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DETENTIONS WITHOUT DUE PROCESS OF LAW FOLLOWING SEPTEMBER 11TH

Professor Erwin Chemerinsky[1]

My thesis for you this afternoon is that since September 11th, some of the worst aspects of American history have been repeated. Throughout American history whenever there has been a crisis, especially a foreign-based crisis, the response has been repression.[2] We have come to realize in hindsight that we were not made any safer. As lawyers, you are familiar with this history. Early in American history when survival of the Republic was still

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[1] Professor Erwin Chemerinsky is a former Sydney M. Irmas Professor of Law and Political Science, University of Southern California Law School. He is presently a faculty member of Duke Law School where he is an Alston & Bird Professor of Law. Professor Chemerinsky is a renowned federal constitutional law scholar and has published extensively in the area of constitutional law. This article is based on a transcript of remarks from the Sixteenth Annual Supreme Court Review Program presented at Touro Law Center, Huntington, New York.

[2] *See* Korematsu v. United States, 323 U.S. 214 (1944). The Court stated:

> Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily.

Id. at 223. *See also* Shirley C. Rivadeneira, Comment, *The Closure of Removal Proceedings of September 11th Detainees: An Analysis of Detroit Free Press, North Jersey Media Group and the Creppy Directive*, 55 ADMIN. L. REV. 843, 858 (2003) (explaining that the Department of Justice arrested and deported numerous radical aliens for their association with communist organizations during the time known as the Palmer Raids of 1919-1920, which came about as a result of labor strikes and bombings, one of which landed on Attorney General Palmer's doorstep).

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in doubt, Congress passed the Alien and Sedition Act of 1798,[3] which made it a crime to falsely criticize the government or government officers. Individuals were convicted and spent time in prison simply for giving speeches opposing the incumbent John Adams'administration.[4] Speeches milder than what Jay Leno or David Letterman say on a nightly basis led to prison sentences.

Historical Background

During the Civil War, President Abraham Lincoln suspended the writ of habeas corpus even though the Constitution does not authorize a president to do that;[5] the Supreme Court later declared such action unconstitutional in *Ex Parte Milligan*.[6] It is often forgotten that hundreds of people were imprisoned during the Civil War just for speaking out and criticizing the way the war was being fought.[7] Civil War historians tell us that the imprisonments did not do anything to enhance the chances of the North winning

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[3] *See* THE ALMANAC OF AMERICAN HISTORY 171 (Arthur M. Schlesinger, Jr., ed., 1983).

[4] *See* JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 76 (1951) (stating that the Sedition Act was directed at deterring people from saying anything negative about the government and those who carry out its measures).

[5] Zweibon v. Mitchell, 516 F.2d 594, 627 (D.C. Cir. 1975) (citing Ex parte Merryman, 17 F. Cas. 144 (C.C. Md. 1861) (No. 9487)).

[6] 71 U.S. 2 (1866).

[7] THE LIBRARY OF CONGRESS CIVIL WAR DESK REFERENCE 720-21 (Margaret E. Wagner et al. eds., 2002) (discussing the riots by people opposing Lincoln's policies and that those people were persecuted and imprisoned as a result); Paul Finkleman, *Speech, Press, and Democracy*, 10 WM. & MARY BILL RTS. J. 813, 819 (2002).

the Civil War.[8]

During World War I, Congress passed two laws in 1917 and 1918. The two laws made it a crime to criticize the draft in the war effort.[9] From law school, you might remember the leading cases here; one was a case called *Schenck v. United States*.[10] In *Schenk*, a man circulated a leaflet arguing that the military draft was unconstitutional and that it was a form of involuntary servitude.[11] There was not a shred of evidence that his leaflet had the slightest effect on the draft or the war effort, but he was convicted and sentenced to ten years in prison.[12] The Supreme Court upheld that sentence.[13] In the *Schenck* decision, Justice Oliver Wendel Holmes wrote the famous opinion about falsely shouting "FIRE" in a crowded theater as not being protected by the First Amendment.[14] Of course, circulating the leaflet was the antithesis of falsely shouting "FIRE" in a crowded theater; this was political speech about an issue of national importance.

