3-1-2006

National Security Versus Due Process: Korematsu Raises Its Ugly Head Sixty Years Later in Hamdi and Padilla

Sarah A. Whalin

Follow this and additional works at: http://readingroom.law.gsu.edu/gsulr

Part of the Law Commons

Recommended Citation
Available at: http://readingroom.law.gsu.edu/gsulr/vol22/iss3/7

This Article is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact jgermann@gsu.edu.
NATIONAL SECURITY VERSUS DUE PROCESS: Korematsu\textsuperscript{1} RAISES ITS UGLY HEAD SIXTY YEARS LATER IN HAMDI\textsuperscript{2} AND PADILLA\textsuperscript{3}

INTRODUCTION

A precarious balance exists between the fundamental individual freedoms of U.S. citizens and the need for national security.\textsuperscript{4} During times of war, this balance tends to shift in favor of national security.\textsuperscript{5}

Perhaps the most striking historical example of this shift toward national security is the internment of U.S. citizens of Japanese descent during World War II.\textsuperscript{6} Following the death of 2,403 Americans in the Japanese bombardment of Pearl Harbor on December 7, 1941, the government indefinitely detained 70,000 U.S. citizens of Japanese descent, without charges or trial in the name of national security.\textsuperscript{7}

After World War II, the pendulum eventually swung back toward individual freedoms with statutes such as the Non-Detention Act of 1971, which provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”\textsuperscript{8} The government also “acknowledge[d] the fundamental

\begin{footnotesize}
\begin{enumerate}
\item Korematsu v. United States, 323 U.S. 214 (1944).
\item See Hamdi, 542 U.S. at 545 (Souter, J., concurring) (“The defining character of American constitutional government is its constant tension between security and liberty . . .”); THOMAS E. BAKER, \textit{THE MOST WONDERFUL WORK . . .}: \textit{OUR CONSTITUTION INTERPRETED} 1-5 (1996) (discussing the framing fathers’ intent in drafting the United States Constitution to structure the government in such a way to avoid governmental tyranny and protect individual freedom).
\item See, e.g., Eugene V. Rostow, \textit{The Japanese American Cases—A Disaster}, 54 YALE L.J. 489 (1945) (discussing the historical and political background of the Japanese internment camps).
\item \textit{Id.} at 490; STONE TWETEN, \textit{Road to Pearl Harbor} (1994), http://history.acusd.edu/gen/WW2Timeline/RD-PEARL.html.
\item 18 U.S.C. § 4001(a) (1994).
\end{enumerate}
\end{footnotesize}
injustice” of the Japanese internment camps and vowed to prevent anything similar from happening again.⁹

On September 11, 2001, 60 years after Pearl Harbor, the United States experienced its second major attack on home soil when al-Qaeda terrorists hijacked four commercial airliners and flew them into the World Trade Center and the Pentagon, killing 2,996 Americans.¹⁰ Despite the lessons of World War II’s “fundamental injustice,” one of the government’s responses in the aftermath of the September 11 attacks was to detain U.S. citizens and hold them indefinitely without charges or trial in the name of national security.¹¹

This Note will discuss the history of the tension between due process and national security and the implications of two recent Supreme Court cases regarding the detainment of U.S. citizens. Part I will examine the historical background of the Court’s justification for the Japanese internment camps and post-war denunciation of these decisions.¹² Part II will discuss the post-September 11 legislation and Supreme Court cases regarding the detainment of U.S. citizen terrorist suspects.¹³ Finally, Part III will examine the implications of these recent Court decisions and their effect on one citizen-detainee who still awaits final adjudication on the merits of his case.¹⁴

I. HISTORICAL PERSPECTIVE

A. Japanese Internment: National Security Trumps Due Process

1. Executive and Legislative Authorization of Japanese Exclusion and Internment

Immediately after the December 7, 1941 attack on Pearl Harbor, the U.S. government arrested known enemy agents and fascist .

---

¹². See infra Part I.
¹³. See infra Part II.
¹⁴. See infra Part III.
sympathizers residing within the country based on specific information compiled by police authorities. These individuals included U.S. citizens and aliens of Japanese, German, and Italian descent.

Then, on February 19, 1942, President Franklin Roosevelt signed Executive Order 9066, authorizing military commanders to use their "discretion" to designate military areas "from which any or all persons may be excluded" to "protect[] against espionage and against sabotage." The President later signed Executive Order 9102, establishing the War Relocation Authority, "to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security." Congress followed suit by giving statutory authority to exclude individuals from the designated military areas. While the executive orders and statute explicitly authorize only exclusion and make no specific mention of internment, the Supreme Court found an implied power to detain citizens as long as it was "confined to the precise purpose of the evacuation program."

Pursuant to these orders, the government drove 110,000 men, women, and children of Japanese descent, including 70,000 U.S. citizens, from their homes on the West Coast and imprisoned them in internment camps. The government held them there indefinitely without charges or trial. To be released, the prisoners had to

15. Rostow, supra note 6, at 492, 496.
16. Id. at 492 n.11.
17. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). This was in part a response to anti-Japanese sentiments on the West Coast that sought to exclude all persons of Japanese descent. See Rostow, supra note 6, at 497.
19. See Act of Mar. 21, 1942, ch. 191, 56 Stat. 173 (1942) (codified as amended at 18 U.S.C. § 97a (Supp. 1943)) ("[W]hoever shall enter, remain in, leave, or commit any act in any military area prescribed. . . . shall. . . . be guilty of a misdemeanor and upon conviction shall be liable to a fine . . . not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.").
20. Ex parte Endo, 323 U.S. 283, 301-02 (1944).
21. See Rostow, supra note 6, at 490.
22. Id. at 502.
navigate a convoluted application process for grants of leave clearance and indefinite leave.\textsuperscript{23}

Application for leave clearance involved the government’s determination of the internee’s loyalty and an investigation of the effect of the individual’s release on the “war program and upon the public peace and security.”\textsuperscript{24} The government set forth nine factors sufficient to deny leave clearance, including “failure or refusal to swear unqualified allegiance to the United States and to forswear any form of allegiance to the Japanese Emperor . . . ; a request for repatriation or expatriation . . . ; military training in Japan; employment on Japanese naval vessels; [or] three trips to Japan after the age of six.”\textsuperscript{25}

If an internee managed to pass this step, he then had to apply for indefinite leave to actually receive permission to leave the internment camp.\textsuperscript{26} To obtain approval, the internee needed to meet one of 14 additional specifications regarding the adequacy and appropriateness of the internee’s proposed employment and living arrangements.\textsuperscript{27} Even then, the government could deny the internee’s application for indefinite leave if it determined the “community sentiment [was] unfavorable” or if the internee planned to live or work in an area closed to indefinite leave, including areas from which the government originally evacuated the internee.\textsuperscript{28}

This system of loyalty checks and leave applications allowed the government not only to detain citizens whose loyalty it had not yet established, but also to continue to detain citizens whom the government itself deemed were not a threat to national security.\textsuperscript{29} The government’s holding of these citizens without charges or trial

\textsuperscript{23} See \textit{Ex parte} Endo, 323 U.S. at 291-92 & n.9 (describing the application and review process for leave clearance and indefinite leave as set forth in the administrative instructions of the Handbook of July 20, 1943).

\textsuperscript{24} \textit{Id.} at 292; see also Nanette Dembitz, \textit{Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions}, 45 COLUM. L. REV. 175, 210-11 (1945) (discussing the leave application process).

\textsuperscript{25} \textit{Ex parte} Endo, 323 U.S. at 292 n.10 (citing the Handbook of July 20, 1943).

\textsuperscript{26} \textit{Id.} at 292.

\textsuperscript{27} \textit{Id.} at 292-93 (listing some of the requirements set forth in the Handbook of July 20, 1943).

\textsuperscript{28} \textit{Id.} at 293.

