UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSE PADILLA,	:	
	:	
DONNA R. NEWMAN, As Next Friend of Jose Padilla	:	Petitioners' Reply to Motion To Dismiss Petition For Writ of Habeas Corpus
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Petitioners,	:	
	:	02 Civ. 4445 (MBM)
-against-	:	
	:	
GEORGE W. BUSH Ex officio Commander-in-Chief of US Armed Forces	:	
	:	
DONALD RUMSFELD Secretary of the Defense	:	
	:	
JOHN ASHCROFT[1] Attorney General U.S. Department of Justice	:	
	:	
COMMANDER M.A. MARR Consolidated Naval Brig	:	
	:	
Respondents.	:	

Preliminary Statement

While denying Jose Padilla access to both this court and his counsel, the Government has the temerity to object to Donna R. Newman, Esq., acting as Mr. Padilla's "next friend" to institute this Petition for Writ of Habeas Corpus. It is respectfully submitted, that in light of Mr. Padilla's unavailability, Ms. Newman, who is Mr. Padilla's attorney, who has met with Mr. Padilla numerous

[1]Petitioners agree to remove Attorney General Aschroft as a Respondent from this Petition.

times, appeared in court on his behalf, filed motions on his behalf, satisfies all the requirements to act as "next friend."

Additionally, and in complete disregard for the clear reading of § 2241(a)[2] in conjunction with § 2242[3] and the case law interpreting 28 U.S.C.§ 2241, et. seq., the government contends that this Court is without jurisdiction to issue the writ because this Court lacks jurisdiction over Commander Marr, whom the government contends is the one and only proper respondent. Government Brief ("Gov't Br.") at 11. The government argues that the "custodian" for habeas purposes must be the "immediate custodian", i.e. the custodian with the day-to-day responsibility for the prisoner, since it is this custodian who can release the prisoner should the writ be granted. See, Gov't Br. at 16.

The government further claims that, in as much as, President Bush[4] or Secretary Rumsfeld, are not Padilla's "immediate custodians", they are not proper respondents in this case. Id. at 11, 14. Moreover, the government asserts, since the custodian must be within this Court's "territorial

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[2] 28 U.S.C. § 2241(a) provides:
(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

[3] 28 U.S.C. § 2242 provides in pertinent part:
Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

[4] The government also asserts that President Bush is an improper respondent since the court lacks the authority to ever enjoin the President in the performance of his official duties. See, Gov't Br. at 14, see, discussion below.

jurisdiction", and Commander Marr is not, this Court lacks jurisdiction over Marr and ipso facto, over this Petition. The government's arguments lack merit and suffer from an incorrect analysis of the facts and law.

Respondent President Bush as Commander in Chief and Secretary of the Defense Rumsfeld, ordered[5] and directed, Padilla's arrest, the transfer of his custody from the Department of Justice to the Department of Defense, the situs of his detention and the conditions of his detention. Based on the facts and circumstances of this case, Respondents Bush and Rumsfeld are Padilla's custodians. They can deliver the "body" while in fact Commander Marr lacks the authority to do so. Further, all Respondents have and had sufficient contacts to the Southern District of New York, through their activities, the activities of those within their chain of command and through the activities of agents acting on their behalf, to make each amendable to process within the Southern District of New York. The Southern District of New York is the proper venue for this Petition, in light of the background of this case and for the convenience of the parties. This Court has jurisdiction over these Respondents and this petition. There is no jurisdictional bar to this Court deciding the merits of this Habeas Corpus Petition.

Furthermore, Padilla's absence from this district and his inability to execute his habeas petition are due entirely to the action of these Respondents. This Court having had jurisdiction originally, in this instance should retain jurisdiction. Accordingly, it is respectfully submitted that

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[5] Attorney General Ashcroft in his announcement to the Press on June 10, 2002 referenced an Order issued by President Bush declaring Padilla an "enemy combatant" and which authorized Mr. Padilla's arrest and detention. Counsel has requested a copy of the Order from the Department of Defense, White House Counsel's Office, and the United States Attorney's Office for the Southern District of New York. She was advised that she would not be provided with a copy and would not be permitted to view this Order. The contents of the Order remain unknown. It is also unknown if in fact a written Order exists. At a minimum, this Court should order the government to provide the Court with a copy to be viewed "in camera" and ex parte to enable this Court to ascertain its relevance to the pending motion.

the Government's motion to dismiss Padilla's writ of habeas corpus should be denied.

Facts[6]

Jose Padilla is an American citizen by virtue of having been born in Brooklyn, New York.

Mr. Padilla was arrested outside of Chicago, Illinois at O'Hare International Airport on May 8, 2002, by agents of the Federal Bureau of Investigation. Mr. Padilla was not arrested on criminal charges, but rather was arrested on a material witness warrant for a grand jury which had been convened in the Southern District of New York. The order which authorized Mr. Padilla's arrest had been signed by the Honorable Michael B. Mukasey, Chief Judge of the United States District Court for the Southern District of New York.

On May 15, 2002, Mr. Padilla was produced in court before Judge Mukasey who assigned Donna R. Newman, Esq., to represent Mr. Padilla. Ms. Newman conferred with her client both when at Court and at the Metropolitan Correctional Center. She met with him on at least nine occasions for a total of approximately eighteen hours. She also met and conferred with the government, represented by United States Attorney's Office for the Southern District of New York about matters relating to her client's detention. She appeared before this Court at least two times with her client. Further, acting as Mr. Padilla's attorney, Ms. Newman filed motions with the Court contesting the legality of Mr. Padilla's detention as a potential grand jury witness. The government filed papers in opposition to the relief Ms. Newman sought for her client. Those motions were scheduled to be heard by this Court on the morning of Tuesday, June 11, 2002.

On Sunday June 9, 2002, before the Court could rule on the pending motions, President

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[6] We note that the government's "Background" statement (Government Brief at 3-6) is in reality unverified facts and legal arguments relating to the merits of the Petition. Petitioners contest the statements and legal arguments contained therein. Further, that section although included in a motion characterized as the government's Motion to dismiss can be viewed as the government's substantive Answer to the Petition. Therefore, having answered the Petition, the government has waived its jurisdictional objections.

Bush, in his role as Commander-in-Chief and acting on the advice of Attorney General Ashcroft and Secretary of Defense Rumsfeld, issued an Order finding Mr. Padilla to be an "unlawful combatant". Mr. Padilla, without notice to counsel, was transferred in the Southern District of New York from the custody of the Department of Justice to the custody of the Department of Defense. Mr. Padilla was placed under arrest by the Department of Defense for the purpose of his being interrogated. He was taken to South Carolina and placed in the brig at the Consolidated Naval Base.

