

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA**

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CHARLESTON, SC

Jose Padilla,

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

Petitioner,

**PETITIONER'S REPLY
(TRAVERSE) TO
RESPONDENT'S ANSWER**

vs.

**Commander C. T. Hanft, USN Commander,
Consolidated Naval Brig.**

Respondent

Petitioner Jose Padilla, by and through undersigned counsel, respectfully submits this Reply (Traverse) to Respondent Commander C. T. Hanft's Answer to the petition for writ of habeas corpus.¹ Petitioner files this reply for two reasons: to preserve the right to dispute the

¹ Rule 5 of the Rules Governing § 2254 Cases and § 2255 Proceedings ("Habeas Rules") neither requires nor prohibits the filing of a reply. The Judicial Conference's Advisory Committee on Federal Rules of Criminal Procedure has recommended the addition of a new Rule 5(e) to the Rules Governing § 2254 Cases and § 2255 Proceedings, which would codify the current common practice of filing a reply to the answer. Rule 5(e) would state that "[t]he petitioner may submit a reply to the respondent's answer or other pleading within a time fixed by the judge." See Report of Advisory Committee on Criminal Rules, dated May 13, 2002, in 123 S. Ct. No. 2, at Ct.R-13, Ct.R-50 (Nov. 15, 2002). See also *id.*, at Ct. R-22 (explaining that "the current rules make no mention of the possibility of a petitioner's or moving party's reply to th[e] [government's] response [to a habeas corpus petition or section 2255 motion]," that "[t]he Committee is aware that in some districts, the court permits the petitioner or moving party to file a reply," and that, "[t]o address that issue the Committee, by a vote of 12-0, added new Rule 5(e)"). The Committee Note to the proposed rule suggests that "[i]n lieu of setting specific time limits in each case, the court may decide to include such time limits in its local rules." *Id.* at Ct.R-50. On April 26, 2004, the Supreme Court approved the amendment to Rule 5 and the rule will take effect on December 1, 2004, unless Congress enacts legislation to reject, modify, or defer the amendments by that date.

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factual averments based on the single hearsay affidavit appended to the government's Answer, and to note that the threshold legal issue focused on by Respondent should be resolved in the context of a motion for summary judgment prior to any evidentiary hearing.

I. Traverse to Respondent's Factual Averments

Respondent's answer contains a "Statement" making factual averments, Answer at 1-9, and a legal "Argument," *id.* at 9-25. Aside from a handful of government documents (the contents of which are not in dispute), the only support for any of the factual averments in the Statement comes from an affidavit signed by a civil servant in the Department of Defense ("DoD"). Answer 4-7. The affidavit describes events about which the affiant claims no first-hand knowledge and so appears to be based entirely on hearsay. *See* Answer, App. B.

There is no indication in the affidavit that the putative facts were obtained in any manner that would permit their introduction into evidence in any federal court. Indeed, voluminous press reports suggest that the alleged hearsay statements upon which the affiant likely relies were obtained under conditions that are illegal, perhaps even criminal. *See, e.g.,* David Johnston & James Risen, "Aides Say Memo Backed Coercion for Qaeda Cases," *N.Y. Times* (June 27, 2004) (reporting government officials acknowledging that Khalid Shaikh Mohammed was "waterboarded" – i.e., strapped to a board and submerged in water – in order to make him think he was being drowned during interrogations and reporting government officials' concerns that interrogations of Mohammed and Abu Zubaydah may have violated federal criminal law prohibiting torture).

Apart from legal prohibitions against the introduction of hearsay or statements obtained by unconstitutional methods, the third-party statements upon which the affiant relies were

reportedly obtained under conditions that – as Respondent’s own officials and official publications admit – produce unreliable information. *See, e.g.*, U.S. Army Field Manual FM 34-52 (“Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear.”), *available at* <http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/FM34-52IntelInterrogation.pdf>; *see also* Dexter Filkins, “General Says Less Coercion of Captives Yields Better Data,” *N.Y. Times* (Sept. 7, 2004) (reporting that “Maj. Gen. Geoffrey Miller, the American commander in charge of detentions and interrogations” and “the former commandant of the American detention center in Guantánamo Bay” had “said that the number of ‘high-value’ intelligence reports drawn from interrogations of Iraqi prisoners had increased by more than half” once the military began investigating the abuses at Abu Ghraib and banned “a number of physically and psychologically coercive practices used by interrogators . . . [including] sleep deprivation, hooding, stripping and the use of dogs to frighten detainees.”); *id.* (““In my opinion, a rapport-based interrogation that recognizes respect and dignity, and having very well-trained interrogators, is the basis by which you . . . increase the validity of that intelligence,” General Miller said in a briefing for reporters. “It is very similar to what you would see civilian law enforcement authorities use.””); *cf.* Oral Arg. Tr., *Hamdi v. Rumsfeld*, 2004 WL 1066082 at *42 (Apr. 28, 2004) (“if you did that [torture] you might get information more quickly, but you’d really wonder about the reliability of the information you are getting”) (statement of Deputy (now Acting) Solicitor General Paul Clement).²