During World War II, 110,000 Japanese Americans, 70,000 of whom were citizens, were uprooted from their lifelong homes and placed in what President Franklin Roosevelt called

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[8] Finkelman, *supra* note 7, at 821 (noting that suppression of speech advances the belief that the government is corrupt and repressive).
[9] *See* Selective Draft Law Cases, 245 U.S. 366, 375 (1918) (upholding the draft as constitutional).
[10] 249 U.S. 47 (1919).
[11] *Id.* at 48.
[12] Edward J. Bloustein, *Criminal Attempts and the "Clear and Present Danger" Theory of the First Amendment*, 74 CORNELL L. REV. 1118, 1127 (1989) (stating that there was no evidence in *Schenck* which proved that people failed to register for the draft as a result of defendant's actions).
[13] *Schenck*, 249 U.S. at 53.
[14] *Id.* at 52.

concentration camps.[15] Not one of these individuals was ever accused, indicted, or convicted of espionage or any crime against the country. Race alone determined who was free and who was put behind barbed wire.[16]

During the McCarthy era people lost their liberty and jobs simply for being suspected of being a communist.[17] You might remember from law school the leading case during this era, a case called *Dennis v. United States*.[18] In *Dennis*, a group of individuals got together to teach the works of Karl Marx and Friedrich Engels.[19] The crime they were charged with, if you go back and look at the indictment, was conspiracy to advocate the overthrow of the United States Government.[20] They were not being charged with overthrowing the government or conspiring to do so, nor were they charged with advocating the overthrow of the government; their crime was conspiracy to advocate the overthrow of the government. For this they were sentenced to twenty years in prison. The Supreme Court opinion by Chief Justice Fred Vinson

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[15] Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack,* 102 COLUM. L. REV. 1413, 1424 (2002).

[16] Jacobs v. Barr, 959 F.2d 313, 314 (D.C. Cir. 1992) (stating that "[f]ifty years ago, President Roosevelt authorized his Secretary of War to send Japanese Americans to internment camps solely because of their race").

[17] Martin H. Redish & Kevin Finnerty, *What Did You Learn In School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox,* 88 CORNELL L. REV. 62, 112-13 (2002). The McCarthy era, which lasted from the late 1940s to the late 1950s, was a period of time when the country "became obsessed with a perceived internal threat of subversion from American Communists." *Id.*

[18] 341 U.S. 494 (1951).

[19] *Id.* at 497-98.

[20] *Id.* at 497.

upheld the sentence.[21] Chief Justice Vinson stated that when the evil is grave as to the overthrow of the government, there does not have to be any evidence which increases the likelihood of that happening.[22]

I think we can only talk about what has occurred since September 11th with this history in mind, because this history should teach us to be very cautious before rights are deprived in the name of liberty. One of the most troubling things that has gone on since September11th has been the unprecedented claim of authority to detain individuals without due process.[23] I want each of you to ask yourselves a simple question — how many people is the government now detaining or has the government detained as part of the war on terrorism since September 11th? Unless you have classified information, you do not know the number. No one knows the number because the government has refused to tell us. Prior to December 2001, the government published the number of non-citizens held on immigration violations as part of the war on terrorism, but since then, the government has not given us this number.[24] We do not know, for example, how many individuals are now being held or have been held as material witnesses as part

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[21] *Id.* at 516-17.
[22] *Id.* at 509.
[23] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2636 (2004) (stating the government's justification for holding Hamdi indefinitely "without formal charges or proceedings" as based on his classification as an enemy combatant).
[24] *See* Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice, 215 F. Supp. 2d 94, 96 (D.D.C. 2002) (stating that "[d]espite demands from members of Congress, numerous civil liberties and human rights organizations, and the media," the government has refused to reveal any information about the detainees).

of the war on terrorism.