The transfer of Mr. Padilla's custody and his arrest in this district was made possible through the efforts, assistance and cooperation of the United States Attorney's Office in this district. Among other things, to enable Mr. Padilla to be seized by agents from the Department of Defense, on June 9, 2002, the United States Attorney's Office had their grand jury material witness warrant withdrawn. Ms. Newman, while the aforementioned motions were still pending before this Court[7], filed a writ of habeas corpus on June 11, 2002 which was amended on June 20, 2002. The government has refused to respond to the merits of the writ and has brought a motion to dismiss the writ on jurisdictional grounds.

Mr. Padilla remains at the Naval Brig in Charleston, South Carolina. Ms. Newman has been informed that she will not be permitted to meet or communicate by any means with Mr. Padilla by representatives of the Department of Defense and the United States Attorney's Office for the Southern District of New York. Accordingly, Ms. Newman has been blocked from obtaining Mr. Padilla's signature on the petition. Mr. Padilla has not been charged with any offense under either civil or military law.

Other than the government's unilateral decision to hold Mr. Padilla in Charleston, there is

[7]The Court on June 13, 2002 determined that in light of the withdrawal of the material witness warrant, these motions were moot.

no nexus between South Carolina and this litigation. In other post-September 11th matters, the government has elected to criminally prosecute both John Phillip Walker Lindh (an American citizen taken into custody in Afghanistan) and Zacarias Moussaoui (a French national arrested in Minnesota) within the geographic area of the United States Court of Appeals for the Fourth Circuit. The Government has elected to hold Yaser Esam Hamdi (an American citizen taken into custody in Afghanistan) on a military base that is within the geographic area of the Fourth Circuit Court of Appeals. Now the government has transferred Mr. Padilla from this district to Charleston, South Carolina which is also in the geographic area of the Fourth Circuit Court of Appeals.

Point I

Donna Newman Has "Next Friend" Standing to Bring This Habeas Petition

28 U.S.C. §2242 requires an application for a writ of habeas corpus shall be in writing, signed and verified by the person for whose relief it is intended or by someone acting in his behalf. The government's contention that Donna Newman lacks "next friend" standing to bring this habeas petition on behalf of Jose Padilla lacks merit.

In Whitmore v. Arkansas, 495 U.S. 149 (1990), the Supreme Court found that there were two prerequisites for standing as a "next friend", first there must be an explanation as to why the party for whom the relief is sought cannot sign and verify the writ. "Most frequently, "next friends" appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves." Whitmore at 160. "Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a "next friend" must have some significant relationship with the real party in interest." Whitmore, at 163(internal citation omitted). Simply stated, the Court requires a person seeking relief to sign and verify the Petition personally, but if they are unavailable then 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. The Whitmore court found that "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." Whitmore at 164.

The Court required a significant relationship between the true party in interest and the "next friend" both to ensure 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 litigation at hand. It is clear that Ms. Newman satisfies the requirements of Whitmore to act as next friend in this matter.

The first Whitmore prong, the unavailability of the true party in interest, is readily satisfied. The government does not dispute that Jose Padilla cannot sign the Petition himself because the government has made him inaccessible by the government's own refusal to allow counsel to have access to Padilla to permit him to sign and verify a petition in his own name.[8]

In Whitmore, the Supreme Court requires that a "next friend" have a significant relationship with the true party in interest. It is respectfully submitted that an attorney-client relationship is a

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[8] In this case, Padilla's unavailability is unquestioned. Virtually all of the cases relied on by the Government [Massie ex rel. Kroll v. Woodford, 244 F.3d 1192, (9th Cir. 2001); Miller ex rel. Jones v. Stewart, 231 F.3d 1248 (9th Cir. 2000); Ford v. Haley, 195 F.3d 603 (11th Cir. 1999); Vargas v. Lambert, 159 F.3d 1161(9th Cir. 1998); In re Heidnik, 112 F.3d 105 (3d Cir. 1997); In re Zettlemover, 53 F.3d 24 (3d Cir. 1995); Brewer v. Lewis, 989 F.2d 1021(9th Cir. 1993); Smith ex rel, Missouri Publ Defender Comm'n v. Armontrout, 812 F.2d 1050 (8th Cir. 1987); Schornhorst v. Anderson, 77 F. Supp 2d 944 (S.D. Ind. 1999); Davis v. Austin, 439 F.Supp. 273 (N.D. Ga.1980)]concern what is known in capital litigation as "volunteers" that is individuals who have in some manner indicated that they do not want anyone to interfere with the process that will result in their execution. In such cases, the courts are concerned with the inmate's competence and therefore his unavailability under the first prong of Whitmore, which is not an issue in this matter.

sufficiently significant relationship to establish "next friend" status. In Lenhard v. Wolff, 443 U.S. 1306, 1310 (1979) Rehnquist, J., as Circuit Justice, stated that "it strikes me that from a purely technical standpoint a public defender may appear as "next friend" with as much justification as the mother of [the inmate]." Similarly, in Morgan v. Potter, 157 U.S. 195, 198 (1895), the Supreme Court held that 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."

The Government concedes, as it must, that an attorney-client relationship came into being between Ms. Newman and Padilla on May 15, 2002. "The law protects confidentiality and sanctity of the attorney-client relationship. 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 Government contends that Ms. Newman fails to satisfy the second Whitmore prong, that the next friend has a significant relationship with the true party in interest. The government contends that Ms. Newman's attorney-client relationship with Padilla was too brief in duration to be considered a significant relationship. The government ignores the reason the Court requires a "next friend" to have a significant relationship with the true party in interest which is to avoid uninvited meddlers. More importantly, the government fails to cite to a single case that suggests that the significance of the attorney-client relationship somehow ripens with the passage of time.

The Government also fails to cite to any authority to support its argument that the quality of

the attorney-client relationship is something that a court can examine absent an alleged conflict between the attorney. In the instant matter, the government seems to be suggesting that the significance of Ms. Newman's attorney-client relationship with Padilla is a fact in dispute that would require a hearing to resolve. Approval of the government's argument would lead to an inevitable erosion to the attorney-client relationship. At what point in time does the attorney-client relationship become significant? If a potential target of a grand jury seeks advice from an attorney who the target had not worked with before is that attorney subject to subpoena or are his notes reachable by subpoena because the attorney-client relationship is not old enough to be considered a significant relationship? It is respectfully submitted these questions are as inappropriate as the government's contention in this matter.

Furthermore, there can be no question that Ms. Newman had developed a substantial relationship with Mr. Padilla. She spent in excess of twenty hours with him during the period of her representation. She visited with him at the Metropolitan Correctional Center and during his court visits. She appeared with him in Court and filed extensive motions on his behalf. To suggest that her representation was anything less than substantial is simply ridiculous.