\textsuperscript{29} See \textit{id.} at 292-93; see also Rostow, \textit{supra} note 6, at 500.
explicitly violated the Fifth Amendment of the Constitution, which provides that "[n]o person shall be . . . deprived of life, liberty or property without due process of law."\textsuperscript{30} Despite this apparent constitutional violation, the Supreme Court nevertheless upheld the validity of the internment camps as necessary for national security, thereby choosing national security over a citizen’s right to due process.\textsuperscript{31}

2. Supreme Court Upholds Japanese Internment

a. Korematsu v. United States

When given the opportunity to review the constitutional validity of the exclusion orders, the Supreme Court supported the government’s actions.\textsuperscript{32} In \textit{Korematsu}, the Court began its decision by stating that restrictions affecting civil rights of a particular minority group are subject to “rigid scrutiny,” however, the Court arguably failed to apply this level of review.\textsuperscript{33}

The government charged Fred Korematsu, a U.S. citizen of Japanese descent, with violating the Act of March 21, 1942, which made it a misdemeanor to disobey the government’s exclusion orders.\textsuperscript{34} Without rigidly scrutinizing the reasoning behind the exclusion orders or the effect they had on the constitutional rights of excluded citizens, the Court found the interests of national security outweighed the importance of a citizen’s individual freedoms.\textsuperscript{35} Despite conceding Korematsu’s loyalty and the great hardships the exclusion orders imposed on Japanese-American citizens, the Court defended the exclusion orders since “under conditions of modern warfare [when] our shores are threatened by hostile forces, the power


\textsuperscript{31} See \textit{Ex parte Endo}, 323 U.S. at 301-02; \textit{Korematsu}, 323 U.S. at 223-24.

\textsuperscript{32} See 323 U.S. at 223-24.

\textsuperscript{33} \textit{Id.} at 216; \textit{Dembitz, supra} note 24, at 193.


\textsuperscript{35} \textit{Korematsu}, 323 U.S. at 219-20.
to protect must be commensurate with the threatened danger." The Court applied its rationale from *Hirabayashi v. United States*, upholding the exclusion orders as a constitutionally delegated war power since "exclusion from a threatened area ... has a definite and close relationship to the prevention of espionage and sabotage."

Furthering its stance that national security outweighed individual freedoms, the Court refused to rule on the constitutionality of the internments themselves, stating it would do so only after the government had issued an assembly or relocation order.

b. *Ex parte Mitsuye Endo*

While the Supreme Court only impliedly affirmed the constitutionality of the government’s power to detain citizens in *Korematsu*, the Court went a step further in *Ex parte Endo* by directly affirming the government’s power to detain citizens in the name of national security. The government detained Mitsuye Endo, a concededly loyal U.S. citizen of Japanese ancestry, at an internment camp without charges or trial. In response, Endo filed a petition for a writ of habeas corpus to challenge her detention. In reviewing the validity of the detention, the Court examined the balance between individual freedoms and national security, and assumed the government was "sensitive to and respectful of the liberties of the citizen" and that the purpose of the wartime measure "was to allow for the greatest possible accommodation between those liberties and the exigencies of war."

Affording great deference to the government’s authority to issue wartime measures, the Court found the initial detention of all Japanese-Americans in internment camps could have been “necessary

36. *Id.* at 216, 219-20.
37. 320 U.S. 81, 93 (1943) (holding a curfew order was a constitutional delegation of governmental power to protect against espionage and sabotage).
39. *Id.* at 222.
41. *Id.* at 284-85, 294.
42. *Id.* at 285.
43. *Id.* at 298-300.
to the successful operation of the evacuation program." The only limitation the Court placed on this power to detain was that once the government conceded a citizen's loyalty, it could no longer subject that citizen to the leave procedure, and should unconditionally release him. Hence, the Court ordered the government to release Endo two and a half years after her initial detention in July 1942 and one and a half years after the government conceded her loyalty in August 1943.

B. Post-World War II: Strengthened Due Process Protections

With no direct attacks on U.S. soil in the decades following World War II, and having learned important lessons from the Japanese internment camps, Congress and the Supreme Court began strengthening protections for procedural due process. This shift was evident in the repeal of the Emergency Detention Act of 1950, the adoption of the Non-Detention Act of 1971, and in the denunciation of the Court's decision in *Korematsu*.

1. Congress Adopts Legislation Shifting the Balance in Favor of Due Process

a. Emergency Detention Act of 1950 Repealed

During the height of McCarthyism and the rampant fear of Communism, Congress passed the Emergency Detention Act of 1950. This Act authorized the President to declare a state of "Internal Security Emergency" and direct the Attorney General to detain individuals suspected of communist activity. The language of

44. *Id.* at 301.
45. *See id.* at 302.
47. *See discussion infra Part I.B.
50. *Id.* § 102(a).
the Act was reminiscent of the Executive Orders used to detain Japanese-Americans during World War II.\textsuperscript{51} However, this Act went a step further and explicitly authorized the detention of U.S. citizens suspected of espionage or sabotage.\textsuperscript{52} But even in this climate of fear, Congress provided detailed mechanisms for due process including the following provisions: (1) preliminary hearings to inform the detainee of the grounds for his detention and his right to counsel; (2) preliminary examinations of probable cause for detention where the detainee could introduce evidence and cross-examine witnesses; and (3) review of the detention orders by a Detention Review Board and the courts.\textsuperscript{53}

Although the government never actually detained any citizen under the Emergency Detention Act, Congress repealed the Act in 1971, “lest [it] become an instrumentality for apprehending and detaining citizens who hold unpopular beliefs and views.”\textsuperscript{54} Given the similarities in language and effect of the Emergency Detention Act and the Executive Orders used to exclude and detain Japanese-Americans, “groups of Japanese-American citizens regard[ed] the legislation as permitting a recurrence of the round ups which resulted in the detention of Americans of Japanese ancestry . . . during World War II.”\textsuperscript{55} In repealing the statute, the House Judiciary Committee specifically addressed the issue of due process, stating the Act seems “to violate the Fifth Amendment by providing imprisonment not as a penalty for the commission of an offense, but on mere suspicion that an offense may occur in the future. The Act permits detention without bail even though no offense has been committed or is charged.”\textsuperscript{56}

\textsuperscript{51} Compare id. § 101(11) (“The security and safety . . . of the United States, and the successful prosecution of the common defense, . . . require every reasonable and lawful protection against espionage, and against sabotage to national-defense material, premises, forces and utilities.”), with Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) (“The successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities.”).

\textsuperscript{52} Emergency Detention Act of 1950 § 104.

\textsuperscript{53} Id. §§ 105-11.


\textsuperscript{55} Id.; see supra note 51.

b. Non-Detention Act of 1971

The Congressional House Judiciary Committee felt so strongly Congress should not permit the detention of U.S. citizens based merely on executive action that, in addition to repealing the Emergency Detention Act, it adopted a statute specifically limiting the executive’s authority.\(^57\) The Non-Detention Act clearly expresses Congress’s intent that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”\(^58\)

2. Denunciation of Korematsu and Reparations

Both Congress and the Supreme Court have expressed disapproval of the injustice resulting from the internment of Japanese-Americans during World War II.\(^59\) In 1988, Congress passed the Civil Liberties Act, specifically apologizing for and making restitution to those Japanese-American individuals whom the government evacuated and interned.\(^60\) In addition to focusing on the past in “acknowledg[ing] the fundamental injustice of the evacuation, relocation, and internment . . . ; apologiz[ing] on behalf of the . . . United States . . . ;” and “mak[ing] restitution to those . . . who were interned,” this Act also sought to “discourage the occurrence of similar injustices and violations of civil liberties in the future.”\(^61\)

The Supreme Court has also denounced the Court’s decision in Korematsu; eight of the nine Justices on the Hamdi and Padilla Court stated the Court wrongly decided Korematsu.\(^62\) Further, the District

\(^{57}\) Id. The Judiciary Committee expressed concern that the Emergency Detention Act could be viewed either as authorization to detain or as a restriction on detention and that “[r]epeal alone might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority.” Id.


\(^{61}\) Id. § 1989(1), (2), (4), (6).

