's choice of venue in the Southern District of New York must be afforded "substantial deference." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 242 (1981).

Padilla, through his counsel and "next friend" is present in the Southern District of New York. The same facts were presented to the district court in the affidavit in support of the grand jury material witness warrant as were presented to the President for his consideration in designating Padilla as an "enemy combatant". *Padilla I*, 233 F.Supp.2d at 571. The district court is intimately

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The Supreme Court has held that traditional venue considerations should apply, including (1) where the material events occurred; (2) where records and witnesses pertinent to the claim are likely to be found; (3) the convenience of the forum for respondent and petitioner; and (4) the familiarity of the court

aware of all the facts of the case. The entire file relative to this action is located in this district. The detention began in this district. Further, counsel can easily travel to see Padilla to confer, which would entail less time and travel expenses than if counsel were forced to litigate the matter in South Carolina.

The only contact to South Carolina is petitioner's current detention there. Padilla did not enter South Carolina voluntarily. The conduct that the President alleged Padilla participated in did not occur in South Carolina. It is equally convenient for Respondent to litigate in this forum as it is in any other forum. The U.S. Government has many lawyers in New York. For these reasons, venue lies in the Southern District of New York.

The district court's ruling that its jurisdiction extended to Secretary Rumsfeld and that, through New York's long-arm statute, the court obtained personal jurisdiction over the Secretary was correct and should be affirmed.

Point IV
PADILLA HAS A RIGHT TO CONSULT WITH COUNSEL

1. Padilla has the Right To Present Facts in Support of His Habeas Petition

The Government argues that Padilla's right to contest his detention through a writ of habeas corpus does not entitle him to present facts in support of the writ. Gov't Br. at 40. Their argument begs the essential question in the case: whether the

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with the applicable laws. *Braden*, 410 U.S. at 493-94

President has the constitutional power to unilaterally and secretly decide that Padilla has, in fact, done something that justifies stripping him of his rights. The Executive assertion of such unreviewable power to strip citizens of their liberty is unprecedented in this nation's history.[17]

The district court correctly rejected the Government's argument. It held that Padilla has the right to present facts in support of his petition through his counsel and, therefore, he must be given access to his counsel. *Padilla I,* 233 F.Supp.2d at 600. The court reiterated its holding on Padilla's right to access to his counsel and present facts to the court in its Opinion and Order in response to the Government's Motion for Reconsideration In Part. *Padilla v. Rumsfeld*, 243 F.Supp.2d 42, 54(S.D.N.Y. March 11, 2003)[hereinafter *Padilla II*].

The district court first considered the habeas statute and concluded that "[q]uite plainly, Congress intended that a § 2241 petitioner would be able to place facts, and issues of fact, before the reviewing court, and it would frustrate the purpose of the remedy to prevent him from doing so." *Padilla I, 233 F.Supp. 2d at*

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Consider Justice Jackson's remarks in his concurring opinion in the *Steel Seizure* case: "There are indications that the Constitution did *not* contemplate that the title Commander in Chief *of the Army and Navy* will constitute him also Commander in Chief of the country . . . *and its inhabitants. Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, at 643-44 (1952)(Jackson, J., concurring)(emphasis added).

600; see also 28 U.S.C.§ 2241*,* et seq (2003)*.* The court's decision is supported by well-settled law. *Wolff v. McDonnell*, 418 U.S. 539, 555-56(1974)("There is no iron curtain drawn between the Constitution and the prisons of this country")*; Procunier v. Martinez,* 416 U.S. 396, 419 (1974),*overruled on other grounds, Thornbrurgh* v. Abbot, 490 U.S. 401, 413-14 (1989)("The constitutional guarantee of due process of law has as a corollary that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights");*Johnson v. Avery*, 393 U.S. 483,485 ("Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that prisoners access to the courts...may not be denied or obstructed").

The Government argues that the district court erred because the habeas provision upon which the district court relied "allows for presenting facts or taking evidence only when necessary to enable resolving the legality of the challenged detention. Gov't Br. at 41, citing *Walker v. Johnston*, 312 U.S. 275, 284 (1941). The habeas statue absolutely provides for a hearing where a factual allegation is contested. See 28 U.S.C. § 2243,2246 (2003). Furthermore, *Walker* does not stand for the proposition stated by the Government.