Additionally, the government's argument is based on the mistaken assumption that the attorney-client relationship was terminated when the material witness matter was rendered moot by the government's transfer of Padilla to the military. The responsibilities of appointed counsel do not end with the conclusion of the matter for which counsel was assigned. Once appointed, counsel is responsible to represent the individual at all stages including post-conviction matters, including the filing of a writ of habeas corpus if appropriate. Once assigned by the court, the representation of counsel continues until terminated by court order. See, United States v. McIntosh, 808 F. Supp. 760, 763 (D.C. Colorado 1992). There has been no action of this court which would permit the

government to believe that Ms. Newman's representation of Padilla has terminated.[9]

The existence of an attorney-client relationship is the basis for Ms. Newman's "next friend" status. In Hamdi v. Rumsfeld, No. 02-6827, slip op. (4th Cir. June 26, 2002) 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 at 5. The critical issue in Hamdi was the complete lack of attorney client relationship. In accord with the clear status of the law on this issue, 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 at 18. In Warren v. Cardwell, 621 F.2d 319 (9th Cir. 1980), the Ninth Circuit permitted an attorney, who had been retained by a client's wife but who had never met the client, to file a habeas petition as next friend. In Warren the prisoner was unavailable because prison lock-down prevented the client from signing the petition. The court found that the attorney who had been retained by the inmate's wife was not an uninvited meddler. Id.

The government's argument constitutes nothing more then speculation that there might be a better "next friend" than Newman. This, however, is not only the incorrect analysis of the law but it does not mean that Newman is not an appropriate "next friend." No court has established a hierarchy of potential "next friends". There is no best "next friend". If the government's argument were correct, the Court would then be required to conduct factual hearing to determine the essence of relationships and who deserves the best "next friend" status. It would result in the Court having to go behind relationships, for the Court to become the meddler into familial relationships and attorney-client relationship. This of course runs counter to the intent of Whitmore.

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[9] This is particularly true in light of this Court's appointment of Andrew Patel to act as co-counsel to Newman on this matter on June 12, 2002, after Padilla had been transferred to the Naval Brig in Charleston, South Carolina.

The Whitmore court explained that a significant relationship was required between the "next friend" and the true party in interest to ensure 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. Donna Newman has undertaken this matter as "next friend" only because it is in her client's best interest to do so.

It is respectfully submitted that Donna Newman satisfies the conditions to serve as "next friend" for Jose Padilla. Mr. Padilla is unavailable to sign the Petition in his own name only because of the government's refusal to allow Ms. Newman access to her client to permit him to sign the documents necessary to bring this action in his own name. Ms. Newman, as the attorney of record for Jose Padilla, has instituted this action on Mr. Padilla's behalf, acting as "next friend" not as an interloper, but in an effort to secure Mr. Padilla's release from unlawful detention.

Point II

This Court Has Jurisdiction to Issue the Writ

A. The Custodian for Habeas Purposes Need Not Be the "Jailer"

The jurisdiction of a district court to grant a writ of habeas corpus is found in 28 U.S. § 2241(a): "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. 2241(a). In Ahrens v Clark, 335 U.S. 188,68 S.Ct. 1443, 92 L.Ed. 1898 (1948), the Supreme Court, narrowly interpreted the phrase "respective jurisdiction"to limit the court's jurisdiction to the territorial boundaries of where the petitioner was located. The Court reasoned that requiring the petition to be brought within the district in which the petitioner was housed, avoided transporting prisoners

distances to other districts. Such transportation was both costly, opened opportunity for escape, and placed a heavy administrative burden upon the receiving state. Id. at 191. Congress in response to Ahrens jurisdictional limitations enacted § 2243 (d) and § 2255 which shifted the focus in post-conviction application from the petitioner's location to the district where the sentence was handed down. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 497 (1973). Additionally, Congress amended the habeas statute to eliminate the need for the transportation of the petitioner where a factual hearing was not necessary for the determination. See, 28 U.S.C.§§ 2243 & 2255.

Subsequently, the Supreme Court, in Braden, recognizing that the legislative amendments to the habeas statute essentially abrogated the basic premise upon which Ahrens was decided, clarified Ahrens further and overruled the basic premise upon which Ahrens was decided. 410 U.S. at 497. The Braden Court shifted the jurisdictional inquiry from the geographical location of the Petitioner to § 2242's phrase: "shall be directed to the person having custody of the person detained." The Supreme Court held that the jurisdiction of a district court considering a habeas corpus petition requires only that the court issuing the writ have jurisdiction over the custodian of the prisoner. Id. at 500. The decision's underpinning were traditional principles of venue and consideration of the most convenient forum. Id. 410 U.S. at 497, n.13, 499-500; see also, ex rel.Sero v. Preiser, 506 F.2d 1115,1128(2d Cir. 1974). Of significance, the Braden Court denounced slavish application of the Ahrens rule and advocated a more flexible application in accord with traditional principles of venue. Braden, 410 U.S. at 499.

Ignoring the clear import of Braden and its progeny, the government insists upon a formalistic approach to the jurisdictional inquiry. Their argument elevates a general rule into a ***per se*** jurisdictional requirement, contrary to well-settled law. See, e.g., Eisel v. Secretary of the Army, 477 F.2d 1251, 1254 (D.C.Cir. 1973)(Where a petitioner "may or may not bring habeas actions is

better determined by analyzing the policies for and against allowing an action in a particular jurisdiction rather than by blind incantation of words with implied magical properties, such as 'immediate custodian'".); Nwankwo v. Reno, 828 F.Supp. 171, 174 (E.D.N.Y. 1993) ("while the general rule may be sound as a matter of policy, the language of the habeas corpus statute does not compel rigid adherence to it in every case."). The Second Circuit in this context stated that "[t]he general rule" treating the immediate custodian as the only proper respondent and that petitioner's situs as the sole correct venue "can not and should not be followed with blind rigid adherence but must bend when necessary to accommodate the commons sense administration of justice". Henderson v. Immigration and Naturalization Service, 157 F.3d 106, 122-23(2d. Cir. 1998)(citations omitted), certified question declined by Yesil v. Reno, 92 N.Y.2d 455 (1998), opinion after certified question declined, 175 F.3d 287 (2d Cir.), cert.denied sub nom., Reno v. Navas, 526 U.S. 1004 (1999). The government's argument, however, precludes flexibility and amounts to nothing more than a throw-back to Ahrens since the petitioner and the jailer will always be located at the same place. Above all, it ignores the current state of the law as it relates to this Court's authority to decide this petition.