² The lack of reliability of information illegally obtained through torture is underscored by the constantly shifting “facts” of the government’s story. Shortly after Petitioner’s seizure, the Attorney General claimed that Petitioner was part of an “unfolding terrorist plot” that planned to detonate a “dirty bomb” in the United States. Amanda Ripley, “The Case of the Dirty Bomber,” *Time* (July 16, 2002). Despite repeating that allegation countless times in pleadings, briefs and

At this time, however, Petitioner cannot specify which averments in the hearsay affidavit he does not contest (if any) and which he does contest (if not all). That is so for three reasons.

First, discovery has yet to begin. Unlike an ordinary post-conviction habeas proceeding under 28 U.S.C. § 2254 or § 2255, the most basic facts about this detention are in dispute. Without an opportunity for Petitioner's counsel to examine the sources (human, documentary and other) on which the government relies, Petitioner would have nothing even remotely resembling "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker," *Hamdi*, 124 S.Ct. 2633, 2648 (plurality). Petitioner thus plans to file a motion seeking discovery – including document requests and depositions of persons detained by the executive branch overseas and named in the Answer – in the event that this Court chooses to move forward with an evidentiary hearing. Petitioner anticipates that the government will oppose those requests, as it has opposed somewhat similar requests in the context of the criminal prosecution of Zaccharias Moussaoui. *See generally United States v. Moussaoui*, No. 1:01-cr-00455-ALL (E.D. Va.), Docket, *available at* <http://notablecases.vaed.uscourts.gov/1:01-cr->

statements to the press, the government now appears to have changed its mind. Its story now is that Petitioner did not come to the United States intending to set off a "dirty bomb," but to cause explosions in gas-heated apartment buildings. Answer ¶ 2. This pattern of inconsistent stories has continued in the government's filings to this Court. For instance, the government's Opposition to the Motion to Expedite (filed August 17, 2004) stated that Petitioner flew from Pakistan to Chicago on May 8, 2002, *id.* at 2; the affidavit appended to its Answer (filed a mere thirteen days later on August 30, 2004) contradicted that claim, averring instead that Petitioner left Pakistan for Egypt on April 5, 2002, lived for a month with his wife and children in Egypt, then flew to Chicago on May 8, 2002. Answer, Ex.B ¶ 16. In a similar vein, the affidavit alleges that Petitioner conducted research on "an atomic bomb," *id.* ¶ 10. Until this affidavit, the government had claimed that Petitioner entertained the possibility of detonating a "radiological dispersal device," a very different device from "an atomic bomb." The new allegation reflects either the affiant's carelessness (confusing two different devices that one might hope a Director of the Joint Intelligence Task Force for Combating Terrorism would keep straight) or another change in the government's story – once again offered with no evidence beyond a government official's say-so.

00455/DocketSheet.html (listing well over a dozen Fourth Circuit orders or opinions). The issues that would arise in an evidentiary hearing in this case could prove at least as complicated as those in the *Moussaoui* case, since they occur not only in the context of the intersection between individual liberty and national security, but also in an area that has as yet benefited from no judicial interpretation whatsoever: hearings testing the veracity of government accusations of enemy combatancy under the Supreme Court's decision in *Hamdi* ("*Hamdi* hearings").