In *Walker,* the district court and the circuit court dismissed Walker's petition based on only its review of the pleadings and the

affidavits submitted. 312 U.S. at 284-85. The Supreme Court reversed and held that where factual issues are raised, the habeas statute requires the court to take testimony and hear argument before ruling on the petition. *Id*. at 261; *see also United States v. Hayman,* 342 U.S. 205 (1952)(reversing and remanding the district court's dismissal of a habeas petition because the court made findings based on *ex parte* affidavit, which contained statements within the petitioner's own knowledge, but without notice to him and without his presence.); *Blackledge v. Allison*, 431 U.S. 63, 82 n.25 (1977); *Wright v. Dickson*, 336 F.2d 878, 882 (9th cir. 1964), *cert. denied* 386 U.S. 1012 (1967).

The Government also claims that the Court can not ascertain those facts necessary to determine Padilla's petition without risking the war effort. Gov't Br. at 47. It has long been the position of this Court, *even during* wartime and expressly dealing with "enemy" aliens, that a petitioner has the constitutional and statutory right to submit facts in support of a habeas petition. *See, e.g., United States ex rel. Zdunic v. Uhl,* 137 F.2d 858 (2d Cir. 1943); *United States ex rel. Schwarzkopf v. Uhl,* 137 F.2d 898, at 900 (2nd Cir. 1943)(finding that disputed issues of "fact" require a hearing); *United States ex rel. Stabler v. Watkins,* 168 F.2d 883 (2nd Cir. 1948)(remanding a *habeas* petition for further fact-finding at a hearing).

Furthermore, contrary to the Government's contention, an Article III Court, in reviewing a habeas petition that seeks relief from executive detentions traditionally determines the "jurisdictional" facts related to the petitioner's detention. The *Great Writ's* "root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment." [18] *Fay v. Noia*, 327 U.S.391, 402 (1963). It is that "threshold determination" that is at the heart of this proceeding. An Article III Court has both the authority and obligation to make such a "threshold determination" of jurisdictional facts and to accept new evidence in support of such facts. See *Frank v. Mangum*, 237 U.S. 309, 331 (1915); *Ng Fung Ho v. White*, 259 U.S. 276 (1922); *In re Grimley*, 137 U.S. 147, 150 (1890); *Hiatt v. Brown*, 339 U.S. 103, 111 (1950); *Givens v. Zerbst*, 255 U.S. 11, 20 (1921); *Ver Mehren v. Sirmyer*, 36 F.2d 876, 880 (8th Cir. 1929).[19]

Padilla simply seeks the fundamental opportunity to contest the facts underlying his designation as an "enemy combatant". Thus,

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Fay contains an extensive historical review of *habeas corpus* litigation; it was overruled on other grounds, *i.e.,* exhaustion principles, in *Keeney v. Tamayo-Reyes,* 504 U.S. 1 (1992).

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Petitioner adopts the arguments of *amici curiae* Retired Federal Judges, *et al* at 4-11, 23-27; *amici curiae* American Bar Association at 8-10; *amici curiae* Association of the Bar of the City of New York at 6-13, 18-22; *amici curiae* American Civil Liberties Union, *et al* at 21-29.

unlike the other combatant cases, here the "jurisdictional facts" are disputed and there has been no concession of facts that would enable a reviewing court to determine Padilla's status. *See e.g., Hamdi v. Rumsfeld,* 316 F.3d 450 (4th Cir. 2003)*[hereinafter, Hamdi III]; Ex parte Quirin*, 317 U.S. 1 (1942); *In re Territo*, 156 F.2d 142 (9th Cir. 1946); *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956). Therefore, these cases "offer no guidance regarding the standard to be applied in making the threshold determination that a habeas corpus petitioner is an unlawful combatant." *See Padilla I at 607.*

The Due Process Clause of the Fifth Amendment also gives Padilla the right to submit facts in support of his habeas petition. "The fundamental requisite of due process of law is the opportunity to be heard." *Goss v. Lopez*, 419 U.S. 565, 579 (1975). The Due Process Clause of the Fifth Amendment protects Padilla's right to confront the "evidence" against him and to be heard on his own behalf. The district court's finding that Padilla had the right to submit facts in support of his petition should be affirmed.