\(^{62}\) See Cole, supra note 48, at 993 & n.165 (citing decisions in which Chief Justice Rehnquist and Justices Breyer, Ginsberg, Kennedy, O’Connor, Scalia, Stevens, and Thomas specifically criticized the Court’s decision in Korematsu with only Justice Souter having yet to weigh in on the issue). Despite this apparent agreement that the Court erred in Korematsu, the Supreme Court has not expressly overruled the decision. See id.
Court for the Northern District of California overturned Korematsu’s conviction and stated that the Supreme Court’s decision in *Korematsu v. United States*

stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizen from the petty fears and prejudices that are so easily aroused.63

This cautionary statement expresses fear that the United States could once again use national security to justify curtailing individual freedom and insists we learn from past mistakes.64 Yet, only 20 years later, we seem to have forgotten the lessons of our past.65

II. POST-SEPTEMBER 11, 2001

A. Legislation Authorizing Military Force

One week after the attacks of September 11, 2001, Congress passed a joint resolution for the “Authorization for Use of Military Force” (AUMF).66 This Act authorizes 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 that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States.”67 The language of

64. See generally *id.*
65. See infra Part II.
67. *Id.*
this resolution grants broad power to the President to use military force against terrorists in the interest of national security, but what are the limits of this power?\footnote{See generally \textit{id.} (authorizing the President to use "all necessary and appropriate force...".)}

B. \textit{Suspected Terrorist Cases}

1. \textit{Hamdi v. Rumsfeld: Citizen Captured on the Battlefield}

Yaser Esam Hamdi was a Louisiana-born U.S. citizen who moved to Saudi Arabia as a child.\footnote{Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).} About two months prior to September 11, 2001, Hamdi moved to Afghanistan where the Northern Alliance later seized him and turned him over to the U.S. military, which detained him in a naval brig for nearly three years.\footnote{\textit{Id.;} Jerry Markon, \textit{U.S. to Free Hamdi, Send Him Home}, WASH. POST, Sept. 23, 2004, at A1.} President George W. Bush determined Hamdi was an "enemy combatant," and the government claimed this "justifie[d] holding him in the United States indefinitely—without formal charges or proceedings—unless and until it [made] the determination that access to counsel or further process [was] warranted."\footnote{Hamdi, 542 U.S. at 510-11.} The government thus denied Hamdi the right to send or receive communication or have access to counsel for nearly the first two years of his detainment.\footnote{\textit{Id.} at 540 (Souter, J., concurring). The government claimed interrogation is a "fundamental tool" in gathering intelligence and that allowing prisoners access to counsel would disrupt the "tightly controlled environment, which has been established to create dependency and trust by the detainee with his interrogator." Declaration of Donald D. Woolfolk, Deputy Commander, Joint Task Force (June 13, 2002), http://news.findlaw.com/tridocs/docs/hamdi/hamdi61302wflkdec.pdf. This disruption would not only "result[] in a direct threat to national security" but "may open an information conduit between [the] detainee [] and members of al Qaida, the Taliban, or other terrorist groups." \textit{Id.}}

The President based Hamdi's enemy combatant classification solely on information provided by Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy, who claimed Hamdi received weapons training from a Taliban military unit, that he remained with this unit after September 11, 2001, and that he possessed a Kalishnikov assault rifle at the time he surrendered to the
Northern Alliance forces. Mobbs further claimed that during Hamdi’s interrogation, Hamdi stated he “entered Afghanistan the previous summer to train with and, if necessary, fight for the Taliban” and “[b]ased upon his interviews and . . . his association with the Taliban, Hamdi was considered . . . an enemy combatant.” Hamdi’s father disputed this characterization, asserting Hamdi was doing relief work in Afghanistan, had no connections with the Taliban, and was just in the “wrong place at the wrong time.”

In its decision to review Hamdi’s writ of habeas corpus, the Supreme Court sought to address two main issues: (1) whether the government had the authority to detain Hamdi; and, if so (2) what process he was constitutionally due.

a. Congressional Authorization of Detention

On the first issue, the Court determined the AUMF met the Non-Detention Act’s requirement that a detention be “pursuant to an Act of Congress.” The Court therefore held the government had “explicit congressional authorization for the detention of individuals” in Hamdi’s situation, emphasizing the importance of Hamdi’s capture on the battlefield. It reasoned that even though the AUMF did not specifically mention detention as part of the powers it authorized, this power was “clearly and unmistakably authorized” since the detention of enemy combatants is so “fundamental and accepted an incident to war” that it falls under the “necessary and appropriate force” language of the AUMF. The Court placed one limitation on the

74. Id.
75. Hamdi, 542 U.S. at 511, 554 (Scalia, J., dissenting).
76. Id. at 516, 524.
77. 18 U.S.C. § 4001(a) (1994); Hamdi, 542 U.S. at 517.
78. Hamdi, 542 U.S. at 517. Although Justice Thomas dissented, he agreed with the plurality opinion on this point, making it a holding of the case that Congress had indeed authorized the President’s detention of Hamdi. Id. at 587 (Thomas, J., dissenting). The plurality, however, limited its opinion to those individuals like Hamdi, who were classified as enemy combatants and who the government alleges were “‘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.” Id. at 516.
AUMF’s authorization to detain Hamdi without charges or formal proceedings. Such authorization exists only so long as the United States is engaged in active combat in Afghanistan. The Court, however, concedes the war against terrorism is unlike traditional warfare, and the current conflict could last for several generations.

This finding is contrary to the congressional intent expressed in the repeal of the Emergency Detention Act of 1950 and the enactment of the Non-Detention Act of 1971. Congress enacted the Non-Detention Act specifically to provide safeguards against another internment situation and to limit the executive’s power such that a court could not construe an executive order as authority to detain citizens. Given the legislative history behind this Act, Congress did not intend for detention to be an implied power, but rather a power that only a specific congressional authorization would grant. Further, there is no indication Congress ever contemplated that the powers authorized by the AUMF would include the power to detain U.S. citizens without further congressional action.

80. Hamdi, 542 U.S. at 521.
81. Id. at 521.
82. Id. at 520.
85. See Hamdi, 542 U.S. at 542-45 (Souter, J., concurring in part, dissenting in part) (finding that in light of the legislative history and other historical background surrounding the enactment of the Non-Detention Act, “Congress necessarily meant to require a congressional enactment that clearly authorized detention or imprisonment”). Justice Scalia also finds the AUMF lacks the “clarity necessary to overcome the statutory prescription” of the Non-Detention Act. Id. at 574 (Scalia, J., dissenting).
86. See 147 CONG. REC. H5638-863 (daily ed. Sept. 14, 2001) (showing no mention of detention of U.S. citizens as a power under the proposed AUMF). Several Representatives expressed that the AUMF does not actually give the President any powers not already granted by the Constitution and the War Powers Act, but that the Act’s purpose was to demonstrate unity between the Executive and Legislative branches. Id. at H5640, 41, 49, 51, 54, 58, 66, 73, 76, 77, 79 (statements of Reps. Hoefelf, Blumenauer, Spratt, DeFazio, Watt, Eshoo, Lofgren, Wu, Costello, McGovern, and Baldwin). One Representative further expressed that such unity would provide an opportunity for Congress and the President to carefully define a common goal and thereby “avoid the problems of the past,” such as the acts committed “against the civil liberties of Japanese-American citizens” during World War II. Id. at H5641 (statements of Rep. Blumenauer). Another Representative expressed concern that future anti-terrorism legislation may lead to another Japanese internment situation unless Congress acted “with great care and with an eye beyond today’s headlines,” but did not think the AUMF raised such concerns or authorized “the President to apprehend ‘alien enemies.’” Id. at H5680 (statements of Rep. Conyers).
In construing the AUMF’s order to use “necessary and appropriate force” as authority to detain citizens, the Court returns to the rationale it used in Korematsu and Ex parte Endo to uphold the authority to exclude and detain citizens.\(^{87}\) In Korematsu, the Court sanctioned the government’s exclusion of U.S. citizens due to its “definite and close relationship to the prevention of espionage and sabotage,” and in Ex parte Endo, the Court found the initial detention was “necessary to the successful operation of the evacuation program.”\(^{88}\) This is precisely the type of implied inference Congress sought to prevent in passing the Non-Detention Act.\(^{89}\)

\(b.\) **Constitutional Due Process: Mathews v. Eldridge\(^{90}\) Balancing Test**

Having found the government had authority to detain Hamdi, the Supreme Court next addressed what level of due process the government owed Hamdi under the Constitution.\(^{91}\) In doing so, the Court used the Mathews test, balancing the government’s interest in maintaining national security against individual interests in constitutional rights.\(^{92}\) The balancing test the Court described in Mathews states that determining the level of process owed “requires consideration of . . . the private interest that will be affected by the official action; . . . the risk of an erroneous deprivation of such interest through the procedures used . . .; and . . . the Government’s interest, including the function involved and the . . . burdens that the additional or substitute procedural requirement would entail.”\(^{93}\)

On the one hand, the Court found Hamdi had considerable private interest in his own liberty and freedom from confinement, stating “commitment for any purpose constitutes a significant deprivation of

---

\(^{87}\) See Hamdi, 542 U.S. at 518-19; Korematsu v. United States, 323 U.S. 214 (1944); Ex parte Endo, 323 U.S. 283 (1944).