Rasul v. Bush

Three of the cases that came to the United States Supreme Court last spring involved detentions without due process of the law. The cases were all decided on June 28th. I want to talk about each of the cases individually. The first of the cases that I want to discuss is *Rasul v. Bush.*[25] *Rasul* involved a lawsuit brought on behalf of some of the detainees in Guantanamo.[26] I should disclose here that I was the lawyer that argued the first case on behalf of the Guantanamo detainees in the federal district court in Los Angeles in February 2002, and then in the Ninth Circuit in July 2002. This case was called *Coalition of Clergy v. Bush.*[27] *Coalition of Clergy* was a lawsuit brought by a coalition of professors, journalists and clergy members on behalf of Guantanamo detainees.[28] Our position was that the federal habeas corpus statute, 28 U.S.C. § 2242,[29] allows a habeas petition to be brought on behalf of another

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[25] 124 S. Ct. 2686 (2004).

[26] *Id.* at 2690. Subsequent to the September 11th attacks, Congress passed a joint resolution which allowed the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons." The United States has captured and detained approximately 650 non-Americans at a navel base in Guantanamo Bay, Cuba. *Id. See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

[27] 310 F.3d 1153 (9th Cir. 2002).

[28] *Id.* at 1156.

[29] 28 U.S.C. § 2242 (2003) 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."

and therefore, we could do so. We lost in federal district court on the grounds that a Supreme Court case from 1950, *Johnson v. Eisentrager*,[30] precluded federal habeas corpus jurisdiction.[31]

Johnson, which was also important in *Rasul*, involved some German citizens who were caught in China during World War II. The German citizens were involved in activities against the United States. They were tried and convicted in a military tribunal.[32] The Germans were then repatriated to Germany where they were held in an American military prison.[33] The German prisoners filed a federal habeas corpus petition and the Court, in an opinion by Justice Jackson, held that no federal court had jurisdiction over a habeas petition by a non-citizen held outside the United States.[34] In *Coalition of Clergy*, the federal district court ruled against the plaintiffs based upon the precedent set in *Johnson*.[35] We appealed to the Ninth Circuit and the Ninth Circuit was concerned about standing.[36] Did journalists, clergy members and professors have

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[30] 339 U.S. 763 (1950).

[31] Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036, 1048-50 (D. Cal. 2002) (explaining that in order for the detainees to establish jurisdiction in any district court, the holding in *Johnson* required the detainees to establish that the Naval Base in Guantanamo Bay was under the sovereignty of the United States, which the court held it was not and therefore, *Johnson* precluded a finding of federal habeas corpus jurisdiction).

[32] *Johnson*, 339 U.S. at 766.

[33] *Id.*

[34] *Id.* at 781.

[35] *Coalition of Clergy*, 189 F. Supp. 2d at 1050 ("The court therefore holds that petitioners' claim that the Guantanamo detainees are entitled to a writ of habeas corpus is foreclosed by the Supreme Court's holding in *Johnson*.").

[36] *Coalition of Clergy*, 310 F.3d at 1157 ("This case stands or falls on whether the Coalition has standing to bring a habeas petition on behalf of the Guantanamo Bay detainees.").

standing to represent the interests of those held in Guantanamo? It seemed surreal to me, but the oral argument focused mainly on whether those in Guantanamo lacked access to the federal courts.

The Government argued that we did not qualify for next friend standing because we had not shown that those in Guantanamo really lacked access to come to the federal courts on their own.[37] The Coalition's argument was that the reason lawsuits were not yet filed on behalf of those in Guantanamo was because the detainees were from foreign nations and the families did not know where they were and did not have the resources to hire American lawyers.[38] To me, this explanation seemed very plausible. We lost on standing grounds with the court saying that we had not shown that the detainees in Guantanamo lacked access to the courts.[39] Meanwhile, two other lawsuits were filed in the federal district court in the District of Columbia. One was by the Kuwaiti government on behalf of some citizens held in Guantanamo. The other case involved a British parent and an Australian parent who filed on behalf of their children. The cases

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[37] *Id.* at 1160. The government claimed that the detainees were not denied access to the courts on their own because they had contact with relatives, the International Red Cross and diplomats from their home countries. *Id.*

[38] *Id.* The Coalition's argument was that "the detainees appear[ed] 'to be held incommunicado' and thus [were] physically blocked from the courts." *Id.*

[39] *Id.* The court rejected the Coalition's argument that because the detainees were being held incommunicado they lacked access to the courts. Rather, the court found that the record clearly showed that the detainees were not being held incommunicado as they had been "visited by members of the International Red Cross and diplomats from their home countries, and have had limited opportunities to write to friends and family members." *Id.*

were *Rasul v. Bush* and *Al Odah v. United States*.[40]