B. The District Court Correctly Exercised It Discretion Under The All Writs Act to Order Counsel Be Permitted To Meet With Padilla.

The stand of review for questions of law raised in this interlocutory appeal does not affect the standard of review for discretionary acts by the district courts. Accordingly, the

court's exercise of its authority under the All Writs Act is reviewed for abuse of discretion. *See, e.g. United States v. International Brotherhood of Teamsters*, 266 F. 3d 45, 49 (2d Cir. 2001)

The district court correctly exercised its discretion in granting Padilla access to counsel[20] under the All Writs Act.[21]28 U.S.C. § 1651(a). There can be no question that Padilla's "right to present facts to the court in connection with this petition [which the Government concedes he has the right to file] [would] be destroyed utterly if he is not allowed to consult with counsel." *Padilla I* at 604. Thus, "it [was] the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Harris*, 394 U.S. at 300. The Supreme Court in *Harris* held that a district court was not without authority to order the necessary discovery procedures in habeas litigation to facilitate a "fair

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[20] The court below determined, pursuant to 18 U.S.C. § 3006A(2)(B), that "it was in the interest of justice" that counsel be appointed to represent Padilla. The Government does not argue that the appointment of counsel was appropriate nor could the Government dispute the appointment. *See Lassiter v. Dep't of Social Services of Durham County North Carolina,* 452 U.S. 18, 26-27 (1981)(holding that due process requires the appointment of counsel when petitioner's physical liberty is at stake); *see also Hodge v. Police Officers*, 802 F.2d 58, 61-62 (2d Cir. 1986).

[21] The All Writs Act authorizes "all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C.§ 1651(a).

and meaningful evidentiary hearing" *Id. Harris* reads broadly the court's power to order such remedies as necessary to enable the Court to fairly rule on a habeas petition. *Padilla I,* 233 F.Supp.2d at 602.

The district court recognized that the right to counsel is paramount where, as here, the "prosecutorial forces of organized society" are pitted against Padilla and he must defend against "the intricacies of substantive and procedural... law." *Id. at 603, citing Kirby v. Illinois*, 406 U.S. 682,689 (1972). There is little doubt that this case presents complex issues which a layman is ill-equipped to handle.[22]

Thus, to enable the court to rule on Padilla's petition, it was appropriate that the district court fashion a remedy as provided by the All Writs Act to allow counsel to meet with their client. The court should affirm this ruling of the district court.

C. Under the Law of War, Padilla is Not An Enemy-Combatant, and Therefore, the Premise Asserted by the Government to Deny Counsel is Without Merit.

Padilla's detention is based on a distorted misapplication and misrepresentation of the Law of War. The Government incorrectly describes the detention of persons like Padilla as a "historical tradition" (Gov't Br. at 37), when in fact the detention of a

[22] Petitioner adopts the arguments of *amici curiae* Retired Federal Judges, *et al* at11-23; *amici curiae* American Bar Association at 18-27; *amici curiae* Association of the Bar of the City of New York at 13-18, 23-29; *amici curiae* National

person not in the armed forces of a sovereign government, captured far from any recognizable field of battle, is a novel and dramatic extension of the Law of War.

The Law of War is concerned primarily with the conduct of nations, which the Government knows and teaches our own military members. *See* Army Regulation [AR] 190-8,*Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*[23] (1997); and Army Field Manual [FM] 27-10, *The Law of Land Warfare* (1956, as amended).[24] The application of the Law of War to the conduct of an international criminal enterprise is fundamentally misplaced. The Law of War is simply not relevant:

> [H]umanitarian law elevates the essence of war—killing and detaining people without trial—into a right, if only for persons designated as "privileged combatants," such as soldiers in an army. Those who take part in hostilities without such a privilege are criminals subject to prosecution and punishment, but they do not thereby forfeit whatever rights they may enjoy under humanitarian, human rights, or criminal law.

Rona, Interesting Times for International Humanitarian Law: Challenges from the "War on Terror" 27:2 The Fletcher Forum of World Affairs 55, 57 (2003).

Association of Criminal Defense Lawyers, *et al* at 22-27.

