

No. 03-1027

IN THE
Supreme Court of the United States

DONALD RUMSFELD,

Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA,

Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF OF RESPONDENT

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STATEMENT

On May 8, 2004, Joe Padilla was arrested in the Chicago O'Hare International pursuant of a warrant, and consequently transferred to the Metropolitan Correctional Center (MCC). While he was held at the facility, Donna R. Newman who was appointed by the District Court of New York to represent Mr. Padilla, filed motion to challenge the warrant. Two days before the date that court had assigned to hear the case, the military personnel, following a direct order from the Secretary of Defense, Donald Rumsfeld, detained Mr. Padilla in pursuant of the president's action to label Mr. Padilla an "enemy combatant." He was then transported to South Carolina, and since then, has remained detained for nearly two years. Joe Padilla – an American citizen and originally born in New York – has been held in solitary confinement while being deprived from the benefit of an attorney and due process of the laws of the United States enacted by congress.

There are numerous aspects surrounding this unique case, which, in harmony with many of the court precedents, undeniably shall lead this court to find the action of the executive in extreme conflict with the laws, amendments, and Constitution of the United States. This court hereby is urged to take prompt action to do justice based on the merits of this case, find the action of the executive inconsistent with the law, and guarantee Mr. Padilla's constitutional right to be tried before a jury and at a speedy and neutral trial.

ARGUMENT

I. THE PRESIDENT IS NOT IN THE POSITION TO LABEL AN INDIVIDUAL AN "ENEMY COMBATANT."

The first aspect of this case involves the foremost grounds of the Department of Defense for detaining Mr. Padilla. After Padilla was arrested by the authorities in Chicago and placed at

the correctional center in New York, he no longer posed an imminent threat to the national security. As a citizen of the United States, he was successfully arrested and put through the judicial due process and judgment by a grand jury, in accordance with the Constitution for examination of facts and possible conviction. Yet the executive deemed necessary to intervene with the judicial process and detain Padilla by the military while relying solely on the president's conclusion that Padilla was an "enemy combatant." However, the very basis of the president's authority to make such judgment is absent. The sole purpose of the act of characterizing an individual as an "enemy combatant," "prisoner of war," etc. is to farther determine the judicial process, and to determine the faith of the individual. On those merits, such classification, purely judicial in essence, shall solely be exercised by a grand jury, and in unity with the laws of the United States, or such other guidelines as those set forth by the Geneva Convention, because "the judicial power of the United States, shall be vested in ... inferior Courts as the congress may ... establish."¹

Even if the president were to be given the power to label a citizen-detainee an "enemy combatant," this action has to be in accordance with the court's clear guidelines of how this power should be practiced. "A citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the *factual basis* for his classification, and a *fair opportunity to rebut the Government's factual assertions* before a neutral decisionmaker. *These essential constitutional promises may not be eroded.*" *Hamdi v. Rumsfeld* (2004) (emphasis added). Not only the executive did not provide Mr. Padilla with *any* factual findings, which resulted in him being labeled an "enemy combatant," but he was also deprived from his right to challenge that status "before a neutral decisionmaker."

¹ U.S. Constitution, Article III, Section 1.

Hence the president's action to take the role of identifying an individual as an "enemy combatant" is in sharp incongruity with the Constitution and laws of the United States, as well as the concept of the separation of powers, which the Constitution's framers intended the three government branches to remain faithful to.

II. THE DEFENSE DEPARTMENT'S DETENTION OF MR. PADILLA VIOLATES THE UNITED STATES CONSTITUTION.

The executive's action of detaining Mr. Padilla by the military and holding him indefinitely in custody infringes Padilla's rights guaranteed to him in the Fourth² and the Fifth Amendments³ of the United States Constitution. Joe Padilla has not been charged with any crime. Neither has the executive provided *any* evidence to support their claim that Mr. Padilla was planning on exploding a "dirty bomb" on American soil, or elsewhere. He has been detained on *a mere suspicion* of his intention to associate and cooperate with Al Qaeda. Such speculative and indefinite suspicion is most definitely not sufficient to meet the standard of "probable cause" and is not "supported by oath or affirmation" of the Fourth Amendment, and hence cannot become acceptable basis for Padilla's detention.