Relying on *Johnson*, the United States Court of Appeals for the District of Columbia Circuit ruled that no court in the country has the authority to hear a habeas petition by those held in Guantanamo.[41] The Supreme Court in a six-to-three decision reversed.[42] In his opinion for the Court, Justice Stevens wrote that *Johnson* was distinguishable because the German citizens held in that case had been accorded a trial before a military tribunal.[43] As of June 28th, the day the Supreme Court decided *Rasul*, those held in Guantanamo had been given no proceedings whatsoever. Justice Stevens also stressed that Guantanamo functions under the terms of the American treaty with Cuba and is thus under United States sovereignty, and therefore, habeas corpus petitions can be heard.[44] By pure coincidence around the time that these cases were being heard, the first reports came out about the torture of Iraqi prisoners by American soldiers.[45] We will never know if that

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[40] 215 F. Supp. 2d 55 (D.D.C. 2002). The plaintiffs in *Rasul* filed suit first and the *Al Odah* plaintiffs subsequently joined that action. *Id.* at 58.

[41] Al Odah v. United States, 321 F.3d 1134, 1141 (D.C. Cir. 2003) ("[N]o court in this country has jurisdiction to grant habeas relief . . . to the Guantanamo detainees . . . .").

[42] *Rasul*, 124 S. Ct. at 2699.

[43] *Id.* at 2693 (stating that the detainees in *Rasul* differed from those in *Johnson* because unlike the detainees in *Johnson*, the detainees in the present case were not afforded access to any military tribunal).

[44] *Id.* at 2696 (explaining that under the terms of the Lease Agreement between Cuba and the United States over the Guantanamo Bay Naval Base, the United States exercises complete jurisdiction "and may continue to exercise such control permanently if it so chooses"; therefore, aliens who are held at that base "are entitled to invoke the federal courts' authority" under habeas corpus).

[45] *See* Thom Shanker, *6 G.I.'s in Iraq Are Charged With Abuse Of Prisoners*, N.Y. TIMES, Mar. 21, 2004,§ 1, at 14.

influenced one or more of the Justices, but I do not think the Supreme Court was willing to accept the idea that the federal government could indefinitely imprison individuals for however long it wanted and that the individuals would have no access to the courts. Justice Stevens' opinion stated that the Court was not specifying what procedures the Guantanamo detainees were entitled to; all that the Court was saying was that the detainees at Guantanamo can come to federal courts on habeas corpus.[46] There are now a large number of cases pending in the United States Court of Appeals for the District of Columbia Circuit raising that very issue.[47]

Hamdi v. Rumsfeld

The second case decided by the Supreme Court on June 28th was *Hamdi v. Rumsfeld*.[48] Yasur Hamdi was an American citizen who was apprehended in Afghanistan and brought to Guantanamo.[49] When it was discovered that he was an American citizen, he was taken to a military prison in South Carolina.[50] His situation was identical to that of John Walker Lindh, an American

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[46] *Rasul*, 124 S. Ct. at 2699 ("Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now.").

[47] *See* Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 173 (D.D.C. 2004) (holding that unless a court determines that Hamdan is not a POW, he must be tried in a court-martial proceeding); Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 124 (D.D.C. 2004) (ordering jurisdictional discovery and describing the scope and guidelines for such discovery).

[48] 124 S. Ct. 2633 (2004).

[49] *Id.* at 2636.

[50] *Id.*

citizen apprehended in the war in Afghanistan. The difference is John Walker Lindh was charged with a crime, pleaded guilty and was sentenced.[51] Yasur Hamdi was never charged with a crime. The government took the position that he could be held indefinitely as an enemy combatant.[52] Hamdi had an attorney file a habeas corpus petition on his behalf and the federal district court ruled that Hamdi had a right to be represented by counsel.[53] The Fourth Circuit reversed and said that Hamdi, as an enemy combatant, had no right to be represented by counsel.[54] The federal district court had ruled that the government should have to answer a series of questions to justify holding an American citizen as an enemy combatant.[55] The Fourth Circuit reversed, holding that when the President designates someone as an enemy combatant, there will be no judicial review.[56] The United States Supreme Court granted review as to that decision. Interestingly, on the very day that the government's opposition of certiorari was due, the government announced it would give Hamdi an attorney, so it mooted the

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[51] United States v. Lindh, 227 F. Supp. 2d 565 (E.D. Va. 2002).