[23] Available at: http://www.usapa.army.mil/pdffiles/r190_8.pdf

[24] Available at: http://www.adtdl.army.mil/cgi-bin/atdl.dll/fm/27-10/toc.htm

Article 57 of the Lieber Code of 1863, which governed the conduct of war for the Union Army during the American Civil War and which served as the basis for the modern Law of War treaties, provided that "so soon as a man is armed by a sovereign Government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses." Instructions for the Government of the Armies of the United States in the Field, Headquarters, United States Army, Gen. Order No. 100 (Apr. 24, 1863),*reprinted* in The Laws of Armed Conflicts 3 (3d ed. 1988); *See also*, Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, Articles 2 and 4 (limiting scope of application of Conventions primarily to conflicts between nation-state signatories to the Conventions); Additional Protocol I arts. 43, 50 and 51.[25]

[25] *See Dow v. Johnson,* 100 U.S. 158, at 170 (1879):

> "The question here is, What is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country; it is not the civil law of the conquering country: it is military law, - the *law of war*, - and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home. . . ."

Thus, the Law of War therefore defines "combatants" in terms of members of the armed forces of a nation-state.[26] "Lawful combatant immunity, a doctrine rooted in the customary international Law of War, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets." *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va., 2002). Unlawful or unprivileged combatancy has also been historically linked to membership in the armed forces of a nation-state. As one of the Quirin prosecutors wrote:

> The fact that the petitioners in the Quirin case were "enemy belligerents" was crucial, for however hostile might be their intent, unless they were part of or associated with the armed forces of the enemy, they would not be subject to the international Law of War which deals only with the relations between nations at war, and individuals acting for, and on behalf of, those nations.

Barber, Trial of Unlawful Enemy Belligerents, 29 Cornell Law Quarterly 53, 61 (1943). That was and is, emphasized by the simple fact that the *non-military*, *i.e.,* civilian co-conspirators of the eight *Quirin* defendants, were all charged and tried in federal district courts. L. Fisher, *Nazi Saboteurs on Trial* (Univ. Press of Kansas, 2003).

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[26] A civilian who takes up arm and participates in fighting on an active field of battle could also be a an unlawful combatant but to be considered a combatant lawful or unlawful that civilian must take up arms on behalf of a nation state not a criminal organization.

That is not to say that when Congress authorizes the United States military to go into armed combat with tanks, attack helicopters and M-16 rifles, that the Law of War has no application or that it is a lawless event. The Law of War may apply on the actual field of battle during combat and to those apprehended during combat, but nevertheless may not be the appropriate body of law to apply off the battlefield to members of an international criminal organization. Members of a criminal organization are not entitled to combatant immunity under the international Law of War. Significantly, their disqualification is not based on their failure to comply with the requirements of the Hague Convention: (1) To be commanded by a person responsible for his subordinates; (2) To have a fixed distinctive emblem recognizable at a distance; (3) To carry arms openly; and (4) To conduct their operations in accordance with the laws and customs of War. Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, Annex art. 1, 36 Stat. 2277, T.S. No. 539 (Jan. 26, 1910) (the "Hague Convention" and the "Hague Regulations").(These same provisions carried into Art. 4 of the 1949 Geneva P.O.W. Convention.) Rather, their lack of combatant status is based on the fact that they do not act on behalf of a nation-state.

An example demonstrates why combatants have traditionally been defined as part of the forces of a nation state. Let us imagine that the members of a criminal organization such as a mafia family

or narcotics organization satisfied the four Hague requirements, that is they followed the command of a superior officer or higher ranking member of the criminal organization, they wore what was clearly recognizable as a uniform, carried weapons openly and conducted their fighting according to the customs of war (e.g., they honored flags of truce, avoided involving civilians, etc.). Surely, no one would suggest that such individuals should be treated as "combatants," entitled to prisoner of war status and immunity from prosecution when captured. It is not the uniform or the command structure that makes a belligerent lawful or unlawful, those are only tokens indicating that the soldier fights for a nation state and has not done anything to lose the privileges that come with that position. A person who fights for an international criminal organization cannot be a combatant, lawful or unlawful, no matter what they wear. The Law of War does not apply to criminal organizations. The Law of War defines combatants (and grants them immunity) only as to soldiers who act lawfully on behalf of a nation. To ignore this requirement, as the Government asks this Court to do, is to reduce the Law of War to nothing more than a dress code.