Even if the executive believed otherwise, it is constitutionally the job of the courts of the United States to examine the evidence and determine the appropriate conviction of the crime, rather than the executive playing the role of judiciary *and* executive by penalizing Mr. Padilla with detention on *no criminal charge*. The executive employed the military to detain the *already-*

² The Fourth Amendment reads, "The right of the people to be secured in their persons, houses, and effects, against unreasonable searches and seizures, shall not be violated, but upon *probable cause, supported by oath or affirmation*, and particularly describing the place to be searched, and persons or things to be seized." (Emphasis added)

³ The Fifth Amendment reads, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of a *Grand Jury*, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; not shall any person be subject for the same offence to be twice put in jeopardy of life or limb; not shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation." (Emphasis added)

arrested Padilla out of the hands of the security forces at the Correctional Center in New York, placed him in military facilities, held him indefinitely, and deprived him from his constitutional rights to a trial and benefit to a counsel. This deprivation violates the right of “due process” in the Fifth Amendment, *his constitutional right as a citizen under any circumstances, including wartime.*

Executive’s action also violates the Sixth Amendment⁴ of the United States Constitution. By detaining Padilla, the Military deprived Mr. Padilla of enjoying a “speedy and public trial,” getting “informed about the nature and cause of the accusation,” being “confronted with the witnesses against him,” having a chance to obtain “witnesses in his favor,” and having “the assistance of counsel for his defence,” all of the rights that he most unquestionably must enjoy before being imposed a prison term by the executive. The executive’s action of detaining Mr. Padilla under no circumstances is supported by neither the Constitution, nor the laws of the United States, the rulings of the courts of the Great Britain and our democratic allies, guidelines of the Geneva Convention, and the rulings of the International Court of War Criminals.

III. U.S.C. § 4001 DELIBERATELY LIMITS THE EXECUTIVE FROM VIOLATING THE U.S. CONSTITUTION BY EXERCISING EXCESSIVE POWER DURING WARTIME

In 2003, the United States congress passed U.S.C. § 4001⁵, one of the most crucial laws

⁴ The Sixth Amendment reads, “In all criminal prosecutions, the accused shall enjoy the right to *a speedy and public trial*, by an *impartial jury* of the state and district wherein the crime shall have been committed, which district shall have been ascertained by law, and to be informed of *the nature and cause of the accusation*; to be *confronted with the witnesses against him*; to have compulsory process for *obtaining witnesses in his favor*, and to have *the Assistance of Counsel for his defence.*” (Emphasis added)

⁵ **Section 4001. Limitation on detention; control of prisons** reads, (a) *No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.* (b)(1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended, and the applicable regulations. (2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.

aimed specifically at addressing the limits of the presidential power. There are two important points about this law that this court needs to keep in mind.

The first point is that this law was passed *after* the terrorist attacks of September 11, and while the United States was in the middle of war. This fact is significant because it conquers a possible argument that the guidelines addressed in this law do not apply to a wartime executive, because in fact, this law is specifically designed to do just that.

The second important point to keep in mind is that after the congress passed the Patriot Act immediately following the September 11 attacks in New York, our legislators looked back on the broad interpretation of power that was given to President Roosevelt during the World War II, which resulted in the creation of the Japanese detention camps, and did not want another military to be able to imprison American citizens on American soil without due process and at a time when the courts are functioning effectively, orderly, and in full capacity. The vast majority of this court's precedents also support the view that President's "power is at its lowest ebb, for then he can rely only upon his own *constitutional powers minus any constitutional powers of Congress* over the matter." *Youngstown Sheet & Tube Co. v. Sawyer*, (1952) (Jackson, J., concurring) (emphasis added). Hence it is imperative for this court to interpret such congressional resolutions in light of the president's constitutional powers.

With that background, this court needs to keep in mind that Section 4001 is aimed at *specifying*, not broadening, the presidential power. Mr. Padilla, a U.S. citizen, was imprisoned by the executive and without any permission granted to the president by the congress. Hence the president's course of action violates section (a) of the U.S.C. § 4001, which obligates such imprisonment only "in pursuant with an act of congress."

IV. THE AUTHORIZED USE OF FORCE (AUMF) DOES NOT GIVE THE MILITARY THE POWER TO DETAIN CITIZENS *INDEFINITELY*.

One of the legislation, which the government has relied on to justify the detention of Mr. Padilla is the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (“AUMF”)⁶, enacted by Congress following the attacks of September 11, which gives the government the power to “take action” to prevent future terrorist attacks.

It is imperative for this court to consider some crucial facts about the Authorized Use of Military Force granted to the president to detain individuals using the military. The AUMF does not say *anything* about the executive having the power to use the military to arrest American citizens on American soil. The law is a mere clarification of president’s power to prevent acts of terrorism. The main reason, which inclined the congress to give the president the authorization to “deter and prevent acts of international terrorism in the United States,” was to provide the president the power he needed to use the U.S. military forces to launch a military strike against Al Queda, and the government of the Taliban *in Afghanistan* that harbored them. However, the congress did not intend to transfer the full judicial power of the courts in the United States to the military, or give the president the power to detain *American citizens on American soil* by the military, hold them indefinitely, and deprive them from due process.