[52] Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 528 (E.D. Va. 2002).

[53] *Id.* at 529.

[54] Hamdi v. Rumsfeld, 296 F.3d 278, 282-83 (4th Cir. 2002).

[55] *Hamdi*, 243 F. Supp. 2d at 533. Judge Doumar stated, in referring to the declaration of Hamdi as an enemy combatant that:

> The declaration is signed by a Michael H. Mobbs and dated July 24, 2002. A thorough examination of the Mobbs Declaration reveals that it leads to more questions than it answers. The declaration fails to address the nature and authority of Mr. Mobbs to review and make declarations on behalf of the Executive regarding Hamdi's classification.

Id.

[56] Hamdi v. Rumsfeld, 316 F.3d 450, 477 (4th Cir. 2003), *cert. granted*, 540 U.S. 1099 (2004).

counsel issue. Therefore, all that was before the Court was Hamdi's status as an enemy combatant.[57]

The Supreme Court faced two issues in *Hamdi*. First, can the United States government hold an American citizen apprehended in a foreign country as an enemy combatant?[58] There is a federal statute, The Non-Detention Act,[59] adopted in 1971, which says that the federal government may imprison an American citizen only as an Act of Congress.[60] This was a law adopted by Congress to make sure that the tragedy of the Japanese internment during World War II was never repeated.[61] The Supreme Court reached a five-to-four decision without a majority opinion, holding that the authorization for the use of military force adopted after September 11th permitted holding Hamdi as an enemy combatant.[62]

Justice O'Connor wrote for the plurality of four.[63] Chief Justice Rehnquist, Justice Kennedy and Justice Breyer joined her opinion.[64] Justice O'Connor stated that the authorization for use of military force met the requirements of The Non-Detention Act.[65] Justice Thomas dissented from the majority.[66] He wrote that the

[57] *Hamdi*, 124 S. Ct. at 2635.
[58] *Id.* at 2639.
[59] 18 U.S.C. § 4001(a) (2004) provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."
[60] *Id.*; *Hamdi*, 124 S. Ct. at 2639.
[61] *Hamdi*, 124 S. Ct. at 2639.
[62] *Id.* at 2639-40.
[63] *Id.* at 2635.
[64] *Id.*
[65] *Id.* at 2639-40.
[66] *Hamdi*, 124 S. Ct. at 2674 (Thomas, J., dissenting).

President has authority as Commander-in-Chief to hold American citizens apprehended in foreign countries as enemy combatants.[67] Justice Souter, joined by Justice Ginsburg, dissented from the Court's opinion.[68] Justice Souter stated that the authorization for use of military force was not sufficiently specific to hold an American citizen as an enemy combatant.[69] Justice Souter said if Congress is going to authorize imprisonment, then Congress has to do so expressly.[70] Justice Scalia dissented, joined by Justice Stevens.[71] The most civil libertarian opinion in this case, maybe the most civil libertarian opinion in the term, was by Justice Scalia. He said that under the United States Constitution, an American citizen cannot be held without criminal charges and criminal proceedings until and unless Congress suspends habeas corpus.[72]

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[67] *Id.* at 2674. "Although the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the President to do so." *Id.* at 2679.

[68] *Id.* at 2652 (Souter, J., dissenting).

[69] *Id.* at 2653 ("The Government has failed to demonstrate that the Force Resolution authorizes the detention complained of here even on the facts the Government claims. If the Government raises nothing further than the record now shows, the Non-Detention Act entitles Hamdi to be released.").

[70] *Id.* at 2659.

[71] *Hamdi*, 124 S. Ct at 2660 (Scalia, J., dissenting).