\(^{88}\) Korematsu, 323 U.S. at 217-18; Ex parte Endo, 323 U.S. at 301.

\(^{89}\) See Hamdi, 542 U.S. at 544-45 (Souter, J., concurring in part, dissenting in part).

\(^{90}\) 424 U.S. 319 (1976).

\(^{91}\) Hamdi, 542 U.S. at 524-39.

\(^{92}\) Id. at 529-35; Mathews, 424 U.S. at 335.

\(^{93}\) Mathews, 424 U.S. at 335 (holding that an injured worker is not entitled to an evidentiary hearing prior to the termination of Social Security disability benefit payments).
liberty that requires due process protection." On the other hand, the Court recognized the government’s interest “in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States” and considered the government’s argument that a system of “trial-like process” would be distracting and would “intrude on the sensitive secrets of national defense.”

In balancing these competing interests, the Court reached an intermediate position holding that the government must inform a citizen-detainee challenging his enemy combatant status of the reason for his classification and give him an opportunity to rebut this evidence before a “neutral decisionmaker,” which may consist of either the courts or military tribunals. However, these “proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict,” including allowing a “presumption in favor of the Government’s evidence” and permitting the government to introduce hearsay evidence. Under this scheme, once the government meets its burden of proof showing the individual qualifies as an enemy combatant, the burden shifts to the habeas petitioner to rebut this classification with more persuasive evidence.

Since the government never gave Hamdi the factual basis for his classification or an opportunity to rebut this evidence, the Court held he had not received the process to which he was entitled and remanded the case for further proceedings. In light of this holding, the U.S. government released Hamdi pursuant to a release agreement requiring him to renounce his U.S. citizenship and abide by strict travel restrictions—requiring him to remain in Saudi Arabia for a set period and avoid travel to certain countries, including the United States, Afghanistan, and Iraq.

94. Hamdi, 542 U.S. at 530.
95. Id. at 531-32.
96. Id. at 533, 537.
97. Id. at 533-34.
98. Id. at 534.
99. Id. at 538-39.
100. See, e.g., Markon, supra note 70. "[T]his clearly shows that the government was not able to meet the burden of proof that the Supreme Court had set for it, and rather than risk further
While the Court ruled in favor of Hamdi through its Mathews test analysis, the implications of its ruling are far from a victory for civil liberties. Instead, the Court has asserted the Constitution does not in fact guarantee an individual the right to due process, but rather that one’s due process right may vary depending on the weight of the government’s interests in denying that right. While holding that a citizen-detainee may rebut the government’s evidence, the evidentiary burden the Court places on the citizen-detainee puts him at a major disadvantage. This makes it nearly impossible to overcome the presumption in favor of the government, particularly when forced to rebut the government’s hearsay evidence. Thus, while the Court claims “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens,” it seems to hand the blank check to the judicial branch, allowing it to modify an individual’s due process rights as it sees fit.

---


101. See Hamdi, 542 U.S. at 578 (Scalia, J., dissenting) (“If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court.”).

102. See id. at 575-76 (Scalia, J., dissenting). Justice Scalia criticizes the use of the Mathews test here, since the Mathews case merely involved the “withdrawal of disability benefits,” an unrelated issue with much smaller stakes. Id. (emphasis omitted). Further, the Constitution and common law already allow for the suspension of the writ of habeas corpus and a separate balancing test is unnecessary. Id.

103. See id. at 575 (Scalia, J., dissenting) (criticizing the Court’s adoption of “an unheard-of system in which the citizen rather than the Government bears the burden of proof, testimony is by hearsay rather than live witnesses and the presiding officer may well be a ‘neutral’ military officer rather than judge and jury”).

104. See Timothy M. Phelps, Supreme Court; Combatant Rulings Seen As Confusing, NEWSDAY, July 2, 2004, at A27.

105. Hamdi, 542 U.S. at 536, 575 (Scalia, J., dissenting).

['T]he major effect of [the plurality’s] constitutional improvisation is to increase the power of the Court. Having found a congressional authorization for detention of citizens where none clearly exists; and having discarded the categorical procedural protection of the Suspension Clause; the plurality then proceeds, under the guise of the Due Process Clause, to prescribe what procedural protections it thinks appropriate. Id. at 575 (emphasis added).
2. Rumsfeld v. Padilla: Citizen Captured off the Battlefield

a. Background

Jose Padilla, a U.S. citizen, was born in Brooklyn, New York and grew up in the United States. As Padilla exited a plane at the Chicago O’Hare International Airport on May 8, 2002 federal officers arrested him pursuant to a material witness warrant to testify at the grand jury investigation of the September 11, 2001 attacks. At the time, Padilla was traveling on a valid U.S. passport, was dressed in civilian clothing, and was carrying no weapons or explosives. Federal authorities transferred Padilla to New York and held him in custody there until June 9, 2002, when the President declared Padilla an enemy combatant and ordered Secretary Rumsfeld to detain him in military custody. The Department of Defense then transferred Padilla to a naval brig in Charleston, South Carolina where it held him for over three and a half years. During this time, the government did not formally charge Padilla with any crime and held him incommunicado, without access to his family or any non-military contacts, and only limited access to counsel.

Like Hamdi, the President based Padilla’s classification as an enemy combatant on information provided by Michael Mobbs, the Special Advisor to the Under Secretary of Defense for Policy. Mobbs asserted that in 1998, Padilla moved to Egypt and later


110. Id. at 432; Linda Greenhouse, Justices Let U.S. Transfer Padilla to Civilian Custody, N.Y. TIMES, Jan. 5, 2006, at A22.


traveled to Pakistan, Saudi Arabia, and Afghanistan and "has been closely associated with known members and leaders of the Al Qaeda terrorist network." Mobbs declared that Padilla researched how to build a uranium-enhanced explosive, or dirty bomb, and had plans to detonate one in the United States, although Mobbs conceded the plan was "still in the initial planning stages." Mobbs also conceded the two confidential sources supplying this information were themselves detainees, that "[s]ome information . . . remains uncorroborated and may be part of an effort to mislead or confuse U.S. officials," that one of the sources later recanted his statements, and that the other source was under the influence of "various types of drugs" while being interrogated. Based on this involuntary and unreliable hearsay evidence, the President concluded Padilla "posed a continuing, present and grave danger to the national security of the United States" and ordered his military detention.

Padilla's court-appointed attorney filed a petition for habeas corpus on June 11, 2002 against Secretary of Defense Donald Rumsfeld in the Southern District of New York and sought an order permitting Padilla's access to counsel. That action marked the beginning of what has become a highly controversial, convoluted legal battle over the scope of the President's power to detain U.S. citizens whom he deems to be enemy combatants. So far, two district courts, two courts of appeal, and the United States Supreme Court have reviewed Padilla's case, with two decisions finding the AUMF authorized Padilla's detention, two finding it did not, and one failing to rule on

114. Id.
115. Id. at 2 n.1.
116. Id. at 5; Order from George W. Bush, President of the United States, to Donald Rumsfeld, Secretary of Defense, to Detain Jose Padilla (June 9, 2002), http://news.findlaw.com/bdocs/docs/padilla/padillabush60902det.pdf [hereinafter Detention Order].
117. Padilla III, 542 U.S. 426, 432 (2004). The Southern District of New York had appointed Padilla an attorney upon his initial arrest under the material witness warrant, but the government denied Padilla access to her once the President classified him as an enemy combatant and ordered him to be taken into military custody. Newman, supra note 106, at 41-44.
118. See infra Part II.B.2.
the issue. On January 13, 2006, the Supreme Court was scheduled to hear Padilla’s case in a closed door conference in order to discuss whether the President has authority to indefinitely detain a U.S. citizen classified as an enemy combatant and captured on U.S. soil.

b. Southern District of New York: AUMF Authorizes Detention

In December 2002, the Southern District of New York held Secretary Rumsfeld was the proper habeas corpus respondent and that the district court had proper jurisdiction over the case. On the merits, the court held the President had authority to detain citizens captured on U.S. soil pursuant to the AUMF. The court found the AUMF confers broad authority to “use all necessary and appropriate force against those” associated with al-Qaeda and, without explicitly analyzing it, assumed this broad authority encompasses the power to detain.