Even if military force is to be used to detain an individual, the detainee should under *no circumstances* remain detained long-term, uncharged with any crime, and deprived from the benefit of a counsel and a speedy and public court to decide his detention on the merits. The use of military to detain a citizen, if at all, shall only be exercised *to capture*, held for a short period for interrogation, and to immediately turn over the individual to the judiciary for due process in

⁶ AUMF reads, “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.”

complete accord with the U.S. Constitution.

V. COMMANDER IN CHIEF CLAUSE DOES NOT GIVE THE PRESIDENT THE POWER TO HOLD MR. PADILLA WITHOUT TRIAL

One might attempt to use the commander in chief clause⁷ to justify the president's right to use the military to detain American citizens without charging them with a crime. Hence it is important to analyze this clause in the Constitution and clarify why such attempt would be nothing more than a failing effort to devise the judicial system.

This clause calls for the president to be the commander in chief of the army and the navy, *when called into the actual service by the United States*. This court has repeatedly supported Alexander Hamilton's interpretation of this clause that the power of the commander in chief "amount[s] to nothing more than the supreme command and direction of the military and naval forces." *The Federalist* No. 69, at 418 (Alexander Hamilton) In addition, U.S.C. § 4001 explicitly prohibits such unconstitutional and excessive abuse of power. Hence this clause by no means gives the president to take such oppressive executive action to detain any American *citizen* off the street on American soil, hold them indefinitely, and deny them the benefit of an attorney, just by labeling them an "enemy combatant."

VI. THE S.C. RULING ON *HAMDI V. RUMSFELD* (2003) FULLY SUPPORTS MR. PADILLA'S RIGHT TO A FAIR TRIAL.

Yaser Hamdi, a Louisiana-born American citizen, was arrested during the military conflicts in Afghanistan. Most similarly to the situation of Mr. Padilla, after the interrogation, the government claimed that Hamdi was an "enemy combatant," and that persons of such status,

⁷ U.S. Constitution, Article II, Section 2, first paragraph reads, "The President shall be the commander in chief of the Army and the Navy of the United States, and of the Militia of the several states, *when called into the actual Service of the United States*; he may require the opinion, in writing, of the principle officer in each of the executive Departments, upon any subject relating to the Duties of their respective offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in case of impeachment." (Emphasis added)

they claimed, could be held indefinitely without any formal charges, court proceedings, or even the freedom to communicate with anyone, beyond prison walls. This court, however, did not agree with such interpretation. JUSTICE O’CONNOR, delivering the opinion of the court, clarified the rules and rights that the executive branch is bound to follow when treating the persons he labels “enemy combatants.” Those rights directly apply to Mr. Padilla.

A. THE RIGHT OF INDIVIDUALS TO HABEAS CORPUS

One of the most relevant issues with respect to an “enemy combatant” which was clearly addressed by the majority opinion was the right to habeas corpus. In the majority opinion, JUSTICE O’CONNOR clearly stated that in the “absent [congressional] suspension, the writ of habeas corpus remains available to *every individual detained within the United States.*” During the Hamdi case, the court believed that the right to the great writ of habeas corpus should only be taken away from individuals in pursuant of congress’s clear suspension of such right.

Mr. Padilla was arrested in Chicago, which is in the United States. The writ of habeas corpus was not suspended at, or after the time of his arrest by congress. Hence Mr. Padilla meets the requirements proposed in the two premises of the rule stated above by the court, and hence, he has the unquestionable right to habeas corpus.

B. THE COURT RULES ON THE RIGHT OF AN “ENEMY COMBATANT” TO CHALLENGE HIS CLASIFICATION

In the opinion of the court, JUSTICE O’CONNOR also clarified the rights of the detainees that must be respected after their arrest. In the opinion of the court, JUSTICE O’CONNOR clearly stated that “due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker...” In addition and in response to the government’s

concern to protect confidential information which they assert would be released indirectly to public, JUSTICE O'CONNOR states that such factors "are properly taken into account in our due process analysis."

Another crucial fact, which this court needs to know in response to possible allegations that a public trial would cause an unwanted release of confidential information, is that Mr. Padilla has been held in the facilities of, and interrogated by the military for the past two years, and the government has candidly admitted that *he no longer has any intelligence value*. Hence a public trial at this point *will not* jeopardize any actionable or other class of intelligence, and such reason, like any other reason, does not qualify in any logical way his deprivation from his constitutional right to due process.