Second, the government has not permitted Petitioner to meet with his attorneys under conditions that allow attorney-client communications. Rather, the government has required his attorneys to sign statements permitting the government to record any meetings between them and Petitioner and to review any written attorney work product notes produced during such meetings. *See* Procedures for Counsel Access to Detainee Padilla At the Naval Consolidated Brig, Charleston (attached as Exhibit A) ("Access Procedures") (filed under seal). While the government's lawyers now claim that it "has not attempted to monitor counsel's meetings with petitioner and has no plans *at present* to do so," Answer at 24 (emphasis added), that claim is not enough to moot the issue. To begin, Respondent continues to review any written communications between Petitioner and his attorneys. Letter of Capt. D.G. Donovan to Andrew Patel (May 14, 2004) (attached as Exhibit B) (filed under seal). Importantly, the Answer contains no affidavit from an official who might be able to attest to the truth or falsity of the Answer's claim that monitoring of Petitioner's meetings with counsel has ceased.³ Absent such a sworn affidavit by an official with personal knowledge of the facts, attorney assertions about

³ *E.g.*, the Director of Central Intelligence, who could swear as to whether any of the members of our nation's intelligence community were monitoring meetings.

the behavior of another branch of government, though likely made with faith in their honesty, provide no evidence of that behavior.⁴

Third and finally, the government has stated that it does not believe that attorneys for Petitioner are entitled to attorney-client privilege. Access Procedures ¶8. If attorney-client privilege does not exist in this context, as the government seems to maintain, then even *unmonitored* communications between Petitioner and his attorneys would be untenable. Federal officials could subpoena Petitioner's counsel to testify as to the content of those communications; if counsel refused to testify, they would risk being held in criminal contempt; if counsel did testify, they would risk violating their ethical obligations and possible disbarment. Any lawyer would refuse to impale himself on the horns of that impossible dilemma.

⁴ Indeed, the rationale behind the requirement of sworn affidavits became clear during oral argument before the Supreme Court in this case and *Hamdi*: in response to Justice Ginsburg asking what would occur if “the executive says mild torture, we think, will help get this [terrorism-related] information,” Deputy (now Acting) Solicitor General Paul Clement informed the Court that “our executive doesn’t” torture detainees, Oral Arg. Tr., *Padilla v. Rumsfeld*, 2004 WL 1066129 at *18 (Apr. 28, 2004); this answer reiterated an even more emphatic answer earlier, when he stated that “I wouldn’t want there to be any misunderstanding about this. It’s also the judgment of those involved in these processes that the last thing you want to do is torture somebody or to do things along those lines.” Oral Arg. Tr., *Hamdi v. Rumsfeld*, 2004 WL 1066082 at *41 (Apr. 28, 2004). His representations to the Court, though almost certainly made honestly, came just hours before national network television broadcast the first photographs of Abu Ghraib detainees tortured by American officials. And it soon came to light that the Department of Justice (DOJ) had written several memoranda attempting to justify the use of torture long before oral argument. *See, e.g.*, DOJ Office of Legal Counsel Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A (Aug. 1, 2002). Finally, the carefully-worded assertion that the government lacks “plans *at present*” to violate attorney-client privilege leaves the government free to resume monitoring (even if it has stopped). The specter of secretly monitored attorney-client communications is enough to chill such communications for the duration of this litigation. Unless and until the government has committed itself not to violate attorney-client privilege through the final resolution of this habeas petition and any possible criminal prosecution of Mr. Padilla that might someday be brought, its “plans at present” are legally – and realistically – irrelevant.

In sum, there can be no final tally of contested facts until discovery is complete *and* the issues involving attorney-client privilege are resolved. Petitioner thus preserves the right to dispute each and every one of the Answer's inherently unreliable and illegally-obtained factual averments based on the single hearsay affidavit appended to it.

II. Provisional Reply to Respondent's Legal Argument

At this point in the litigation, the facts are secondary. Resolution of the long train of constitutional and evidentiary issues that would likely arise in the context of a *Hamdi* hearing is not necessary unless and until this Court rules against Petitioner on the threshold legal issue. That is because the government's factual assertions are simply irrelevant to the question whether the Constitution and laws of the United States allow the executive branch to detain without charge an American citizen seized in the United States in a civilian setting. At least five Justices of the U.S. Supreme Court have made clear that they believe the executive branch has no such power.⁵

⁵ See *Rumsfeld v. Padilla*, 124 S.Ct. 2711, 2735 (Stevens, J., dissenting, joined by Souter, J., Ginsburg, J., and Breyer, J.) (“Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.”); *Hamdi*, 124 S.Ct. at 2660, 2671 (Scalia, J., dissenting, joined by Stevens, J.) (concluding that person detained by executive branch as alleged enemy combatant “is entitled to a habeas decree requiring his release unless (1) criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus.”); *id.* at 2673 (noting that “my views in this matter . . . apply only to citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court. This is not likely to be a numerous group; currently we know of only two, Hamdi and Jose Padilla.”).