For example, contrary to the government's position "[n]o where does the statute speak of an **'immediate custodian'** or intimate that an action must necessarily be instituted in the location of such an 'immediate custodian.'" Eisel, 477 F.2d at 1258. (emphasis added). Rather, the identity and the location of a petitioner's custodian are "flexible concepts". Wang v. Reno, 862 F.Supp. 801, 812 (E.D.N.Y. 1994). Notably, "the statute neither defines 'custody'" nor does it define "who the person having 'custody' will be." Nwankwo v. Reno, 828 F.Supp. 171, 173 (E.D.N.Y. 1993). There has never existed ... an absolute requirement that a ***habeas*** action be brought in the location of the "immediate custodian." Eisel,477 F.2d at 1261.(emphasis added). "Th[e] search for the proper

"custodian" is not merely unproductive, it is not required by law. Id. The Second Circuit observed that "[h]istorically, the question of who is 'the custodian' and therefore the appropriate respondent in a habeas suit, depends primarily on who has power over the petitioner and ...on the convenience of the parties and the court." Henderson, 157 F.3d at 122(citations omitted). Accordingly, who the "custodian" is for the purposes of 28 USC § 2242 is based upon the facts and circumstances of the case with due consideration of the traditional principle of venue. See, Braden, 410 U.S. at 499-500; Ex parte Endo, 323 U.S. 283 (1944).

Even before Braden, the Supreme Court made it clear that for habeas jurisdictional purposes it not necessary for the respondent to be petitioner's "immediate custodian". In Ex parte Endo, the Supreme Court found jurisdiction to lie in California for a petition filed in California by petitioner, an American citizen of Japanese ancestry, detained in Utah in an internment camp by the War Relocation Authority. Id. at 304. Prior to her forced "relocation", petitioner filed her habeas petition in the Northen District of California where she was originally detained. Id. at 305. The Court held that either the Acting Secretary of Interior or the assistant director who had offices in San Francisco were proper respondent because they were responsible for petitioner's detention and had the power to release her. Id. at 304-305; see also, Kinnell v. Warner, 356 F. Supp. 779, 782 (D. Hawaii 1973) ("Anyone in the 'chain of command' with control over petitioner's whereabouts is that petitioner's proper custodian for habeas purposes.").

The Supreme Court's flexible approach to custodian and the appropriate habeas respondent is also seen in Strait v. Laird, 406 U.S. 341 (1972). In Strait, an army reservist applied for a conscientious objector discharge by filing his papers in California where he lived and where his application was filed and hearings held. Id. at 344. His military records were kept at Fort Benjamin Harrison, Indiana where his nominal commanding officer was located. The Supreme Court found

jurisdiction to lie in California where petitioner filed his habeas petition as opposed to Indiana where his "immediate custodian" was located. In reaching this ruling the Court recognized that far greater contacts to the issue presented existed in California than in Indiana. Also, the Strait Court stressed that "the concepts of 'custody' and 'custodian' are sufficiently broad to allow us to say that the commanding officer in Indiana, operating through officers in California in processing petitioner's claim is in California for the limited purposes of habeas corpus jurisdiction." Id. at 346.

In Ex parte Hayes, 414 U.S. 1327 (1973), the Supreme Court was presented with a habeas petition where both the petitioner, an army private, and his immediate commanding officer were stationed in Germany. The Hayes Court permitted the habeas action to proceed in the District of Columbia, finding the jurisdictional requirement was met by the presence in that jurisdiction of others in the chain of command. Thus, in view of Endo, Strait, Hayes, and Braden, the government's claim that the custodian must always be the petitioner's "immediate custodian" and that the petition must be heard only within the territorial jurisdiction of the custodian's location is clearly wrong and inapposite to Supreme Court precedent.

B. President Bush and Secretary Rumsfeld Are Proper Respondents

President Bush and Secretary Rumsfeld are proper respondents and the government's argument to the contrary suffers from a distortion and over-simplification of the law.

1. This Petition is Not an Intrusion on Presidential Authority

The government's claim that President Bush can never be a Respondent in a habeas petition is without merit. See, Gov't Br. at 14. The government cites to Franklin v. Massachusetts, 505 U.S. 788 (1992) for the proposition that courts have no jurisdiction to enjoin a President in the performance of his official duties. While no one contests that point of law, it is irrelevant to the issue now before this Court. In Franklin, the Supreme Court reversed the district court which had

entered an injunction directing the President to recalculate the number of representatives the State of Massachusetts received after the 1990 census. Similarly, in Mississippi v Johnson, 71 U.S. 475 (1866), the Supreme Court held that the Court had no jurisdiction to enjoin the President from executing the Reconstruction Acts.

Nothing in the Petition seeks to enjoin the President from doing anything Congress has authorized. The only purpose of the writ is to question the constitutionally of the President's actions. As the Court found in Franklin, "the President's actions may still be reviewed for constitutionality." Id. at 801. To hold otherwise would be to recognize an imperial presidency that our constitution was designed to prevent.

2. The Cases Upon Which the Government Relies are Unavailing

The government argues the instant petition is analogous to claims made by prisoners who challenge the determinations of the Parole Board. Gov't Br. at 12, citing, Billiteri v U.S. Board of Parole ,541 F.2d 938, 948 (2d Cir. 1976). In Billiteri, the petitioner was challenging the Board's calculation of his date of parole while he was still serving his sentence. He was therefore not under the custody of the Board, but rather was under the custody of the warden of the facility where he was serving his sentence. Padilla's situation is distinguishable. Petitioner here is challenging the legality of his detention and his situtation is controlled by Respondent's Bush and Rumsfeld who placed him under detention. As such, his situation is analogous to a parolee who is incarcerated as a result of a parole violation and brings a writ challenging the legality of that detention. The Billiteri Court noted in that situation, the proper respondent would be the Board of Parole and not the warden. Id. at 948., see also, Benet v. Soto, 850 F.2d 161, 163 (3d Cir. 1988)(same).

Monk v. Secretary of the Navy, 793 F.2d 364 (D.C. Cir. 1986) does not lend support for the government's position because it does not concern the jurisdictional question at issue here. See,

Gov't Br. at 13. Petitioner Monk, incarcerated in Kansas after being court-martialed and convicted, brought a civil action seeking monetary relief and declaratory relief in the District of Columbia, naming as respondent the Secretary of the Navy. The Court re-characterized the action as writ of habeas corpus and dismissed the writ finding the District of Columbia lacked jurisdiction to issue the writ. Id. at 369-70. The government makes much of the Court's statement that for purposes of the federal habeas corpus statute, jurisdiction lie in the district in which the immediate and not the ultimate custodian is located. Id While that language, in light of Supreme Court precedent is undoubtedly over-broad, nonetheless, in the context of the facts of Monk the holding accords with Braden and its progeny. Simply, in terms of the traditional consideration of venue, lacking in Monk's petition was a nexus between his claims, the Secretary of the Navy, and the District of Columbia. See, Id. at 369. In this respect, Monk is similar to general prison cases who name as a respondent the Attorney General. See, e.g. Sanders v. Bennett, 148 F.2d 19 (D.C.Cir. 1945). Padilla's situation is entirely different. As discussed below, here exists a strong nexus between the actions of the Respondents, the Southern District of New York, and the constitutional violations recited in Padilla's petition.