Further, the court found the AUMF, a joint resolution, qualifies as an “Act of Congress” under the Non-Detention Act, looking only at whether a joint resolution in general may be viewed as an “Act of Congress” and skirting the issue of whether that “Act of Congress” must be explicit or implied. Finding a joint resolution is an “Act of Congress” and implying that the AUMF includes authorization to detain, the court declared that the Non-Detention Act does not bar Padilla’s detention.

c. Second Circuit Court of Appeals: AUMF Does Not Authorize Detention

In December 2003, the Second Circuit Court of Appeals affirmed the district court’s finding of proper jurisdiction over the case, but held the AUMF does not provide specific authorization to detain

119. See infra Part II.B.2.b-f.
120. See Greenhouse, supra note 110.
122. Id. at 598.
123. Id. at 598-99.
124. See id. at 598.
125. Id. at 599.
citizens captured on U.S. soil as required by the Non-Detention Act.\textsuperscript{126} The appellate court spent more time than the district court analyzing the pertinent questions underlying whether the AUMF satisfies the Non-Detention Act’s requirement.\textsuperscript{127} The court found that “[b]ased primarily on the plain language of the Non-Detention Act but also on its legislative history and the Supreme Court’s interpretation, . . . that precise and specific language authorizing the detention of American citizens is required to override its prohibition.”\textsuperscript{128} Next, the court held the AUMF does not satisfy the Non-Detention Act’s requirement for “precise and specific language,” nor is there an implied authorization for detention in the legislative history or structure of the resolution.\textsuperscript{129}

d. United States Supreme Court: Failure to Rule on the Merits

In June 2004, the case reached the U.S. Supreme Court.\textsuperscript{130} Despite the fundamental constitutional questions raised in Padilla’s case and the fact that the same Court, on the same day, held that Yaser Hamdi was entitled to some level of due process, the U.S. Supreme Court refused to rule on the merits of Padilla’s case.\textsuperscript{131} Instead, it reversed both lower courts, holding Secretary Rumsfeld was not the proper respondent for the habeas corpus petition and dismissing the case without addressing whether the AUMF authorizes the President to detain citizens captured on U.S. soil.\textsuperscript{132}

\textsuperscript{126} Padilla \textit{II}, 352 F.3d 695, 698, 708, 710-11 (2d Cir. 2003).

\textsuperscript{127} See \textit{id.} at 722-24.

\textsuperscript{128} \textit{id.} at 719-20 (emphasis added).

\textsuperscript{129} \textit{id.} at 722-23 & n.31 (“[T]he Joint Resolution contains no language authorizing detention,” the “debates on the Joint Resolution . . . never mention the issue of detention,” and “[i]t is unlikely . . . that Congress would expressly provide in the Joint Resolution an authorization required by the War Powers Resolution but . . . leave unstated and to inference something so significant and unprecedented as authorization to detain American citizens under the Non-Detention Act.”).

\textsuperscript{130} Padilla \textit{III}, 542 U.S. 426 (2004).

\textsuperscript{131} \textit{id.} at 430.; see Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004); discussion supra Part II.B.1.

\textsuperscript{132} Padilla \textit{III}, 542 U.S. at 430. The Court interpreted the federal habeas corpus statute to mean that the only appropriate respondent is the one person who has “immediate custody” over the person detained. \textit{id.} at 435. In Padilla’s case, the person with this level of control was Commander Marr, commander of the brig where the government detained Padilla. \textit{id.} at 436.
However, had the Court wanted to address this issue, it likely could have found jurisdiction was proper.\textsuperscript{133} Both the district court and court of appeals found the unique facts of this case indicated Secretary Rumsfeld was an appropriate respondent for the habeas corpus petition although this would not normally be the case.\textsuperscript{134} Further, while the Supreme Court attempted to set forth a bright-line rule for determining the proper habeas respondent, it cited several exceptions to that rule and rejected what it saw as Padilla’s “request for a new exception . . . based upon the ‘unique facts’ of this case.”\textsuperscript{135} However, “[i]n recognizing exception upon exception and corollaries to corollaries, the Court itself persuasively demonstrates that the rule is not ironclad. It is, instead, a workable general rule . . . .”\textsuperscript{136}

By declining to rule on the merits of the case, the Court chose to perpetuate the indefinite, incommunicado detention of a U.S. citizen for interrogation purposes, which it had just found unconstitutional in \textit{Hamdi}.\textsuperscript{137} By delaying a final determination on whether the President has authority to indefinitely detain U.S. citizens captured on U.S. soil solely for interrogation purposes, and by allowing this practice to continue, the Court has, in essence, ruled in favor of that authority for the time being.\textsuperscript{138} This decision is reminiscent of the Court’s refusal

\textsuperscript{133} See \textit{id.} at 464 (Stevens, J., dissenting); \textit{Padilla II}, 352 F.3d 695; \textit{Padilla I}, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (the latter two cases finding proper jurisdiction). The Supreme Court’s arguments “do not justify avoidance of [their] duty to answer” the profoundly important questions of constitutional law that this habeas corpus case raises. \textit{Padilla III}, 542 U.S. at 455 (Stevens, J., dissenting).

\textsuperscript{134} See \textit{Padilla II}, 352 F.3d at 705-08 (affirming the district court’s finding that Secretary Rumsfeld is the proper respondent and stating courts “‘have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements’”); \textit{Padilla I}, 233 F. Supp. 2d at 581-82 (finding no bright-line rule in determining the proper habeas corpus respondent; this case is unique given Secretary Rumsfeld’s personal involvement in Padilla’s detention and his ability to determine when Padilla is no longer a threat, and thus Secretary Rumsfeld is the proper respondent).

\textsuperscript{135} \textit{Padilla III}, 542 U.S. at 433-42, 460 (Stevens, J., dissenting).

\textsuperscript{136} \textit{id.} at 460 (Stevens, J., dissenting).


\textsuperscript{138} Cf. Rostow, \textit{supra} note 6, at 504-05 (discussing the Supreme Court’s ruling in \textit{Hirabayashi v. United States}, and suggesting that “[t]he refusal of the Supreme Court to face the problem [of the legality of the internment camps] was itself a positive decision on the merits,” giving strength to those in favor of the internment and weakening those in opposition to it).
in Korematsu to rule on the constitutionality of the detainment of U.S. citizens captured on U.S. soil, preferring to delay answering that question until it presented itself in the proper form.\(^{139}\)

e. District of South Carolina: AUMF Does Not Authorize Detention

Padilla refiled his petition for habeas corpus relief in the proper jurisdiction, the United States District Court for the District of South Carolina, and against the proper respondent, Commander C.T. Hanft, the new commander of the naval brig where the government was detaining Padilla.\(^{140}\) The district court held the AUMF did not authorize the detention of citizens like Padilla, refusing to find implied Congressional authorization sufficient to overcome the Non-Detention Act’s clear and unambiguous prohibition against detentions.\(^{141}\) The court distinguished Padilla’s case from Hamdi’s, focusing primarily on Padilla’s capture within the United States rather than on the battlefield.\(^{142}\) While Hamdi’s capture was “necessary and appropriate” under the AUMF, the court found that Padilla’s capture was “neither necessary nor appropriate” since “[h]is alleged terrorist plans were thwarted [when he was] arrest[ed].”\(^{143}\)

Since the government lacked authorization to detain Padilla, the court ordered Padilla’s release from custody within 45 days, stating the government was free to bring criminal charges against him or hold him as a material witness.\(^{144}\) But rather than bringing criminal charges against Padilla, the government appealed to the United States Court of Appeals for the Fourth Circuit.\(^{145}\)

\(^{139}\) See Korematsu v. United States, 323 U.S. 214, 222 (1944).


\(^{141}\) Id. at 685-86, 689.

\(^{142}\) Id. at 685.

\(^{143}\) Id. at 686.