C. THE COURT APTLY ASSERTS AN *UNLIMITED* DETENTION UNCONSTITUTIONAL UNDER ANY CIRCUMSTANCES

One of the most important factors that JUSTICE O'CONNOR, along with the majority, finds unacceptable is *unlimited* detention. Although the court admits that under very unique circumstances, the military may be employed to detain an individual only for a limited time, JUSTICE O'CONNOR asserts that "given its unconventional nature, the current conflict is unlikely to end in a cease-fire agreement" and that the position which the government has taken suggests that Hamdi's detention "could last for the rest of his life." Mr. Padilla's detention, almost identical in nature to Mr. Hamdi's, could also last for the rest of his life. However the court uncompromisingly states in simple words, "*indefinite detention for the purpose of interrogation is not authorized.*" This ruling unquestionably applies to Mr. Padilla and his detention is not based on a crime charge or conviction, but solely interrogational.

**VII. THE RESOLUTIONS PASSED BY CONGRESS FOLLOWING THE
ATTACKS OF SEPTEMBER 11 ARE LAWS, RATHER THAN
AMENDMENTS TO THE CONSTITUTION.**

Following the attacks of September 11, the congress deemed necessary to pass laws to provide the executive with a greater power to fight the war on terror and prevent future attacks against American interests. However one important fact that this court ought to apply to all of these laws and resolutions is that they are to be executed in full accordance with the United States Constitution. There is absolutely no fact that would indicate that by passing these laws, the congress intended to make a drastic departure from the United States Constitution and give the president unlimited and unsupervised power to divest U.S. citizens militarily from the justice and civil liberties guaranteed in the U.S. Constitution. Such rules are made for the executive to follow, but *not use to escape the Constitution*.

If these laws give the president any power that is not enumerated under the executive powers under Article II, or any other sections of the U.S. Constitution, the framers of our Constitution intended for the Supreme Court to be the only branch to have the power to strike down those laws, as it has in the past. Hence, if in this court's judgment, any of the laws passed by congress, literally or practically, allow a branch of government to take away the *constitutional rights* and civil liberties of individuals, *at any time and under any circumstances*, those laws shall by all means be struck down to protect the very foundations on which our union was built.

**VIII. SUCH MILITARY DETENTIONS AS MR. PEDILLA'S IS IN DIRECT
CONTRAST TO THE CONCEPT OF SEPARATION OF POWERS.**

When the fifty-five delegates gathered at the Philadelphia convention in 1779 to write the Constitution of the United States and engineer a multi-branch government, they employed the

concept of separation of powers and checks and balances to prevent one branch to overpower the other two and become tyrannical. Throughout the history of the United States government, this system has functioned extraordinarily well as the three branches exercised their enumerated powers to check the actions of the other two branches.

Today this court is faced with a case where the executive has taken full charge of the executive *and* judicial aspect of managing the government in wartime. Hence there are two fundamental facts that this court needs not disregard.

The executive has repeatedly used the claim of necessity of extra executive power during the time of war in order to expand its power. However, as it is reflected in the Federalist papers and extended discussions at the convention, the delegates were well aware that they needed to write a Constitution that would be applicable *at anytime*. The Constitution was written during one of the most perilous times in the history of this country, when the country was deeply divided, much as it is today, over how to create a sense of nationhood, and at the same time respect the states' rights. Hence the Constitution is brilliantly written in a way that makes it well fit and necessary during uneasy times.

The second important point, which relates to the course of executive's actions in treatment of Mr. Padilla, is that by detaining him and unconstitutionally divesting him from his rights, the executive interrupted the judicial process, which resulted in one branch to micromanage a case unilaterally and without judicial check. For instance the U.S.C. § 4001 calls for the president to use "necessary and appropriate" force to fight terror. However if the executive has taken these measures to mean that the president is the sole person to be the judge of what is "necessary and appropriate." By attempting to manage the fight against terror unilaterally, the executive has closed the possibility for the judiciary to question what it is that

makes it “necessary and appropriate” to detain citizens and detain them based on secretive reasons, in a country where the courts are open and has regular criminal proceedings.

If the executive is to detain individuals and hold them uncharged without the judiciary’s judgment, and in contrast to congressional rules and limitations, then where does the “judicial check” take place? We have to be crystal clear about the concept that even though a broader interpretation of power is important to protect our nation, *the president’s claim of power must be evaluated in light of established limitations on executive practices, including detention and military authority* in order for us to “preserve our commitment at home to the principles for which we fight abroad.” *Hamdi v. Rumsfeld* (2004)

Mr. Padilla does not request this court to free him without trial. Nor does he deny the necessity of presidential power during these times. However he strongly believes in his right to be charged, tried, and convicted before being put behind bars, based on the principle that “it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support.” *Korematsu v. United States* (1944) (Murphy, J, dissenting).

CONCLUSION

Mr. Padilla’s rights to the writ of habeas corpus, benefit of an attorney, and a speedy and public trial for judgment on the merits of the case shall resolutely be protected, and his unlimited and indefinite detention must effectively be terminated.

Respectfully Submitted.

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