The war on terrorism may include military actions that resemble a conventional "war," but that does not trigger the

applicability of the "Laws of War."[27] The application of the Law of War to Padilla - a private citizen who is not alleged to have been in a combat zone[28] - distorts all prior and current military and international concepts of the Law of War.

The district court correctly found that the Law of War permits the detention without trial of *combatants* of an enemy state for the duration of the hostilities. *Padilla I* at 593. Such detention is authorized to prevent the soldier from rejoining his country's armed forces during the war. In other words, hostilities will end and the relationship between the warring nations will return to a sufficiently peaceful state that the captured soldiers of the respective nations can be permitted to return home. To suggest that a body of law that envisions the release of detained combatants at the end of hostilities is applicable to dealing with terrorists is absurd. Terrorists are criminals, they are not soldiers of a nation state. But, Padilla is *not* a combatant; he is *not* a member

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[27] Petitioner adopts the arguments of *amici curiae* Experts on the Law of War at *passim*; *amici curiae* National Association of Criminal Defense Lawyers, *et al* at 47-55; *amici curiae* Law Professors at *passim*; *amici curiae* Center for Constitutional Rights, *et al* at 29-36.

[28] The *DoD Dictionary of Military Terms*, defines "combat zone" as follows: 1. That area required by combat forces for the conduct of operations. 2. The territory forward of the Army rear area boundary. See also combat area; communications zone: *Available at*: http://www.dtic.mil/doctrine/jel/doddict/index.html (Current through June 5, 2003)

of any country's armed forces; he is *not* even a member of a "terrorist organization" based upon the Government's own evidence below [JA- 46, *Mobbs' Declaration*]. The Government cannot evade the Constitution by wrongfully and inappropriately invoking the Law of War in circumstances where it was never intended to apply and where its invocation denigrates what it means to be a soldier.

D. The Degree of Deference Demanded by the Government Is Inappropriate.

The President's designation of Padilla as an "enemy combatant" does not merit the deference the Government seeks. In support of its claim of deference, the Government cites to *Hamdi,* though it ignores the Fourth Circuit language that limits this decision:

> [A]ny broad or categorical holdings on enemy combatant designations would be especially inappropriate. We have no occasion, for example, to address the designation as an enemy combatant of an American citizen captured on American soil or the role that counsel might play in such a proceeding. See, e.g., *Padilla v. Bush, 2002 U.S. Dist. LEXIS 23086, No. 02 Civ. 445 (MBM), 2002 WL 31718308* (S.D.N.Y. Dec. 4, 2002). We shall, in fact, go no further in this case than the specific context before us -- that of the undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces.

(*citing Hamdi*, 316 F. 3d at 465).

The Government also inappropriately cites to this Court's decision in *Able v. United States*, 155 F.3d 628 (2d Cir. 1998), which arose

out of a challenge to the legality of the "don't ask - don't tell" policy on homosexuals serving in the military. The deference that this Court found to be appropriate in *Able* was "based on factors which are unique to military life." *Id.* at 634. The Court deferred to the military in *Able* because of the military special community. *Id. at 635.* Such deference is irrelevant in determining the validity of the President's classification of Padilla.

The Government's pursuit of deference is a call for judicial abdication, which has previously been resoundingly rejected. *United States v. Robel*, 389 U.S. 258, 264 "this concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of power designed to promote such a goal."); *Hamdi III* 296 F.3d 278 (4th Cir. 2002)(requiring a meaningful review of "enemy combatant" status)*; United States v. Lindh*, 227 F. Supp. 2d 565(holding that deference does not mean "conclusive deference" or judicial abstention"). Justice Marshall in *Rostker v. Goldberg* observed: "[T]hat even in the area of military affairs, deference to congressional judgments cannot be allowed to shade into an abdication of this Court's ultimate responsibility." 453 U.S. 57, 89 (1981)(Marshall, J. dissenting).

Judicial deference to a President's decision is warranted with respect to the conduct of "military commanders engaged in day-to-day fighting in a theater of war." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1959); *see also Hamdi III, 296 F.3d 278;*

Ex parte Endo, 323 U.S. at 302. However, such deference is considerably less when the President purports to exercise his power as Commander-in-Chief at home. *Youngstown*, 343 U.S. at 587.