To the extent, the government infers that the Secretary of the Navy or similarly ranking executive can never be a proper respondent, both common sense and case law prove them wrong. See e.g.,Ex Parte Hayes, 414 U.S. at 1327 (Jurisdiction may be based upon the location of the petitioner's commanding officer or *others within the commanding officer's chain of command)*; Schlanger v. Seamans, 401 U.S.487, 489-91(1971); Dillon v. Chandler, 452 F.2d 1081, 1082-83 (9th Cir. 1971). It also can not escape notice that Court's have considered the Secretaries of Armed Services and the Secretary of Defense as proper Respondent when there exists contacts to the jurisdiction relative to the action. See, e.g. Strait v. Laird, 406 U.S. 341; Middendorf, Sec'y of the

Navy v. Henry, 425 U.S. 25 (1976); Ex Parte Hayes, 414 U.S. at 1327;Arlen v. Laird, 451 F.2d 684 (2d Cir. 1971); Carney v. Laird, 462 F.2d 606 (1st Cir. 1972); Applebaum v Seaman, 365 F.Supp. 1177. Moreover, when it has suited the government they have argued in favor of having a member of the executive branch named as a respondents. See, Parisi v. Davidson, 396 U.S. 1233, 1234, 90 S.Ct. 497, 24 L.Ed.2d 482 (1969). Thus, the presence of the "immediate custodian" within the territorial jurisdiction of the court is a not sine qua non. See, Gov't Br. at 14, n.3.

3. Respondent's Bush and Rumsfeld Are Padilla's Custodian and Played a Pervasive Role in His Arrest and the Condition of His Incarceration

Respondents Bush and Rumsfeld played a more direct role in Padilla's custody then the Attorney General does in the immigration detainee cases, where the petitioner and his jailer are not in the territorial jurisdiction of the district court and the Attorney General is named as a respondent. Most of the courts in this district who have considered the jurisdictional issue presented in those cases, have concluded that the Attorney General is a proper respondent and that the Attorney General has sufficient contacts within this district for jurisdiction to lie here. See, e.g.,Cinquemani v. Aschroft, 2001 U.S.Dist.LEXIS 12163 (E.D.N.Y. Aug. 16, 2001)(Attorney General is proper respondent and this court has jurisdiction to hear petition); Halley v. Reno, 2001 WL 184571 at *1 (E.D.N.Y. Feb. 21, 2001)(same); Arias-Agramonte v. Commissioner of INS, 2000 U.S. Dist. LEXIS 10724, 2000 WL 1059678 (S.D.N.Y. Nov. 2, 2000)(same); Acaide-Zelaya v. McElroy, 2000 U.S.Dist. LEXIS 15714 (S.D.N.Y. Oct. 27, 2000)(same); Pena-Rosario v. Reno, 83 F.Supp.2d 349, 361 (E.D.N.Y. 2000)(same); Pottinger v. Reno, 51 F.Supp.2d 349, 356 (E.D.N.Y. 1999); aff'd 242 F.3d 367 (2d Cir. 2000)(same); Mojica v. Reno, 970 F.Supp. 130, 166 (E.D.N.Y.1997)(same); Nwankwo, 828 F.Supp. at 174(same); Barton v. Ashcroft, 152 F.Supp.2d 235(D.Conn. 2001)(same); see also e.g, Chavez-Rivas v. Olsen, 194 F.Supp.2d 368, 374 (D.N.J. 2002)(same); Roman v. Ashcroft, 162 F.Supp. 2d 755 (N.D.Ohio 2001)(same); but see, Belvett v. Ashcroft, 2002 U.S.Dist.

LEXIS 3168 *4 (S.D.N.Y. Feb. 27, 2002)(Proper respondent is either INS Director or warden where alien is detained); Martinez-Rymer, 2002 U.S.Dist LEXIS 5611 *4(S.D.N.Y. Feb. 14, 2002)(Proper respondent is the district director responsible for the detention facility where the petitioner is held); Wang v. Reno, 862 F.Supp. 801 (E.D.N.Y. 1994)(same); Vasquez v. Reno, 233 F.3d 688 (1st Cir. 2000), cert. denied, 70 U.S.L.W. 3233, 122 S.Ct. 43, 151 L.Ed.2d 15 (2001)[10](Warden is the appropriate respondent) [11] These courts reasoned the Attorney General plays a pervasive and extensive role in immigration detention and removal decisions. See e.g, Arias-Agramonte v. Commissioner of INS, 2000 U.S. Dist. LEXIS 10724 *, 2000 WL 1059678 (S.D.N.Y. Nov. 2, 2000); Mojica v. Reno, 970 F.Supp. 130, 166 (E.D.N.Y.1997); Nwankwo v. Reno, 828 F.Supp. 1717, 176 (E.D.N.Y. 1993); see also, Henderson, 157 F.3d at 126.

The Second Circuit, while not deciding the issue, noted the Attorney General may be a proper respondent in Immigration detainee cases in light of the unique role the Attorney General plays in immigration matters: 1) The Attorney General makes the ultimate determination of detention

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[10] The government relies heavily on Vasquez Gov't Br. at 11, 13, 14 n.3. Its reliance on Vasquez is misplaced. The Vasquez Court's espoused a *per se* rule for INS detainee cases-i.e. the proper respondent must always be the warden of the facility who is responsible for the detainee's day-to-day care since it is that warden who can deliver the "body". Id. at 693. As discussed above, this is contrary to established law which recognized the custodian is flexible and not static term. See, e.g. Strait, 406 U.S. at 346, 92 S.Ct. at 1693; Braden, 410 U.S. at 499-500. Moreover, the local warden typically is simply under an INS contract and has no ability to produce the "body." In light of the weakness of the Vasquez opinion, it is not surprising that it has come under sharp attack. See, e.g. See, Roman, 162 F.Supp. 2d at 761 (The conclusions of Vasquez can eviscerate the Writ and suggest the Court has no power to do anything to grant relief, contrary to well established precedent.); Chavez-Rivas, 194 F.Supp.2d at 374 (Prefix "the" does not always refer to one and only one person, e.g. "the custodian parent"). Finally, the Vasquez Court concedes, its analysis is contrary to Henderson. Id. at 694, n4. Accordingly, Vasquez is not controlling on this Court and it is of little assistance in determining the proper respondent in this case.

[11] Although these courts found that the Attorney General was not a proper respondent, there is no uniformity in these decision on who is the proper respondent.

and removal; 2) Congress has designated the Attorney General as the legal custodian of the petitioner; 3) The Attorney General is named as proper respondent in most court actions reviewing the legality of removal; 4) It is within the Attorney General's power to direct her subordinates to carry out an order to produce or release the alien and has the power to detain them indefinitely. Henderson, 157 F.3d at 126.(citations omitted); see also, Nwankwo, 828 F.Supp. at 176; Chavas v. Rivas, 194 F.Supp.2d 368, 374 (D. N.J. 2002)(citing with approval, Henderson, supra.). Notably, most of the courts which have rejected the Attorney General as respondent, nonetheless, recognize that in certain circumstances, the Attorney General would be would be a proper respondent. See, e.g., Vasquez, 233 F.3d at 696; Wang 862 F.Supp. at 812.

