UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Jose Padilla, **Petitioner** **v.** **Commander C.T. Hanft,** U.S.N. Commander, Consolidated Naval Brig, **Respondent**	**C/A No. 02:04-2221-26AJ** **Petitioner's Opposition to Government's Motion for Stay Pending Appeal**

Petitioner Jose Padilla, by and through undersigned counsel, respectfully submits this Opposition to Respondent Commander C.T. Hanft's Motion for Stay Pending Appeal of the Court's order directing Petitioner's release from military custody by April 14, 2005 (filed March 11, 2005, dkt. no. 51) ("Mot. for Stay").

1. The government cannot show a substantial likelihood of success on appeal. When the circumstances of Petitioner's case are considered in tandem with *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), it is clear that at least five members of the Supreme Court believe that the President has no authority to order the indefinite military detention of Petitioner without criminal charge. Justice Scalia, joined by Justice Stevens, categorically disavowed any executive authority to hold Hamdi absent clear congressional suspension of the writ of habeas corpus. *Id.* at 2660 (Scalia, J., dissenting) ("Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. . . . [T]he Constitution's Suspension Clause . . . allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military

exigency has not been thought sufficient to permit detention without charge."). Justice Souter, joined by Justice Ginsburg, reached the same conclusion on statutory grounds.[1] *Id.* at 2654-59 (finding that the Non-Detention Act, 18 U.S.C. § 4001(a), imposed a bar on Hamdi's detention that was not overcome by the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224, § 2(a)(2001)). Finally, Justice Breyer's decision to join the dissenting opinion in *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), suggests, at minimum, that he would be likely to conclude that the President is statutorily barred from detaining Petitioner. *Id.* at 2735 n.8 (Stevens, J., dissenting) (suggesting that the Non-Detention Act "prohibits . . . the protracted, incommunicado detention of American citizens arrested in the United States").[2] Though these opinions do not constitute binding authority, *see* Reply at 13-14, the arguments propounded in these opinions are highly persuasive and are likely to carry the day. Moreover, they are highly relevant to determining Respondent's likelihood of success on appeal.

The government argues that it is likely to prevail on appeal because the issues in this case have "divided" the courts, Mot. For Stay at 4, but the decisions the government cites are distinguishable from the situation here. For example, the government cites *Hamdi* and *Ex parte Quirin*, 317 U.S. 1 (1942), in support of its position. Though the government plays down the importance of the locus of capture distinction in *Hamdi*, *see* Mot. for Stay 3, as this Court found, the Supreme Court deliberately (and repeatedly) limited its ruling in *Hamdi* to the case of a U.S. citizen captured on a *foreign battlefield.* Op. 10-11 & n. 8. The government also urges that

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[1] Justice Souter also found "weakness" in the argument for "inherent, extrastatutory authority under a combination of Article II of the Constitution and the usages of war" for Hamdi's detention. *Hamdi*, 124 S. Ct. at 2659 (Souter, J., dissenting); *see also id.* ("[A]n emergency power of necessity must at least be limited by the emergency; Hamdi has been locked up for over two years.").

[2] The dissenting opinion's language also intimates a broader constitutional concern regarding Petitioner's detention. *See, e.g.*, *Padilla*, 124 S. Ct. at 2735 (Stevens, J., dissenting) ("Unconstrained executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber." (footnote omitted)).

Quirin shows the unimportance of locus of capture. Mot. for Stay 3. However, the *Quirin* Court reached this conclusion by interpreting the specific congressional authorization at issue. *See Quirin*, 317 U.S. at 28. It can hardly be cited as showing the unimportance of locus of capture with regard to the AUMF. Moreover, as this Court has noted, *Quirin* is distinguishable on numerous grounds and does not apply to the facts of this case. *See* Op. 14 & n.10.

The *Khalid* decision is even more inapposite because that case involved a *foreign national* captured and detained *abroad*, a starkly different set of facts from those presented here. *Khalid v. Bush*, Nos. 04-1142 & 04-1166, 2005 WL 100924, at *2 (D.D.C. Jan. 19, 2005) ("None [of Petitioners] are United States citizens or have any connection to the United States, other than their current status as detainees at a U.S. military base.").

The government also cites the overruled district court opinion on Padilla's original habeas petition and the subsequent dissenting opinion in the Second Circuit as demonstrating disagreement among the courts about the issues presented in his case. Mot. for Stay 3-4. However, an overruled district court opinion and a later dissent in the court of appeals are weak support at best, especially since those disagreements were intra-court and intra-circuit. Moreover, both these decisions were rendered before the Supreme Court provided further guidance on the issues in its *Hamdi* and *Padilla* decisions, and there is no reason to believe that the overruled district judge and the dissenting court of appeals judge would view Padilla's case in the same way today, now that a majority of the Supreme Court has made their views clear.