\(^{144}\) Id. at 692 n.14.

\(^{145}\) See Padilla v. Hanft (Padilla V), 423 F.3d 386 (4th Cir. 2005).
f. Fourth Circuit Court of Appeals: AUMF Authorizes Detention

The Fourth Circuit Court of Appeals reversed the district court’s decision, finding the President does possess the authority to detain citizens in Padilla’s situation pursuant to the AUMF.\textsuperscript{146} Interpreting the Supreme Court’s \textit{Hamdi} decision as holding that the AUMF authorizes the detention of all enemy combatants, and finding Padilla clearly qualifies as an enemy combatant, the court found Padilla’s detention was “unquestionably authorized.”\textsuperscript{147}

Without specifically discussing the Non-Detention Act, the court rejected Padilla’s argument that detention of U.S. citizens requires a “clear statement” from Congress.\textsuperscript{148} However, even if such a requirement existed, the court held the AUMF is a sufficiently “clear statement” from Congress authorizing detention, relying on the plurality’s reasoning in the Supreme Court’s \textit{Hamdi} decision.\textsuperscript{149}

Unlike the district court, the Fourth Circuit refused to distinguish Hamdi’s capture on the battlefield and Padilla’s capture off the battlefield, since both detainees posed similar risks of returning to the battlefield, regardless of the place of capture.\textsuperscript{150} The court emphasized that the Supreme Court’s \textit{Hamdi} decision did not “mention the locus of capture” in its framing of the issue.\textsuperscript{151} However, the Supreme Court was actually quite careful to confine its holding only to those individuals, like Hamdi, who were “engaged in an armed conflict against the United States’’ in Afghanistan, specifically attempting to preclude the extension of its holding to Padilla’s case.\textsuperscript{152}

While the court handed the government a huge victory with this decision, the court limited its determination of Padilla’s enemy combatant status and the President’s authority to detain Padilla to the

\textsuperscript{146} \textit{Id.} at 389.
\textsuperscript{147} \textit{Id.} at 392.
\textsuperscript{148} \textit{Id.} at 395-96.
\textsuperscript{149} \textit{Id.} at 396.
\textsuperscript{150} \textit{Id.} at 393-94.
\textsuperscript{151} \textit{Padilla} V, 423 F.3d at 393.
facts presented in the government’s brief. That brief primarily relied on a declaration by Jeffrey N. Rapp, Director of the Joint Intelligence Task Force for Combating Terrorism, detailing Padilla’s al-Qaeda connection and his alleged involvement in a plot to bomb U.S. apartment buildings using natural gas.

\( g. \) Transfer of Padilla Out of Military Custody

On November 22, 2005, the government changed tactics, finally charging Padilla with a crime and requesting to transfer him from military custody into a Miami federal prison. The indictment charged Padilla with being a member of a violent “North American support cell,” providing material support to terrorists, and conspiracy to “murder, kidnap, and maim” people outside the United States. The indictment named four other defendants and suggested Padilla played a relatively small role in the group, serving mostly as a courier rather than a main organizer. Notably missing from the indictment was any mention of the two previous allegations against Padilla: the dirty bomb attack and the plot to blow up U.S. apartment buildings.

Expecting rubber stamp approval, the government filed a petition for Padilla’s transfer with the historically government-friendly Fourth Circuit Court of Appeals. Concerned about the discrepancy between the allegations used to support Padilla’s military detention and the actual charges levied against Padilla, however, the Fourth Circuit refused to approve the transfer request without further

153. Padilla V, 423 F.3d at 390 n.1.
154. Declaration of Mr. Jeffrey N. Rapp, Director, Joint Intelligence Task Force for Combating Terrorism, at 6-7 (Aug. 27, 2004), http://www.wiggin.com/db30/cgi-bin/pubs/Joint%20Appendix%20Part%201.pdf.
156. Eggen, supra note 155; Lichtblau, supra note 155.
157. Eggen, supra note 155; Neil A. Lewis, Indictment Portrays Padilla as Minor Figure in a Plot, N.Y. TIMES, Nov. 24, 2005, at A27.
158. Eggen, supra note 155; Lichtblau, supra note 155.
explanation from the government.\textsuperscript{160} Without an adequate explanation, the court further threatened to withdraw its prior \textit{Padilla} decision since it had upheld the President’s authority to detain Padilla based largely on assertions that Padilla had planned to bomb targets within the United States.\textsuperscript{161} In response, the government filed a motion requesting both Padilla’s transfer out of military custody and a withdrawal of the court’s earlier decision.\textsuperscript{162}

In a sharply worded opinion, the Fourth Circuit denied the government’s motion.\textsuperscript{163} The court expressed deep concern that the government’s sudden change in direction only days before the Supreme Court would decide whether to grant certiorari in Padilla’s appeal gave the “appearance that the government may be attempting to avoid consideration of [the Fourth Circuit’s] decision by the Supreme Court.”\textsuperscript{164} The court expressed irritation with the government’s failure to provide any explanation for its actions, and refused to “rest [its] decision on media reports of statements from anonymous government sources.”\textsuperscript{165} Such reports suggested the government was avoiding Supreme Court review or avoiding revealing details of harsh interrogation techniques, neither of which “would justify the intentional mooting of the appeal of [the Fourth Circuit’s] decision to the Supreme Court after three and a half years of prosecuting this litigation and on the eve of final consideration of the issue by that [C]ourt.”\textsuperscript{166} In sum, the Fourth Circuit stated the government’s actions had come at a “substantial cost to the government’s credibility before the courts.”\textsuperscript{167}

\textsuperscript{161} Id.
\textsuperscript{163} \textit{See Padilla v. Hanft (Padilla VI), 432 F.3d 582 (4th Cir. 2005).}
\textsuperscript{164} Id. at 583-84.
\textsuperscript{165} Id. at 585-86.
\textsuperscript{166} Id. at 585.
\textsuperscript{167} Id. at 587.
The government appealed the court’s decision to the U.S. Supreme Court, which reversed and ordered Padilla’s transfer out of military custody with little explanation.\(^{168}\)

\textit{h. Status of Padilla’s Appeal to the Supreme Court}

Now that the government has finally charged Padilla with a crime, it is unclear whether Padilla’s appeal regarding the President’s authority to detain him for the past three and a half years will survive.\(^{169}\) In the Supreme Court’s transfer order, the Court merely stated it would review Padilla’s petition “in due course.”\(^{170}\) The government has asserted Padilla’s petition is now “moot” since the government indicted him and he is no longer in military custody.\(^{171}\) By doing so, the government seeks to avoid review by the Supreme Court and the possibility that the Court would overturn the Fourth Circuit Court of Appeal’s decision that the AUMF grants the President authority to detain Padilla and other enemy combatants.\(^{172}\)

However, many believe Padilla’s appeal is still valid since his indictment did not address his enemy combatant status, leaving open the possibility the government could detain Padilla again if a jury acquits him at trial.\(^{173}\) Some have also suggested the intensity of the arguments and the constitutional importance of the issue make it likely the Supreme Court will grant certiorari and rule on the merits of the case.\(^{174}\)

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{169} See Greenhouse, supra note 110.
\item\textsuperscript{170} \textit{Padilla VII}, 126 S. Ct. 978.
\item\textsuperscript{171} Greenhouse, supra note 110.
\end{enumerate}
\end{footnotesize}
III. WHAT SHOULD THE COURT DECIDE IN PADILLA’S CASE?

Given the lack of consensus in the lower courts regarding the President’s authority to detain Padilla and the Supreme Court’s holding in *Hamdi*, it is difficult to predict the final outcome of Padilla’s case. Assuming the Supreme Court will ultimately decide the case, it will likely examine the two main issues it looked at in *Hamdi*: (1) whether the AUMF granted authority to detain Padilla; and if so (2) what form of due process is he constitutionally owed?

A. Does the Authorization for Use of Military Force Authorize Detainment?

The threshold issue in this case is whether the President has the authority to detain U.S. citizens captured on U.S. soil whom he later designates as enemy combatants.

1. Interpretation of the Non-Detention Act

The answer to this question rests largely on the Court’s interpretation of the Non-Detention Act’s requirement that detention be “pursuant to an Act of Congress.” An analysis of the text,

---


176. *See Hamdi*, 542 U.S. at 516, 524; *see also Motion Made to Detain Terror Suspect*, NEWSDAY, July 20, 2005, at A22.