Comparatively, President Bush and Secretary Rumsfeld's involvement in this case is far greater than that of the Attorney General in an immigration detention/removal case. Here Respondents Bush and Rumsfeld acted upon Padilla, specifically and individually. Without Constitutional or statutory authority, President Bush and Secretary Rumsfeld took complete charge of Padilla's arrest and detention. They ordered Padilla's arrest, arranged for and directed the transfer of custody from the Department of Justice to the Department of Defense, directed that his attorney be denied all access to him(including written correspondence). When Attorney General John Aschroft announced on June 11, 2002, Padilla's transfer to the Department of Defense, he made it clear that the arrest of Padilla was a joint effort by the Department of Justice, the Department of Defense and other senior officials. Respondent Bush and Rumsfeld role has not been as mere administrators or figure head executives. These Respondents' involvement have been hands-on and continues as such. Thus, it is Respondent Bush and Rumsfeld who alone can order any change to Padilla's condition of confinement, permit counsel access to Padilla, or order his release. Respondent Bush and Secretary Rumsfeld's involvement, in short, has effected every aspect of

Padilla's current circumstances, and every aspect of the constitutional violations claimed in the instant petition. The circumstances here are unique, extraordinary and like no other. The blind application of any general rule of geographic jurisdiction is simply inappropriate.

C. Commander Marr Can Not Deliver the "Body"

The government argues that Commander Marr is the only proper Respondent because she alone has the power and ability to release Padilla. Gov't Br. at 15-16 The government states: [Marr] "is the one who can free the prisoner should the writ be granted". Marr is not the one who can release Padilla and thus, she is not the only proper respondent. See, ex rel. Goodman v. Roberts, 152 F.2d 841, 842 (2d Cir. 1946)("A writ of habeas corpus must be directed to *some* person who has the power to produce before the court the body of the party detained (emphasis added)(citations omitted)). In reality President Bush and Secretary Rumsfeld can "produce the body" or permit counsel to see Padilla.(See, discussion,supra)

It must be recognized that Marr is not Padilla's commander. Padilla is a civilian who has not been charged with a violation of military law. Commander Marr is not holding Padilla pursuant to a Military Court order or for trial. Padilla is not contesting his Commander's decision or his status within the military; he is not in the military. Rather, Padilla, is a United States citizen who is detained by the military pursuant to an Order from the President, as Commander-in-Chief and implemented by the Secretary of the Defense.

Commander Marr receives her orders through the chain of command. With respect to Padilla, Commander Marr receives her direction from her superiors who are receiving their orders from Secretary Rumsfeld and President Bush. Moreover, even in the typical military arrest, which of course this case is not, Marr would lack the authority and power to release Padilla.

Insight into the limitations of Commander Marr's authority can be found in the Department

of Defense("DOD") policy statements, the *Uniform Code of Military Justice* ("UCMJ") found at 10 U.S.C. § 801, *et seq*. and the *Rules for Court-Martial ("RCM")* which are contained within the *Manuel for Courts-Martial* ("MCM")[12]. DOD Directive ¶ 2310.1, entitled, *DOD Program for Enemy Prisoners of War Enemy Prisoners of War and other Detainees,* states at paragraph 3.3:

> 3.3 Captured or detained personnel shall be accorded an appropriate legal status under international law. Person captured or detained may be transferred to or from the care, custody, and control, of the U.S. Military Services *only* on approval of the Assistant Secretary of Defense for International Security Affairs (ASD(ISA)) and as authorized by the Geneva Conventions Relative to the Treatment of Prisoners of War and for the Protection of Civilian Person in Time of War.

While this Directive is not directly on point[13], since Padilla is a civilian, a United States citizen, and not military "personnel", nonetheless, it sets forth military policy which advises that Commander Marr is without the authority to alter Padilla's current status, i.e. to permit counsel to visit, to release him or even produce him in court without direct orders from Secretary Rumsfeld or President Bush. Further explanation of Marr's limited authority over Padilla is found in RCM 304. That RCM provides in pertinent part:

> Rule 304 Pretrial Restraint
> (a) Types of pretrial restraint. Pretrial restraint is moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement.
> ...
> (4) Confinement. Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of

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[12] The MCM is an Executive Order, promulgated pursuant to 10 U.S.C. § 836 and the RCM are contained within the MCM and provide the procedural guidelines for the UCMJ.

[13] In fact there is nothing under Military Law or Civilian Law which provides for the action taken by the President and thus, nothing which provides for the procedures military personnel are to follow.

offenses. See. RCM 305[14].

(b) Who may order pretrial restraint.

(1) Of civilians and officers. Only a commanding officer to whose authority the civilian or officer is subject may order pretrial restraint of that civilian or officer.

.....

(g) Release. Except as otherwise provided in RCM 305, a person may be released from pretrial restraint by a person authorized to impose it. Pretrial restraint shall terminate when a sentence is adjudged, the accused is acquitted of all charges, or all charges are dismissed.

Marr lacks the authority to direct Padilla's release because only a person who has the authority to order the restraint originally, here Respondent Bush[15], can direct the release of the prisoner. Id. subsections (b) & (a). Further, if she were to release Padilla in violation of orders given by her superiors in the chain of command, she would herself be subject to court-martial. 10 U.S. C.

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[14] Rule 305 concerns pretrial confinement when the person confined is subject to trial by court- martial. It thus, has even less application here where Padilla is not being charged with a crime and is being held only for interrogation purposes.

Rule 305 Pretrial Confinement

(a) In general. Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges.

(b) Who may be confined. Any person who is subject to trial by court-martial may be confined if the requirement of this rule are met.

(c) Who may order confinement. See RCM 304(b).

...

(g) Who may direct release from confinement. Any commander of a prisoner, an officer appointed under regulations of the Secretary concerned to conduct the review under subsection (i) and/or (j) of this rule, or once charges have been referred, a military judge detailed to the court-martial to which the charges against the accused have been referred, any direct release from pretrial confinement. For purposes of this subsection, "any commander" includes the immediate or higher commander of the prisoner and the commander of the installation on which the confinement facility is located.

[15] This is not meant to be read as a concession that President Bush had the authority to order Padilla's arrest and detention. We contest the legality of President Bush and all the Respondent's actions on the grounds that they were in violation of Padilla's constitutional rights.