As a final argument, the government points out that other courts that have heard this case granted stays pending appeal. Mot. for Stay 4. However, the cited stays were also granted before the Supreme Court's decisions in *Hamdi* and *Padilla*. As explained *supra*, these opinions substantially decreased the government's likelihood of success on the merits in this case.

As this Court held in its opinion, "to find for Respondent would . . . be to engage in judicial activism. . . . [T]he President has no power, neither express nor implied, neither constitutional nor statutory, to hold Petitioner as an enemy combatant." Op. 20-21. The government has failed to show a sufficient likelihood of success on appeal to justify a stay of this Court's ruling.

2. The government's assertion that it would suffer irreparable harm absent a stay of this Court's order is belied by the circumstances of Petitioner's detention and the narrow scope of the order itself. The government concedes the litany of possible civilian crimes that Petitioner may potentially be charged with and the option of holding him as a material witness, *see* Mot. for Stay 6, but contends that continued military detention of Petitioner is "necessary to *prevent him from aiding al Qaeda* in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens." Mot. for Stay 5 (quoting President's Order ¶ 5) (emphasis added). It fails to explain how transferring Petitioner to civilian detention would grant him this conduit to aid al Qaeda, since federal prison officials retain broad authority to restrict or deny the communications of inmates in their custody. *See, e.g.*, 28 C.F.R. § 501.3(a) ("Upon direction of the Attorney General, the Director, Bureau of Prisons, may authorize the Warden to implement special administrative measures that are reasonably necessary to protect persons against the risk of death or serious bodily injury."). The availability of such measures alleviates any fear that civilian detention would allow Petitioner to contact al Qaeda, its members, or its sympathizers.[3]

[3] The adequacy of these measures in preventing outside communication is demonstrated by the pretrial civilian detention of Zacarias Moussaoui, an admitted member of al Qaeda awaiting trial on multiple conspiracy counts for his alleged role in the September 11, 2001 terrorist attacks. Outside access to counsel, the Justice Department's restrictions place Moussaoui in near total isolation; contact with immediate family members is severely limited and monitored, and communication with other inmates or third parties is prohibited. *See* Motion for Relief From Conditions of Confinement, Exhibit A, *United States v. Moussaoui* (E.D. Va. Apr. 12, 2002) (Crim. No. 01-445-A); *see also United States v. Reid*, 369 F.3d 619, 621-22 (2d

The government next maintains that the order, if not stayed, would eliminate the President's Commander-in-Chief authority "to order the military capture and detention of enemy combatants who enter the United States bent on attacking civilians and the homeland." Mot. for Stay 5. Any brief lapse in this authority "would plainly amount to irreparable injury." Mot. for Stay 6. This assertion grossly misreads the scope of the order. This Court held that the President "has no power, neither express nor implied, neither constitutional nor statutory, *to hold Petitioner* as an enemy combatant." Op. 21 (emphasis added).[4] The Court granted Petitioner's habeas petition; it has not issued any sort of general injunctive relief against the government on behalf of other individuals. There is simply no "lapse" in his general ability to protect the homeland. Further, if the order is reversed on appeal, transferring Petitioner back to military custody will fully vindicate the government's interests.[5]

The government lastly cites the stayed orders of release issued in prior litigation as supporting authority. Mot. for Stay 6. Yet, these orders were issued in response to the government's repeated averments that granting Petitioner access to counsel would immediately and irreparably frustrate its interrogation objectives.[6] They provide no support for the

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Cir. 2004) (detailing the extensive administrative measures imposed on terrorist suspect Richard Reid's civilian detention).

[4] *See also* Op. 20 ("Accordingly, and *limited to the facts of this case*, the Court is of the firm opinion that it must reject the position posited by Respondent." (emphasis added)).

[5] While this path would admittedly require the initiation of traditional criminal processes against Petitioner during the pendency of this appeal, the government has indicated its willingness to expend such resources and effort in similar contexts. *See* Government's Motion to Set Trial Date, *United States v. Moussaoui* (E.D. Va. Oct. 27, 2004) (Crim. No. 01-445-A) (requesting the Court to set a trial date despite defendant's intention to petition the Supreme Court for review of the constitutional adequacy of his trial procedures). If the government, after almost three years, still has not accumulated any evidence of criminal activity sufficient to support an indictment against Padilla, that only heightens the arguments for releasing him from custody immediately.