178. *See 18 U.S.C. § 4001(a) (1994)*. There is also some disagreement whether the President, as Commander in Chief, has an inherent power to detain citizens who take up arms against this country pursuant to Article II, Section 2 of the United States Constitution. *Compare* Opening Brief for the Appellant at 52-57, Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005) (No. 05-6396), *with* Brief of Petitioner-Appellee at 39-55, Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005) (No. 05-5396), *available at* http://www.wiggin.com/db30/cgi-bin/pubs/Padilla%20Brief%20Jun%20%2005.pdf. The Supreme Court left this question open in *Hamdi*, finding the AUMF was a congressional authorization for
history, and intentions behind the Non-Detention Act reveals a clear congressional objective to limit the authority to detain citizens to circumstances in which an Act of Congress specifically authorized such detentions. However, the district court in Padilla I, the court of appeals in Padilla V, and the Supreme Court in Hamdi overlooked the clear intent behind the Non-Detention Act, relying instead on Ex Parte Quirin, a case decided before the Act’s enactment, to support the inference that “necessary and appropriate force” includes the traditional power of detaining citizens during times of war. Thus, it is likely the Supreme Court will once again ignore the Non-Detention Act’s explicit purpose, and instead stretch to infer the President’s authority to detain U.S. citizens.

2. Trade-Off Between National Security and Due Process Concerns

In determining whether the AUMF provides this implied authorization for Padilla’s detention, the Court must once again strike a balance between concerns for national security and due process, with either decision having significant consequences.

Hamdi’s detention, thus making it unnecessary to determine whether there was also an inherent power. Hamdi, 542 U.S. at 516-17. However, the government asserted such inherent power in its brief to the Fourth Circuit. Brief for the Appellant at 52-57, supra. The president’s inherent power to detain is beyond the scope of this Note. See Stephen I. Vladeck, Note, The Detention Power, 22 Yale L. & Pol’y Rev. 153 (2004) (providing a thorough discussion of the President’s inherent power to detain).

179. See Padilla II, 535 F.3d at 718-22; supra text accompanying notes 83-86.

180. See Hamdi, 542 U.S. at 518-19; Padilla V, 423 F.3d at 392; Padilla I, 233 F. Supp. 2d at 594-96 (relying primarily on Ex parte Quirin, 317 U.S. 1 (1942), in finding no bar on holding a citizen as an enemy combatant during times of war). Ex parte Quirin held the President had authority to order “enemy aliens,” including one U.S. citizen and four non-citizens, to be detained and tried by military tribunal, rather than by civil courts, for attempting to destroy certain U.S. war facilities. 317 U.S. at 20-21, 26. However, even in Ex parte Quirin the Court afforded the citizen and non-citizen detainees the opportunity to seek judicial review of their unlawful combatant status and to be represented by counsel. Id. at 24.


182. See infra Part III.A.2.a.
2006]  

NATIONAL SECURITY AND DUE PROCESS  739

a. Finding No Authority in the AUMF: National Security Concerns

If the Court determines that the AUMF does not authorize the government to detain Padilla, it must order Padilla's release from military custody and afford him his constitutionally protected rights. If Padilla were truly as dangerous as the government claims, this action would theoretically pose a significant risk to national security. Of course, the government has already criminally charged Padilla, meaning he will likely remain in civilian custody and pose no additional immediate threat to national security. However, holding that the AUMF does not authorize Padilla's detention may pose a long-term threat to national security since it would hinder the President's ability to detain other enemy combatants captured under similar circumstances, at least until Congress enacts legislation specifically authorizing the detention of citizens in Padilla's position.

b. Finding Authority in the AUMF: Due Process Concerns

However, if the Court determines the AUMF authorizes the detention of U.S. citizens captured on U.S. soil who the government designates as enemy combatants based on hearsay evidence, it will be authorizing a "unique and unprecedented threat to the freedom of every American citizen." Even if the Court were to limit the holding to Padilla's specific situation, as it did in Hamdi, it would enable the government to detain individuals based on minimal

183. See Padilla II, 352 F.3d at 724; Padilla IV, 389 F. Supp. 2d 678, 692 (D.S.C. 2005) (both ordering Padilla's release after finding the government did not have authorization to detain him).

184. See Mobbs Declaration II, supra note 113, at 5; Detention Order, supra note 116 ("Padilla [is] a continuing, present and grave danger to the national security of the United States . . . .").

185. See Greenhouse, supra note 110. The government also may hold Padilla as a material witness in the investigation of the September 11 attacks, which would provide him full protections under the Constitution. See Padilla II, 352 F.3d at 724; Padilla IV, 389 F. Supp. 2d at 692 n.14

186. Cf. Padilla II, 352 F.3d at 719-20 (describing the legislative history behind the Non-Detention Act, including concerns that placing limitations on the President's power to detain citizens would "tie the President's hands in times of national emergency" and "would limit detentions in times of war and peace").

evidence and to test the boundaries of its authority until the Court placed a limit on it.\(^{188}\) After finding this initial authority under the AUMF, the Court would address the process rights to which Padilla is entitled, balancing the interests of the government and those of the individual under the Mathews test it used in Hamdi.\(^{189}\)

Under this scheme, the government would have initial authority to detain segments of the U.S. population, not necessarily based strictly on racial lines as it did during World War II, but based, for instance, on hearsay evidence of travel to certain Middle Eastern countries during the months surrounding September 11, 2001.\(^{190}\) The government could then detain these citizens just for interrogation purposes, without charges or trial.\(^{191}\) Upon review of the writs of habeas corpus, the Court would grant modified levels of due process on a case-by-case basis by balancing the government’s interests against the individual’s interests, but only after the government had potentially detained the citizen for years.\(^{192}\) This initial detention in the interest of national security followed by the case-by-case determination of rights resembles the structure of the application for leave in the Japanese internment camps, where the government evaluated the internee’s loyalty on a case-by-case basis only after interning all persons of Japanese descent.\(^{193}\)

---


\(^{189}\) See id. at 528-35.

\(^{190}\) See Korematsu v. United States, 323 U.S. 214, 216, 223-24 (1944) (finding that while restricting a single racial group’s rights is suspect, it is not unconstitutional, and the government had authorization to detain an entire class of U.S. citizens based solely on their Japanese ancestry); Brief of Respondent at 7, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027) (predicting that if the Court authorizes the President’s detention of Padilla “it would mean that for the foreseeable future, any citizen, anywhere, at any time, would be subject to indefinite military detention on the unilateral order of the President”). The Justice Department asserts it has the power to detain anyone who falls under its broad definition of “enemy combatant,” which includes any individual “part of or supporting Taliban or Al Qaeda forces or associated forces.” See Liptak, supra note 173. Thus, according to the Justice Department, the military can detain as an “enemy combatant” even “a little old lady in Switzerland who writes checks to what she thinks is a charitable organization that helps orphans in Afghanistan but really is a front to finance Al Qaeda activities.” Id.

\(^{191}\) See Hamdi, 542 U.S. at 510-11.

\(^{192}\) See id. at 528-35.

\(^{193}\) See Rostow, supra note 6, at 507-08.
B. How Should the Court Decide?

The importance of national security in this country is a high priority.\textsuperscript{194} It is necessary for the government to have certain powers to protect its citizens, and the courts should generally afford the government great deference in making decisions that affect national security.\textsuperscript{195} However, "[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."\textsuperscript{196}

World War II represented one of these "challenging and uncertain moments" in our history, and rather than preserving our "commitment to due process," the Supreme Court endorsed the detention of U.S. citizens without such process.\textsuperscript{197} The Supreme Court has since denounced this decision, and our Congress has deemed the internment of Japanese-Americans a "fundamental injustice."\textsuperscript{198} Even in passing the Emergency Detention Act during another "challenging and uncertain moment[ ]" in our history, Congress put in place mechanisms to preserve due process by providing for preliminary hearings and administrative and judicial review procedures.\textsuperscript{199} In 1971, Congress acted to further protect due process and avoid the injustice wrought by detention by repealing the Emergency Detention Act and passing the Non-Detention Act, providing that the government could not detain any citizen "except

\textsuperscript{194} See, e.g., Padilla \textit{v.} Illinois, 552 F.3d 695, 699 (2d Cir. 2003) ("As this Court sits only a short distance from where the World Trade Center once stood, we are as keenly aware as anyone of the threat al Qa'eda poses to our country and of the responsibilities the President and law enforcement officials bare for protecting the nation.")