As set forth in his initial petition, Petitioner disagrees completely with the legal analysis set forth in the Answer and believes that his seizure and detention cannot be justified on the basis of the executive branch's authority to detain citizens captured on foreign battlefields. See *Hamdi*, 124 S.Ct. at 2648 (plurality). The plurality decision in *Hamdi* concluded that the Congressional Authorization for the Use of Military Force, 115 Stat. 224 (2001) (AUMF) gave the executive branch the power to detain citizens captured on a foreign battlefield. *Id.* at 2639-40. But the opinion was carefully limited to citizens captured on foreign battlefields – and in no way authorizes the detention without charge of an American citizen seized by government agents in a civilian setting in the United States.⁶ As Judge Wilkinson has noted, “[t]o compare this battlefield capture [in *Hamdi*] to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges.” *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring).

⁶ *Hamdi*, 124 S.Ct. at 2639 (“for purposes of this case, the ‘enemy combatant’ that [the executive branch] is seeking to detain is an individual who, it alleges, was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there. We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.”) (quotation and quotation marks omitted); *id.* at 2641 (Congress has authorized detention only “in the narrow circumstances considered here.”); *id.* at 2641-42 (“[O]ur understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.”); *id.* at 2642 (holding that executive branch “may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who ‘engaged in an armed conflict against the United States.’ If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of ‘necessary and appropriate force’, and therefore are authorized by the AUMF.”); *id.* at 2645 (noting significance of fact that Hamdi had not conceded being “*captured* in a zone of active combat operations in a foreign theater of war”) (emphasis in original); *id.* at 2649 (in discussing process due in an enemy combatant habeas petition, noting that “[t]he parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized. The Government has made clear in its briefing that documentation regarding battlefield detainees already is kept in the ordinary course of military affairs.”) (underlining added, italics in original).

Put simply, the executive branch has no legal authority to keep Petitioner in military detention without charge.

But the merits of that threshold legal issue are more properly argued in a summary judgment motion than in a reply pleading. *See Blackledge v. Allison*, 431 U.S. 63, 80-81 (1977) (“As in civil cases generally, there exists a procedure whose purpose is to test whether facially adequate [habeas] allegations” warrant relief as a matter of law; “[t]hat procedure is, of course, the motion for summary judgment.”); *accord, e.g., Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir.), *cert. denied*, 531 U.S. 831 (2000) (noting that “Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases” whenever “it does not conflict with the habeas rules”). Accordingly, Petitioner will soon file a motion for summary judgment on this threshold issue.

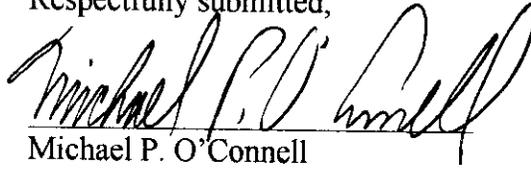
This Court should resolve that threshold issue – whether the federal government has the power to detain without charge an American citizen seized in the United States in a civilian setting – before turning to the discovery issues and the hearing discussed above. The summary judgment process requires a court to decide a strictly legal issue that does not depend on facts for its resolution before holding any hearing to find facts. *See Johnson v. Rogers*, 917 F.2d 1283, 1284-85 (10th Cir. 1990) (granting mandamus requiring district court to rule on habeas petitioner’s summary judgment motion). The reason behind that rule is evident here, where resolution of the threshold issue could vitiate the need for a *Hamdi* hearing and avoid the long trail of constitutional questions that such a hearing would likely entail. If this Court determines – in accord with the record statements of five justices of the Supreme Court – that the government has no such power to detain citizens seized at home, then the habeas petition would be granted

and the issue on which the Supreme Court granted certiorari last year would be ripe for further appellate review.

CONCLUSION

The petition should be granted.

Respectfully submitted,



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CHARLESTON DIVISION

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Petitioner) **CERTIFICATE OF SERVICE**
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-VS-)
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COMMANDER C.T. HANFT, USN)
Commander, Consolidated Naval)
Brig)
)
Respondent.)

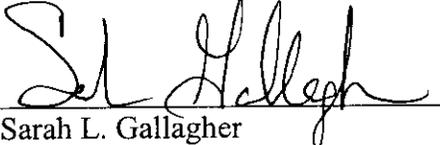
I, Sarah Gallagher, do hereby certify that a filed copy of the foregoing
Petitioner's Reply (Traverse) to Respondent's Answer in the above captioned case has
been served on counsel for the Defendants at the addresses shown below on this 10th day
of September, 2004.

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