

ARGUMENT

Background

This case involves an issue of considerable national importance. Indeed, the U.S. Supreme Court has already had briefing and argument on the key issue now before this court, succinctly stated by Chief Justice Rehnquist: “did the President possess authority to detain Padilla militarily.” *Rumsfeld v. Padilla*, 540 U.S. ___, slip op. (June 28, 2004) at 1. That single threshold issue was not resolved because of a jurisdictional defect in the original filing of the petition. But that technical defect in the original filing did not prevent the Court from unanimously agreeing that “the merits of this case are *indisputably* of “profound importance,” *post.* at 1, 7.” *Id.* at 23 (*citing* Stevens, J., dissenting) (emphasis added); *see also id.* at 11 (Stevens, J., dissenting) (“At stake in this case is nothing less than the essence of a free society.”).

In short, this was not an ordinary referral of a post-conviction or immigration habeas petition. Nor are the consequences ordinary. Jose Padilla, an American citizen, has now been detained in solitary confinement in a military prison for more than two years without a charge ever being brought against him. Acting pursuant to an Order of a United States District Judge, Padilla was initially seized by Agents of the Federal Bureau of Investigation on May 8, 2002. Padilla was transferred out of the control of civilian officials into the hands of the military on or about June 9, 2002, by order of the President. Two days later, on June 11, 2002, Jose Padilla filed his original petition for a writ of habeas corpus through his next friend.

Revocation of Referral to Magistrate

In the two years since, both sides of this dispute have repeatedly briefed and argued the legal issue at the core of this case: whether the President has the authority, consistent with the

constitution and federal law, to detain U.S. citizens seized on U.S. soil without any criminal charge merely by labeling them enemies. That issue was briefed and argued in the United States District Court for the Southern District of New York, it was briefed and argued in the United States Court of Appeals for the Second Circuit, and it was briefed and argued in the United States Supreme Court. Each stage of briefing and argument involved many of the same attorneys that now come before this Court, and indeed Acting Solicitor General Paul Clement participated at each stage. In short, the core issue in this case is clear, the arguments on either side of it have been honed over a course of more than two years, and the attorneys working on both sides are knowledgeable and experienced in the deployment of those arguments.

There is no reason to delay. The Report and Recommendation of a Magistrate ordinarily provides this Court with valuable additional insight into habeas cases. But this is no ordinary habeas case. The history of this controversy already provides this Court with a wealth of analyses by Article III judges on the threshold merits issue in this case – analyses that, in light of the jurisdictional defect found by the Supreme Court, amount in essence to a series of reports and recommendations. Indeed, eight federal judges – a district court judge, three circuit court judges, and four Supreme Court judges – have already spoken to the merits of the single threshold now issue before this Court. *See Rumsfeld v. Padilla*, 542 U.S. __ (2004) (Stevens, J., dissenting); *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003); *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002, Mukasey, C.J.); *See also, Hamdi v. Rumsfeld*, 542 U.S. __, slip op. at __ (2004) (Scalia, J., dissenting) (finding that the President has no power to detain without charge even a citizen captured on a foreign battlefield). We respectfully suggest that they constitute an adequate body of legal analysis for this Court to detour from its ordinary practice of referring a habeas petition to a Magistrate from the time of its filing.

This Court naturally retains the discretionary authority to revoke a referral to a Magistrate. *See* Local Rule 73.02(D), (“Nothing in these Local Civil Rules shall preclude the Court or a District Judge from reserving any proceeding for conduct by a District Judge, rather than a Magistrate Judge.”). That is particularly true where, as here, a referral has occurred without the consent of the parties. Indeed, a District Court can even vacate a referral to a Magistrate that has occurred with consent of the parties, pursuant to 28 U.S.C. § 636(c), where, as here, “it is appropriate to have the trial before an Article III judicial officer because of the extraordinary questions of law at issue and judicial decision making is likely to have wide precedential importance.” 12 Wright & Miller, *Federal Practice & Procedure: Civil* § 3071.3 (*quoting* Sen. Jud. Committee, S. Rep. No. 74, 96th Cong., 1st Sess. 14 (1979) (submitted with 1979 amendments to Magistrate Act that added consensual referral of entire civil matters and provided for vacatur of such referral where appropriate)). If there were ever a case for this Court to exercise its discretionary power to revoke an automatic referral to a Magistrate, this is it.²

Expedited Proceedings

² The referral here, made pursuant to local rule, was presumably intended to fall within the authority of 28 U.S.C. § 636(b)(1)(B), which permits referral to magistrates for proposed findings of fact and recommendations for disposition of “applications for post-trial relief made by individuals convicted of criminal offenses and of prisoners challenging conditions of confinement.” *Id.* However, Padilla has not been convicted of a criminal offense and he does not challenge the conditions of his confinement. *See Wimmer v. Cook*, 774 F.2d 68, 74 n.9 (4th Cir. 1985) (holding that a challenge to “conditions of confinement” challenges the manner in which a prisoner is detained – not the legality of the detention itself). This case thus does not fit within the plain language of the statute. While the U.S. Supreme Court has held that 28 U.S.C. § 636(b)(1)(B) provides sufficient statutory authority for the non-consensual referral to Magistrates for report and recommendation on ordinary actions, *see Mathews v. Weber*, 423 U.S. 261 (1976) (holding that Federal Magistrates Act authorizes initial referral to Magistrate of actions to review administrative determinations regarding entitlement to Social Security benefits), it is not clear that the statute provides authority to refer to a Magistrate, without consent of the parties, a case raising a constitutional challenge to the legality of a detention that occurs pursuant to no criminal charge or conviction.