\textsuperscript{195} See Hamdi, 542 U.S. at 535 ("[The Court] accord[s] the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize[s] that the scope of that discretion necessarily is wide.").

\textsuperscript{196} Id. at 532; see also Sonnett, supra note 5, at 2 (acknowledging the need to prevent further terrorist attacks but also the importance of maintaining "sufficient safeguards to protect the innocent and prevent possible abuses of power").

\textsuperscript{197} See Korematsu \textit{v.} United States, 323 U.S. 214 (1944); \textit{Ex parte Endo}, 323 U.S. 283 (1944); \textit{supra} Part I.A.2.


pursuant to an Act of Congress." In doing so, Congress intended to require a specific act of Congress authorizing detention before the government could detain any citizen.

Today we face another "challenging and uncertain moment[]" in our nation's history, yet thus far we have ignored these crucial lessons of our past. In the name of national security, the Court, in its Hamdi decision, ignored Congress's intent, finding that despite the AUMF's failure to mention detention, it satisfied the requirements of the Non-Detention Act. "The attitude seems to be that in the fight against terrorism, almost any curtailment of people's normal rights is acceptable if it will buy an increment of security, however small."

Faced now with a U.S. citizen captured on U.S. soil, however, the Court should heed the warning of Korematsu's dissent that "once a judicial opinion rationalizes such [detention] to show that it conforms to the Constitution, ... the Court for all time has validated the principle of ... [such detention, which] then lies about like a loaded weapon ready for the hand of any authority ... [with] a plausible claim of [ ] urgent need." Thus, in light of this country's history of detention and congressional intent to safeguard due process, the Court should limit the government's ability to construe the AUMF as authority to detain citizens and should leave it to Congress to enact legislation specifically authorizing this detention if Congress deems it necessary.

201. See supra Part I.B.1; notes 83-86 and accompanying text.
202. See supra Part II.
206. See SONNETT, supra note 5, at 12 (recommending Congress establish "clear standards and procedures governing" the detention of enemy combatants and "monitor the Executive's detention practices . . . to assure that they are consistent with Due Process, American tradition, and international law"). In his Hamdi dissent, Justice Scalia also reasoned that Hamdi was entitled to habeas corpus review unless Congress has suspended the writ and that "there is a world of difference between the people's representatives' determining the need for that suspension (and prescribing the conditions for it), and this Court's doing so." Hamdi, 542 U.S. at 573 (Scalia, J. dissenting). "It is far beyond my
Based on the dissenting opinions in *Hamdi* and *Padilla*, and the distinction between Hamdi’s capture in Afghanistan and Padilla’s capture in the United States, the Court should find the AUMF does not authorize Padilla’s detention.\(^{207}\) Four Justices opined in *Hamdi* that the AUMF does not authorize even the detention of a U.S. citizen captured on the battlefield.\(^{208}\) A fifth Justice joined the dissent in *Padilla*, stating the AUMF would not authorize detention of a U.S. citizen captured on U.S. soil.\(^{209}\) If these Justices’s positions remain the same, Padilla’s case should end up differently from Hamdi’s, and the Court should place a limit on the government’s authority to detain its own citizens captured on U.S. soil without Congress’s explicit consent.\(^{210}\) Even recent changes in the Court’s composition, replacing Chief Justice Rehnquist with Chief Justice John Roberts and Justice Sandra Day O’Connor with Justice Samuel Alito, should not alter this result.\(^{211}\)


\(^{208}\) See *Hamdi*, 542 U.S. at 574 (Scalia, J., dissenting, joined by Stevens, J.) (“I do not think [the AUMF] even authorizes detention of a citizen with the clarity necessary to satisfy the interpretive canon that statutes should be construed so as to avoid grave constitutional concerns, . . . or with the clarity necessary to overcome the statutory prescription of the [Non-Detention] Act . . . .”). “[T]he Government has failed to support the position that the [AUMF] authorizes the described detention of Hamdi for purposes of the [Non-Detention Act].” Id. at 551 (Souter, J., concurring in part, dissenting in part, joined by Ginsburg, J.).


\(^{210}\) See supra notes 153-54 and accompanying text.

Although the majority of Justices appear to agree that Padilla’s detention was unconstitutional, the Court has refrained from getting involved.\footnote{See From Reuters, The Nation; Court Rejects Padilla’s Appeal for Swift Review, L.A. TIMES, June 14, 2005, at A9.}\footnote{Id.} Despite this case’s historic and constitutional significance, the Supreme Court turned down the opportunity to expedite the case, denying Padilla’s petition for a writ of certiorari before judgment of the Fourth Circuit.\footnote{Markon, supra note 168.}\footnote{See Greenhouse, supra note 110, Markon, supra note 168 (quoting the Court saying only that it would act on Padilla’s appeal “in due course.”).} Then it permitted the government to transfer Padilla from military custody to federal prison, despite suspicion that the government was attempting to avoid Supreme Court review.\footnote{See supra text accompanying notes 184-86, 213-16.} While it is unclear whether this move rendered Padilla’s appeal moot, it is clear the Court is in no rush to address the constitutional issues raised by this case.\footnote{See supra note 5.}

Given the interests of national security at stake in this case and the Court’s hesitance to become involved, it seems likely that one of the Justices may well change position, or at least qualify it, when it actually counts.\footnote{See Hamdi v. Rumsfeld, 542 U.S. 507, 524-35 (2004); Radack, supra note 137, at 2 (“Together, the Rasul [v. Bush, 542 U.S. 466 (2004)] and Hamdi cases telegraph that when Padilla refiles his case in the proper court, he should receive the due process right to challenge before an unbiased arbitrator the government’s rationale for his detention.”). The Supreme Court’s decision in Rasul v. Bush is outside the scope of this Note since it involves the detainment of a non-citizen. See generally Rasul, 542 U.S. 466.} This would allow the Court to hold that the AUMF does, in fact, authorize Padilla’s detention and then to provide Padilla with some procedural rights by balancing the concerns of national security and due process, as it did in \textit{Hamdi}.\footnote{See supra note 5.}

\textbf{Conclusion}

The precarious balance between our national security and our individual freedoms fluctuates during times of war and peace.\footnote{See supra note 5.} History illustrates that our interests in national security are highest when our country is threatened, and that, during these times, the
government may erode the individual freedoms of U.S. citizens.\footnote{219} Unfortunately, our country is currently under a threat of terrorist attack, and the executive branch is testing the limits of its powers to deny individual rights in the name of national security.\footnote{220}

Our legislature and courts have implicitly authorized the President to detain those individuals, regardless of citizenship, whom he determines are enemy combatants, without charging them, and without concrete evidence of their terrorist connections.\footnote{221} When faced with the opportunity to check the power of the executive branch and restore individual freedom, the U.S. Supreme Court, in one instance, upheld the government’s authority to detain citizens and offered only a modified form of due process to the detainee.\footnote{222} In the other instance, it refused to address the issue altogether, twice delaying the constitutional inquiry based on jurisdictional technicalities and procedural preferences.\footnote{223}

Should the Court eventually review the case on its merits, it will face the ultimate decision between national security and due process.\footnote{224} The Court can find the AUMF does not authorize the government to detain citizens captured on U.S. soil without charges or access to counsel, thus causing a potential threat to national security as courts order the release of detainees.\footnote{225} On the other hand, the Court can find the AUMF did authorize the government to detain Padilla, striking a blow to individual liberty by expressly giving broad authority to the President to detain any citizen he deems a threat.\footnote{226}

Based on the history of the \textit{Korematsu} decision, the intent of the Non-Detention Act, and the individual Justices’s decisions in both \textit{Hamdi} and \textit{Padilla}, the Court should find that no authorization exists...
to detain citizens captured on U.S. soil without charges. The Court, however, will likely follow its recent precedent and, in the interests of national security, find authorization to detain these individuals and then offer only a modified form of traditional due process to the detainee.  

Sarah A. Whalin

---

227. See supra Part III.B.
228. See id.