

ARGUMENT

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. *See Rumsfeld v. Padilla*, 542 U.S. ___, slip op. (June 28, 2004) at 1. 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 (majority opinion, *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 is not an ordinary case. 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.

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 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. Indeed, eight federal judges – a district court judge, three circuit court judges, and five 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).

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.² 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: 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 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.³

² 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 informed Petitioner’s counsel that it does not consent to either expedition or revocation of the referral.

³ 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

Respectfully submitted,

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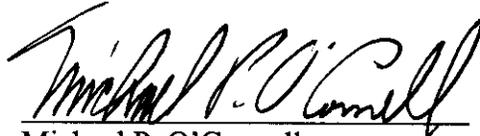
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8/3/04

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)

Petitioner)

-VS-)

COMMANDER C.T. HANFT, USN)
Commander, Consolidated Naval)
Brig)

Respondent.)

C/A No. 2:04-2221-26AJ

AFFIRMATION

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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