[72] *Id.* at 2660-61. Justice Scalia stated:

> Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, § 9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify

After determining that Hamdi could be detained as an enemy combatant, the Supreme Court went to the second issue, which was whether the government must accord him due process.[73] The government took the position that Hamdi was not entitled to any form of due process.[74] Eight of the Justices agreed that Hamdi must be accorded due process, with only Justice Thomas disagreeing.[75] The Supreme Court did not specify what procedures must be followed. Justice O'Connor's plurality opinion said the lower court should follow the traditional balancing test for deciding the procedures required in a procedural due process case.[76] This balancing test was taken from the Supreme Court's decision in a 1976 case called *Mathews v. Eldridge*.[77] The *Mathews* decision articulated the procedure that must be accorded an individual before Social Security benefits are revoked.[78]

If you practice in the area, you already know the courts balance the importance of the interest to the individual, the ability of additional procedures to reduce the risk of erroneous

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> its actions here, is an implementation of the Suspension Clause. Accordingly, I would reverse the decision below.

Id.

[73] *Id.* at 2643.

[74] *Id.* at 2644. The Government argued that because Hamdi was seized in a combat zone, a habeas determination without a hearing did not violate constitutional due process provisions. *Id.*

[75] *Id.* at 2680-81 (Thomas, J., dissenting).

[76] *Hamdi*, 124 S. Ct. at 2647 ("We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.").

[77] 424 U.S. 319 (1976).

[78] *Id.* at 349 (holding that an evidentiary hearing was not necessary; rather, the existing administrative procedures satisfied due process).

deprivation, and the government's interest involved.[79] Justice O'Connor stated that though there has to be notice of the charges, representation by counsel and a meaningful factual hearing, the burden of proof might be put on Hamdi to show that he was not an enemy combatant.[80] I thought this very troublesome. How can somebody prove a negative? How can I prove to you that I am not an enemy combatant? How could Hamdi show that? The Court remanded the issue to the lower court for a determination.[81] As you know, just within the last week Hamdi was released from custody. The government in essence negotiated a plea with him where Hamdi denounced his citizenship and agreed to never come back to the United States thereby making the *Hamdi* case moot.[82] But it certainly does not make moot the issue of whether the government must provide due process of law to an American citizen apprehended in a foreign country and held as an enemy combatant.

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[79] *Hamdi*, 124 S. Ct. at 2646.

[80] *Id.* at 2649 ("[O]nce the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.").

[81] *Id.* at 2639.

[82] *CBS News: Terror Suspect's Release Hits Snag* (CBS news broadcast, Sept. 30, 2004). *Available at* http://www.cbsnews.com/stories/2004/ 10/11/national/ main648566.shtml (last visited Feb. 8, 2005).

Rumsfeld v. Padilla

The third and final case that was decided, *Rumsfeld v. Padilla*,[83] was to me the most troublesome of the cases. Jose Padilla is an American citizen who was apprehended in a Chicago airport in May of 2002.[84] His alleged crime was plotting to build and detonate a dirty bomb in the United States.[85] Although Padilla has been in prison for twenty-nine months, he has never been charged with any crime, has never been indicted, has never been tried and he has never been convicted.[86] The government's position was that he could be held indefinitely as an enemy combatant.[87]

There is, of course, no stopping point to this argument. If the government can arrest Jose Padilla in a Chicago airport and hold him forever as an enemy combatant, could the government also have held Timothy McVeigh and Terry Nichols as enemy combatants for blowing up the Oklahoma City federal building and not have to try them at all? Could the government hold any drug dealer as an enemy combatant as part of the war on drugs? Could the government designate you or me as an enemy combatant saying we are a danger to our country and hold us forever without review? I am always skeptical of arguments based on the Framers' intent, but if there is any area where their intent seems clear, it is

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[83] 124 S. Ct. 2711 (2004).
[84] *Id.* at 2715.
[85] *Id.* at 2716 n.2.
[86] Padilla v. Bush, 233 F. Supp. 2d 564, 569 (S.D.N.Y. 2002).
[87] *Padilla,* 124 S. Ct. at 2715.