The deference sought by the Government is a demand for a rubber-stamp review. It is the crux of the Government's circular reasoning. Without the degree of deference demanded, the Government would be forced to concede that Padilla must have access to counsel to enable him to contest the factual basis of the President's determination. This Court should reject, as did the district court, the degree of deference demanded by the Government, and should require and an even more searching standard of review than that used by the district court.

The words of Justice Jackson bear repeating: "No penance would ever expiate the sin against free Government of holding that a president can escape control of executive powers by law through assuming his military role." *Youngstown,* 343 U.S. at 646.

2. Intelligence Gathering is Not a Basis for Detention

Intelligence gathering may well be an important governmental function, but the Government cites no authority for the proposition that a citizen can be detained to extract information from him.[29] *See Gov't* Br. at 50-53. Such detention is the anthesis of a republican form of government.(JA 55-63) The district court found

[29] Petitioner contends that this violates his due process rights. See, Petitioner's Opening Brief, Point II, subpoint B.

that Admiral Jacoby's expectation that Padilla might actually give information was "speculative." *Padilla II* at 52*; see* (JA55-63).

Even a cursory review of the Vice Admiral's Declaration supports this determination. The suggestion that Padilla has time-sensitive and perishable information is belied by the manner in which the Government has proceeded in this case. Padilla was detained as a material witness for close to a month before the President designated him as an "enemy combatant". During that time he met with counsel on a regular basis without interference by the Government. Padilla's designation was announced to the world through the highly publicized news conference of Attorney General Ashcroft. *Padilla I,* 233 F.Supp. 2d at 573. Such an announcement runs counter to an attempt to obtain information, perishable or otherwise. *See Center for National Security Studies v. U.S. Department of Justice*, 2003 U.S. App. LEXIS 11910 *30("[T]he Government's judgment that disclosure would deter or hinder cooperation by detainees is reasonable. The Government reasonably predicts that if terrorists learn one of their members has been detained, they would attempt to deter any further cooperation by that member through intimidation, physical coercion, or by cutting off all contact with the detainee."). As to concerns that counsel would be a conduit for the passage of information, the district court characterized this as "gosamer speculation." *Padilla I*, 233 F.Supp. 2d at 604.

It is on the basis of such speculation that the Government argues that an American citizen can be detained without a finding of guilt, access to counsel, or meaningful access to a court to review his detention. Intelligence gathering may have value in national defense but "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties...which makes the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 265 (1967).[30] Intelligence gathering has never been, and should never be, a valid basis for the detention of a citizen. Indeed, it violates the respondent's own policies and regulations:

> 4.1. All DoD [Department of Defense] intelligence activities shall be carried out in strict conformity with the U.S. Constitution [AND] applicable law.... DoD Directive 5240.1, *DoD Intelligence Activities* (1988).[31]

See Also, DoD 5240.1-R, Procedures Governing the Activities of DoD Intelligence Components That Affect United States Persons (1982).[32]

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[30] "The Bill of Rights . . . served notice to all the world that national independence, without personal liberty, was an empty prize." R. Rutland, *The Birth of the Bill of Rights: 1776-1791,* (Boston: Northeastern Univ. Press, 1983), at 218.

[31] Available at: http://www.dtic.mil/whs/directives/corres/pdf/d52401_042588/d52401p.pdf

[32] Available at: http://www.dtic.mil/whs/directives/corres/html/52401r.htm

Both DoD publications forbid "intelligence activities" against United States citizens.

CONCLUSION

The district court's rulings on certified questions one and two should be affirmed and this matter should be remanded for further proceedings. The district court correctly found that it has jurisdiction to decide this habeas petition and that Secretary of Defense Donald Rumsfeld is a proper Respondent. The court below also correctly found that Padilla has the right to present facts in support of his habeas petition and that the only way for him to do that is with the assistance of counsel. The Government's arguments in support of Padilla's detention and their objection to his consultation with counsel are based on, at best, a misapplication, if not a distortion of the Law of War. The Government incorrectly describes as "historical tradition" (Gov't Br. at 37) what is actually a novel application of the Law of War to someone who is neither a participant in combat nor a member of the military of a nation state. Not since King John was forced to sign the Magna Carta at the point of a sword has an English-speaking executive contended that it possessed such unreviewable power over the liberty of its citizens.

Dated: New York, New York
August 12, 2003

Respectfully submitted,

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