[6] *See, e.g., Padilla v. Rumsfeld*, 256 F.Supp. 2d 218, 222 (S.D.N.Y. 2003) ("[I]t would be deeply irresponsible for a district court to deny a brief stay . . . in the face of the government's insistence that issues of national security are at stake."); Jacoby Decl., *in Padilla v. Rumsfeld*,

government's present invocations of national security, for they predated the government's decision to permit Petitioner access to counsel and to cease interrogating him.[7]

Lacking any specific reason that Petitioner's transfer to civilian custody would harm national security interests or argument that the President's ability to respond to future combatants on U.S. territory has been limited, the government cannot legitimately allege a requisite "irreparable injury" for a stay of the Court's order.

3. Military as opposed to civilian custody has already caused and continues to cause Petitioner irreparable harm. Petitioner has been detained militarily for nearly three years in violation of his constitutional rights. The government's notion that Petitioner will not suffer irreparable harm because he may be in some form of custody regardless of whether a stay is granted, *see* Mot. for Stay 6, misses the significance of the litigation at hand. This case is not about whether the government may detain someone accused of criminal acts, but whether the government must give Petitioner, a U.S. citizen arrested on U.S. soil, the same constitutional protections as other U.S. citizens accused of a crime. Indeed, the presumption for release, *see* Fed. R. App. P. 23(c), is stronger than usual in this case, where there has been no process,

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243 F.Supp. 2d 42, 50 (S.D.N.Y. 2003) ("Permitting Padilla any access to counsel may substantially harm our national security interests. . . . Padilla is unlikely to cooperate if he believes that an attorney will intercede in his detention."); *see also* Affirmation in Support of Respondent's Motion to Stay the Mandate, 6, *Padilla v. Rumsfeld* (2d Cir. Jan. 6, 2004) (Nos. 03-2235 (L.); 03-2438 (Con.)) (noting that "Padilla possesses valuable intelligence information concerning al Qaeda that if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States" (internal quotation omitted)).

[7] *See, e.g.*, Press Release, Padilla Allowed Access to Lawyer, United States Department of Defense (Feb. 11, 2004), *available at* http://www.defenselink.mil/releases/ 2004/nr20040211-0341.html (last visited March 19, 2004) (noting that "such access will not compromise the national security of the United States" or "interfere with intelligence collection"); Press Conference, Deputy Attorney General James Comey (June 1, 2004), *available at* http://www.cnn.com/2004/LAW/06/01/comey.padilla.transcript/ (last visited March 20, 2005) (stating that Petitioner "had largely admitted all of . . . his efforts" and that his "intelligence value no longer required that he not have access to a lawyer"). The government has stated that it is no longer interrogating Padilla at this time. *See* Tr. of Telephone Conf. Before Mag. Judge Carr at 8-10 (Sept. 14, 2004).

indictment or conviction; where the custody is military in nature; and where there are none of the civilian assurances that Petitioner's constitutional rights are being protected.

The conditions of Petitioner's confinement – which at present are still being set entirely by the military –have had a serious and harmful effect on Petitioner's psychological well-being and should not be continued any longer than necessary. Indeed, by the government's own public admission, the conditions of Padilla's confinement have been *deliberately crafted* to have a harmful psychological effect on him.[8] Should this Court be inclined to grant a stay of its ruling pending appeal, Petitioner requests that the Court hold a hearing on the conditions of his confinement and make the issuance of the stay contingent on a modification of those conditions.[9]

The government cites *Walberg v. Israel*, 776 F.2d 134 (7th Cir. 1985), and *Hernandez v. Dugger*, 839 F. Supp. 849 (M.D. Fla. 1993), to illustrate that a *conditioned* release counters the presumption of release under Fed. R. App. P. 23(c), *see* Mot. for Stay 6-7. These cases are easily distinguishable. *First*, in each of these cases, without a stay Petitioners would have been released into the streets. If the order is not stayed in this case, Petitioner will merely be transferred from military to civilian custody.[10] *See* Mot. for Stay 6. Thus, the issuance of the stay triggers no concern that the government will be unable to secure Petitioner's presence at later proceedings or that he will pose a danger to the public; at most such issues would have to be considered at a bail hearing once he were transferred to civilian custody. *Second*, in each cited

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[8] Decl., *in* Joint Appendix at 75, 86, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (No. 03-1027) (describing the "sense of dependency and trust" interrogators were attempting to create by keeping Padilla isolated from the outside world and denying him access to counsel).