the Framers' great distrust of government, especially law enforcement power. That is why the Fourth Amendment[88] says a person cannot be arrested except with a warrant issued by a justice magistrate.[89] A person cannot be held for trial unless the Fifth Amendment[90] requirement for a grand jury indictment has been met.[91] A person cannot be imprisoned unless a jury of his or her peers finds proof of guilt beyond a reasonable doubt.[92] What the President was claiming in the *Padilla* case is no less than the authority to suspend the Fourth, Fifth and Sixth Amendments for American citizens apprehended in the United States. Unfortunately, the Supreme Court did not decide this question. The Supreme Court in a five-to-four decision ruled that Padilla's habeas corpus petition had been filed in the wrong district.[93]

Padilla, after being arrested in Chicago, was taken to New York where he was held briefly as a material witness and then he was shipped to a military prison in South Carolina.[94] While he was in New York, a lawyer filed the habeas corpus petition for him in the Southern District of New York.[95] The case was then litigated

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[88] U.S. CONST. amend. IV provides in pertinent part: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
[89] *See* Illinois v. McArthur, 531 U.S. 326, 330 (2001).
[90] U.S. CONST. amend. V provides in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."
[91] *See* Digital Equip. Corp. v. Desktop Direct, 511 U.S. 863, 874 (1994).
[92] U.S. CONST. amend. VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."
[93] *Padilla*, 124 S. Ct. at 2727.
[94] *Id.* at 2715-16.
[95] *Id.* at 2715.

to the Second Circuit and went up to the Supreme Court.[96] The Court, with Chief Justice Rehnquist writing, ruled in a five-to-four decision that a habeas corpus petition has to be filed in the district where the individual is held.[97] So Padilla has to start all over again in South Carolina. Justice Stevens wrote a vehement dissent. He stated that the *Padilla* case was not about subject matter jurisdiction because there is no doubt that the federal courts have subject matter jurisdiction.[98] Justice Stevens further stated that the case was not about personal jurisdiction because there is no doubt that the President and Secretary of Defense are eminent with personal jurisdiction in New York.[99] Justice Stevens asserted that the issue in *Padilla* was one of venue.[100] Venue is always a flexible doctrine in the interest of justice.[101] Jose Padilla had been in prison since May 2002 without due process. It is not in the interests of justice to make Jose Padilla start all over again.

In footnote eight, Justice Stevens said that he completely agreed with the Second Circuit that there was no authority to hold an American citizen apprehended in the United States as an enemy combatant.[102] Justices Souter, Ginsburg and Breyer joined his

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[96] *Id.* at 2717.
[97] *Id.* at 2722.
[98] *Padilla*, 124 S. Ct. at 2734 (Stevens, J., dissenting).
[99] *Id.* at 2733-34.
[100] *Id.* at 2734.
[101] *Id.* at 2732.
[102] *Id.* at 2735 n.8 ("Consistent with the judgment of the Court of Appeals, I believe that the Non-Detention Act . . . prohibits — and the Authorization for Use of Military Force Joint Resolution . . . does not authorize — the protracted, incommunicado detention of American citizens arrested in the United States.") (citations omitted).

dissenting opinion.[103] Remember in the *Hamdi* case, Justice Scalia dissented and said that an American citizen can never be held as an enemy combatant unless Congress suspends the writ of habeas corpus.[104] So it seemed clear that there were five Supreme Court Justices willing to rule in favor of Padilla, but he has to start all over again to get back to the Supreme Court.

I conclude with two quotes from Supreme Court Justices. One is from the late Justice Robert Jackson. Justice Jackson said, "if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[105] Of course he is right about that. Even precious rights are subject to compromise if it is truly necessary for the sake of national security. But it has to be truly necessary with no other alternative to safeguard national security. The other quote comes from the late Justice Louis Brandeis. He said that "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent."[106] Justice Brandeis further stated that "[m]en born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers."[107] He said "[t]he greatest dangers to liberty lurk in

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[103] *Padilla*, 124 S. Ct. at 2729 (Stevens, J., dissenting).
[104] *Hamdi*, 124 S. Ct. at 2670 (Scalia, J., dissenting) ("Though treason often occurred in wartime, there was, absent provision for special treatment in a congressional suspension of the writ, no exception to the right to trial by jury for citizens who could be called 'belligerents' or 'prisoners of war.' ").
[105] Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).
[106] Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).
[107] *Id.*

insidious encroachment by men of zeal, well-meaning but without understanding."[108]

[108] *Id.*