The U.S. Supreme Court set an expedited schedule for its consideration of the merits of this case. *See Rumsfeld v. Padilla*, 540 U.S. __, __ (Feb. 20, 2004) (granting certiorari and setting expedited schedule). The gravity of the issue presented – and the grimness of the possibility that an American citizen has languished in illegal military detention for more than two years – more than justified the Supreme Court’s decision to expedite matters. Indeed, though the federal government naturally contests the illegality of the detention, it has unmistakably acknowledged the need for expedition in the determination whether the detention is illegal. *See Motion to Expedite Consideration of Petition for Certiorari and to Establish Expedited Schedule for Briefing and Argument if Certiorari Is Granted in the U.S. Supreme Court, Rumsfeld v. Padilla* (Jan. 16, 2004) (arguing that expedition was warranted in light of, *inter alia*, “the importance and urgency of the questions presented for review in this case”).

The U.S. Supreme Court and the Executive branch were correct: the single threshold merits question in this case – whether the President has the power to detain without charge American citizens seized on American soil – is an important and urgent question warranting expedition.³ Given the frequency with which this core issue has been argued by the attorneys on both sides of this controversy and the extraordinary need for expedition, Petitioner respectfully moves this Court to establish the following schedule, consecutively with revocation of the referral to the Magistrate: Respondent’s answer to the petition shall be due seven days from the granting of this motion; Petitioner’s traverse to the answer and its opening brief on the threshold merits question of Presidential authority to detain an American citizen seized on American soil without charge shall be due fourteen days after the filing of Respondent’s answer; Respondent’s

³ The federal government now appears to have changed its mind about “the importance and urgency of the questions presented for review in this case.” The Solicitor General’s office has

brief in response to Petitioner's opening brief on the threshold merits question shall be due fourteen days after the filing of Petitioner's opening brief; Petitioner's reply brief, if any, on the threshold merits question shall be due seven days after the filing of Respondent's brief in response to Petitioner's opening brief. Moreover, Petitioner respectfully requests that this Court schedule oral argument for a day not more than ten days after the filing of Petitioner's reply brief.⁴

ATTORNEYS FOR PETITIONER

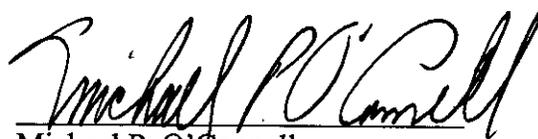
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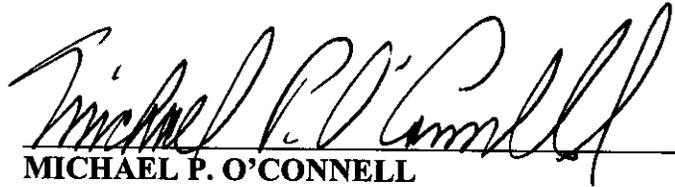
informed Petitioner's counsel that it does not consent to either expedition or revocation of the referral.

⁴ Ample authority for this Court to amend its own scheduling order is provided by Rule 4 of the Rules Governing § 2254 Cases In the United States District Courts ("The judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.") and Rule 4(b) of the Rules Governing § 2255 Cases In the United States District Courts (same).

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

JOSE PADILLA)
) C/A No. 2:04-2221-26AJ
)
) Petitioner)
) **AFFIRMATION**
)
)
) -VS-)
)
)
) COMMANDER C.T. HANFT, USN)
) Commander, Consolidated Naval)
) Brig)
)
) Respondent.)

The Petitioner's counsel affirms that prior to filing the Motion, co-counsel conferred with opposing counsel and attempted in good faith to resolve the matter contained in this Motion.



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8/3/09

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

JOSE PADILLA)	C/A No. 2:04-2221-26AJ
)	
Petitioner)	CERTIFICATE OF SERVICE
)	
-VS-)	
)	
COMMANDER C.T. HANFT, USN)	
Commander, Consolidated Naval)	
Brig)	
)	
Respondent.)	

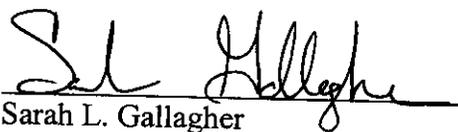
I, Sarah Gallagher, do hereby certify that a filed copy of the foregoing Motion to Vacate Referral to Magistrate Judge and to Expedite Proceedings and Motion to Expedite Proceedings in the above captioned case has been served on counsel for the Defendants at the addresses shown below on this 3rd day of August, 2004.

HAND DELIVERY

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Sarah L. Gallagher