§ 892. Article 92 & Article 96[16]. Marr's authority, therefore, is circumspect, at best and here is almost non-existent. Thus, her role vis-a-via Padilla is far less than even the local warden of a facility contacted to hold INS detainee. There the warden can afford the detainee those rights accorded the remainder of his prison population, counsel visits, telephone calls, family visits, etc. Commander Marr lacks the authority to do even this. Although, Commander Marr may hold the key to Padilla's prison cell, President Bush and Secretary Rumsfeld hold the key to the main gate. Commander's Marr's key is useless for our purposes. Thus, to say Commander Marr is Padilla's only custodian upon which jurisdiction must be based is to "exalt fiction over reality". See, Strait, 406 U.S. at 344.

D. All Respondents, Including Commander Marr Are Amenable to Process Within the Southern District of New York

The government argues that the physical absence of the Respondents from this district defeats Padilla's claim that this court has jurisdiction over the habeas petition. Gov't Br. at 16-20. The law reflects that the government's position is untenable. The physical absence of the

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[16] 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 member of the armed forces, which it is his duty to obey, fails to obey the order; or
(3) is derelict in the performance of his duties; shall be punished 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, or who through neglect or design suffers any such prisoner to escape, shall be punished as a court-martial may direct, whether or not the prisoner was committed in strict compliance with law.

Respondents does not defeat this court's jurisdiction over the Respondents. Rather, jurisdiction is established through their own activities and the activities of those within the chain of command within the district relative to Padilla.

1. Jurisdiction Is Co-extensive with Service of Process

In Braden , the Supreme Court held:

> read literally, the language of § 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 . . . even if the prisoner himself is confined outside the court's territorial jurisdiction. Id. 410 U.S. at 497. (Emphasis added).

Despite the express language in Braden that a custodian who can be reached by service of process is within the court jurisdiction, the government argues, the Supreme Court could not have intended to expand the meaning of "custodian" beyond the territorial jurisdiction of the district court. Gov't Br. at 18, 14,n.3 . On page 18 of their brief, the government states:

> Braden's reference to service, however, cannot be read to have altered the rule of Schlanger(requiring territorial jurisdiction over the custodian) – and to tacitly allow state long-arm statutes to trump the territorial limitations in federal habeas statute.

The above is just one more example of the government's misstatement of the law.

First, Schlanger does not stand for the proposition that the custodian must be within the court's territorial jurisdiction for a habeas to issue. The Supreme Court made this clear in Hayes. 414 U.S. at 1329; see also, Ex Parte Endo,323 U.S. at 306. There the Court explained that in Schlanger, "we found that the District Court did not have jurisdiction over the habeas application of an Air Force enlisted man because neither his commanding officer nor *anyone 'in his chain of command*' was a resident of the district." Id.(emphasis added). Therefore, Schlanger only held that

a custodian, or *one in the chain of command*, must be within the reach of the court's jurisdiction. Ex rel. Appelbaum v. Seaman, 365 F.Supp. 1177, 1179 (S.D.N.Y. 1973)(emphasis added)(citing, Schlanger, 401 U.S. 487, 91 S.Ct. 995). Accordingly, the presence of the custodian or one in the custodian's chain of command within the reach of the court's service of process establishes the court's jurisdiction for the issuance of the writ. Id.at 1180, n1(citing, Donigan v.Laird, 308 F.Supp. 449, 453 (D.Md. 1969)).

Second, there can be no dispute as to Braden's meaning. The Second Circuit has stated that habeas jurisdiction is co-extensive with scope of service of process. Preiser, 506 F.2d at 1128; Henderson, 157 F.3d at 123(INS detainee seeking habeas relief from INS detention could obtain jurisdiction in New York over an out-of-state custodian through use of New York's long arm statute); see also, Wang v. Reno, 862 F.Supp. at 812 ("Given the clear language in Braden concerning 'service of process,' it appears that the jurisdiction requirement of § 2241 is read to refer to personal jurisdiction over the custodian, rather than the geographical boundaries of the district court's jurisdiction."); Chavez-Rivas, 194 F.Supp.2d at *7 ("The Braden court, however, explicitly refused to promulgate any hard and fast rule limiting the jurisdictional reach of District Courts to the place of the petitioner's confinement".); Nwankwo, 828 F.Supp. at 174; Belvett, 2002 U.S. Dist. LEXIS 3168 *4.

Third, the Braden court did overrule Ahrens. Patterson v. McLean Credit Union, 485 U.S. 617 (1988).(citing, Braden and its overruling of Ahrens as an example of a case in which the Supreme Court has explicitly overruled statutory precedents).

1. This Court Has In Personam Jurisdiction Over All the Respondents

This Court has personal jurisdiction over all Respondents. Personal jurisdiction of a federal court over a non-resident defendant is governed by the law of the state in which the court sits. Fed.

R. Civ. P. 4(e)(1); Henderson, 157 F.3d at 123(citation and quotation omitted). New York law establishes that personal jurisdiction exists over non-resident who, in person or through an agent, "transacts any business within the state". N.Y.C.P.L.R. § 302(a)(1)(McKinney 2002). Proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendants 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. Henderson, 157 F.3d at 157 (citations omitted); Parker v. Bernet Galleries v. Franklin, 26 N.Y.2d 13 (1970); Reiner & Co v. Schwartz, 41 N.Y.2d 648 (1977).

The Supreme Court has found jurisdiction to lie where the Secretary was present or through the presence of others in the Secretary's chain of command. Strait v. Laird, 406 U.S. 341, 346, 92 S.Ct. 1693, 1696, 32 L.Ed.2d 141 (1972); Ex Parte Mitsuye Endo, 323 U.S. 283, 304 (1944)); In cases involving habeas petitions by military personnel, courts find jurisdiction based upon the location of the petitioner's commanding officer or *others within the commanding officer's chain of command.* Ex Parte Hayes, 414 U.S. at 1327; Schlanger, 401 U.S. at 489-91; see also, Dillon v. Chandler, 452 F.2d 1081, 1082-83 (9th Cir. 1971); Chavez-Rivas, 194 F.Supp.2d at 374; Nwankwo v. Reno, 828 F.Supp. at 175.

President Bush, Secretary Rumsfeld, and Commander Marr in their official capacity directly and through others in the chain of command and/or those acting as their agents came into the Southern District of New York for the purpose of arresting Padilla and taking him into their custody. The transfer of Padilla's custody from the Department of Justice to the Department of Defense was accomplished in the Southern District of New York. Prior to the actual transfer, it can be assumed that these Respondents, their agents and/or, members of their respective staffs, communicated both in person and by telephone or other means with members of the United States Attorney's Office for

the Southern District of New York. They also had communications with member of the staff at the Metropolitan Correction Center in New York City.