[9] Under the current access agreement, counsel for Petitioner are prohibited from publicly discussing the specific conditions of his confinement and so any filings on this issue would need to be under seal and any such hearing would need to be held *in camera*.

[10] Assuming, of course, that the government has some basis for holding him in civilian custody. As previously noted, if the government lacks evidence to charge him with *any* crime after holding him three years, that fact strongly weighs in favor of his immediate release, not against it.

case, the court found more than sufficient evidence on the record for a reasonable fact-finder to convict the defendant of the crime for which he is detained at a new trial. The key fact was not, as the government contends, that the order of release was conditional, but rather that there was "no reason to suppose that the state cannot retry him in an error-free trial and convict him, *since the evidence of his guilt is . . . overwhelming.*" *Walberg*, 776 F.2d at 136 (Posner, J.) (emphasis added). In this case, there has been no trial, no chance for Petitioner to be heard, and no evidence taken. Rather, so far the only evidence against Petitioner is inadmissible hearsay. *See, e.g.*, Respondent's Answer, Exhibit B. Hence, the unique circumstances of Petitioner's case support the presumption of release created by Fed. R. App. P. 23(c).

Finally, the government's contention that Petitioner "chose" to mount a legal rather than factual challenge to his detention is disingenuous at best. Mot. for Stay 7. Petitioner can hardly challenge the factual grounds for his confinement when, nearly three years since his arrest, facts have yet to be alleged in a criminal complaint, let alone proven with admissible evidence. Rather, Petitioner urges that a writ issue, without further delay, so that he may be allowed to challenge the factual basis of his confinement, if any there be, in a criminal proceeding. Petitioner has pressed his legal claims because he believes he has a constitutional right not to be imprisoned unless he is proven guilty beyond a reasonable doubt in a criminal proceeding.

4. Petitioner acknowledges that national security concerns are matters of paramount public interest that this Court must respect. Yet, as noted above, the government's motion is devoid of explanation as to why transferring Petitioner to civilian custody would jeopardize national security, with respect to his case or the President's constitutional powers generally. *See supra* pp. 4-6. Without any articulable concern regarding national security interests, the analysis of *Hilton*'s "public interest" factor cannot, as the government proposes, rest solely on the

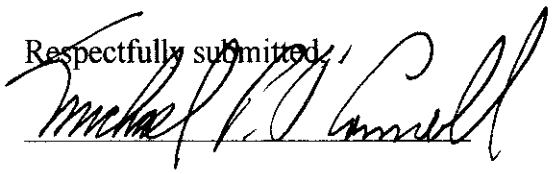
following reasoning: the President has "explicitly determined" that military detention is necessary to ensure national security and, therefore, "it is *a fortiori* in the public interest for Petitioner to be detained militarily . . . during the pendency of the appeal in this case." Mot. for Stay 8. Such blind adherence was vigorously rejected by the Supreme Court in *Hamdi*. 124 S.Ct. at 2650 ("We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." (citation omitted)).

By contrast, the need for public attention and debate is at its maximum when a fellow citizen faces a complete deprivation of his liberty at the hands of his government. In the face of substantial constitutional doubts, *see supra* pp. 1-2, Petitioner's continued detention in military custody and isolation from all non-Executive branch personnel denies the public any meaningful assurance that his detention is factually warranted and that his rights, as an American citizen, are being respected. *See Hamdi*, 124 S.Ct. at 2668 (Scalia, J., dissenting) ("The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders' general mistrust of military power permanently at the Executive's discretion."); *see also* Statement of Patrick Henry, 3 Elliot's Debates 169-70 (J. Elliot ed. 1881) ("The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them."). A transfer of Petitioner to civilian custody during the pendency of this appeal, while not in any manner endangering the security of the nation, would restore the mechanisms designed by the Framers to ensure, even in times of great stress and fear, full accountability when the government deprives the liberties of its citizens.

CONCLUSION

For the foregoing reasons, this Court should deny the government's motion for a stay of its order pending final disposition of its appeal.

Respectfully submitted,



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UNITED STATES DISTRICT COURT
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Jose Padilla, Petitioner,	**C/A No. 2:04-2221-26AJ**
vs.	
Commander C. T. Hanft, USN Commander, Consolidated Naval Brig. Respondent	

CERTIFICATION OF SERVICE

This is to certify that on this 28th day of March, 2004, a copy of the foregoing Petitioner's Opposition to Respondent's Motion for Stay Pending Appeal was mailed, via United States first-class mail, postage prepaid, to:

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