Further, the United States Attorney's Office in this district acted as an agent of both Respondents Bush and Rumsfeld. This is evident from the degree of involvement the Department of Justice had in this matter from its inception and continuing to the present. Padilla was initially arrested on a grand jury material witness warrant and detained in this district under the custody of the Department of Justice. Just before this Court could rule on the legality of Padilla's detention as a grand jury material witness, Secretary Rumsfeld and Attorney General Ashcroft, with other senior officials consulted with each other with respect to Padilla. Thereafter, they advised the President that the Department of Defense should take over Padilla's custody. The President acted upon this advise and ordered Padilla's transfer to the military. The United States Attorney's office in this district withdrew its Grand Jury warrant to enable the transfer of Padilla's custody to the Department of Defense.

The United States Attorney's Office continues to work on behalf of President Bush, Commander-in-Chief, the Department of Defense and Secretary Rumsfeld. They have together with the Solicitor General's Office brought the within motion to dismiss. Matters concerning Padilla's detention, including counsel's right to see petitioner, Padilla's ability to receive counsel's letter, counsel's request for a copy of the President's Order directing Padilla's arrest were, per the directions of the United States Attorney's office, addressed to their attention. Interrogation of Padilla is being conducted, inter alia, by members of the Federal Bureau of Investigation ("FBI") which falls within the purview of the Department of Justice. As recently as Wednesday, July 1, 2002, FBI agents visited Padilla's mother and upon their invitation, picked-up a letter from her to her son, which they stated they would deliver to her son. Thus, even under a theory of agency law,

Respondents Bush and Rumsfeld have had sufficient contact with this district for the respondent to be amendable to process of this Court. See, Parker v. Bernet Galleries v. Franklin, 26 N.Y.2d 13.

In sum, although only one contact with the Southern District of New York would be sufficient for this Court to have *in personam* jurisdiction over all Respondents, in this instance, the Respondents all had extensive contact with the Southern District either directly or through someone within the chain of command or their agents to enable this Court to have in personam jurisdiction over all Respondents.

E. The Southern District of New York Is the Proper Venue

Venue is proper in the United States District Court for the Southern District of New York since this Court has unique familiarity with the facts and circumstances of this case and its resolution does not require Padilla's presence. Traditional venue considerations apply to habeas cases. Braden, 410 U.S. at 493-94. Those considerations include: (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 with the applicable laws.

The complained of events, Padilla's illegal arrest on order from President Bush, occurred within this district. His illegal custody by Department of Defense began in this district. The Petitioner was originally brought into this district pursuant to a grand jury material witness warrant signed by this Honorable Court, applied for by the United States Attorney's Office for the Southern District of New York.

During the time Padilla was held in this district, this court had an opportunity to hear, and review several motions brought on Padilla's behalf. Those motions sought relief similar to the instant

petition. The events which occurred in this district are a significant part of the background of this case which simply can not be divorced from the current petition. Padilla's counsel is in this district. Her familiarity with these events, and Padilla is based on her representation of Padilla in this district. Accordingly, application of the traditional venue consideration compel a determination that the Southern District of New York is the appropriate venue for the resolution of this case.

F. <u>The Government Has Engaged in Impermissible Forum Shopping</u>

It is impossible not to notice that currently within the Fourth Circuit's jurisdiction are the three prominent "terror" cases, all brought to the district courts, within that Circuit, by the government-Zacarias Moussaoui (trial pending in district court in Virginia); John Phillip Walker Lindh[17] (trial pending in district court in Virginia); Yaser Esam Hamdi(habeas application pending in district court in Virginia). None of the complained of crimes alleged in those cases are alleged to have occurred within the territorial jurisdiction of the district courts in which the actions are pending.

Similarly, the offenses which the President and Secretary Rumsfeld alleged Padilla participated, did not occur in South Carolina. Padilla did not enter South Carolina voluntarily. He has not chosen that jurisdiction. Padilla's presence in South Carolina is the result of the orders of Respondents Bush and Rumsfeld. There is no nexus between the jurisdiction of South Carolina and the instant petition. In short, the government has maneuvered Padilla's location to be in the Fourth Circuit, as they apparently maneuvered the other cases.

Adding insult to injury, the government now moves the Court to dismiss the within petition on the grounds that the petition must be brought in South Carolina, the location orchestrated by the

[17] David Kelley, an Assistant United States Attorney from the Southern District of New York, has been assigned as part of the prosecution team in Lindh matter.

government. This is nothing more than improper forum shopping, on which, they now seek the Court's imprimatur. The Court must not permit the government's manipulation of this Court's jurisdiction. See, Alcaide-Zelaya, 2000 U.S.Dist.LEXIS *14(Unless INS petitioners are permitted to name the Attorney General as respondent, "there will be almost no check in the government's ability to forum shop. It is, after all, the government that directs where an alien is detained.").

G. Court Had Jurisdiction Over this Matter and its Jurisdiction Continues

There is no question that had Padilla been moved after the filing of the instant habeas petition, this Court would have jurisdiction. Jones v. Cunnigham, 371 U.S. 236 (1963); Ex parte Endo, 323 U.S. 283 (1944); Ledesma-Valdes v. Sava, 604 F.Supp. 675, 679 (S.D.N.Y. 1985). The within petition was filed less than 48 hours after Padilla was moved. The petition could not be filed earlier since counsel was not advised in advance of the government's intention to move Padilla.

Moreover, this Court having had original jurisdiction over the matter should have the priority over any subsequent lawsuit. Ojeda Rios v, Wigen, 863 F.2d 196, 202 (2d Cir. 1988)(citing, Factors Etc. Inc. v. Pro Arts, Inc., 579 F.2d 215, 218 (2d Cir. 1978), cert. denied, 440 U.S. 908, 59 L.Ed.2d 455, 99 S.Ct. 1215 (1979)). The Second Circuit noted in Ojeda Rios: "If the current location of Ojeda Rijos' confinement had been selected by prosecuting officials, his entitlement to challenge here would be considerably stronger." Id. at 202. Here, that is exactly what the Respondents did-they chose the location of Padilla's confinement. Moreover, as stated supra, this Petition contests the legality of Padilla's detention, the very issue albeit on different grounds addressed in motions filed in this district. To deny this court jurisdiction would encourage the government to continue in their machinations. It is respectfully submitted that this court should retain the jurisdiction which it had originally.

Conclusion

Justice Fortas writing for the Supreme Court in Harris v. Nelson, 394 U.S. 286, 290-91(1969) stated:

> The scope and flexibility of the writ – 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.

It is respectfully submitted that it is clear that Donna R. Newman satisfies the requirements to act as "next friend" and that this Court has jurisdiction over this writ of habeas corpus. We respectfully request that the government's motion to dismiss the writ be denied and that the writ be issued.

Dated: July 11, 2002
New York, New York

Respectfully submitted,

_____

Donna R. Newman
Attorney for Jose Padilla

_____

Andrew G. Patel
Attorney for Jose Padilla