

Enemy Combatants and Separation of Powers

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In two cases decided on June 28, 2004, the Supreme Court emphatically upheld the rule of law and the right of those being detained as part of the war on terrorism to have access to the courts. In *Rasul v. Bush*,¹ the Court held that those being detained in Guantánamo Bay, Cuba are entitled to have a habeas corpus petition heard in federal court. In *Hamdi v. Rumsfeld*,² the Justices declared, by an 8-to-1 margin, that an American citizen apprehended in a foreign country and held as an enemy combatant must be accorded due process, including a meaningful factual hearing on his status.

In a third case decided on the same day, *Padilla v. Rumsfeld*,³ the Court dismissed on jurisdictional grounds a challenge by an American citizen apprehended in the United States and held as an enemy combatant. The Court ruled that José Padilla should have filed his habeas corpus petition in federal court in South Carolina, where he is being held, rather than in New York, where he had been held on a material witness warrant before being transferred to military custody. Although the Court did not reach the merits of the underlying claim, at least five Justices clearly signaled that they would rule in favor of Padilla and hold that the government has no authority to detain an American citizen arrested in the United States as an enemy combatant.

The significance of these cases can be fully appreciated only in the context of the Bush administration's arguments in the Supreme Court and in the lower federal courts. In each case, the government took the position that it had unreviewable authority to hold individuals as enemy combatants as part of the war on terrorism. In its briefs and oral arguments to the Supreme Court, the Solicitor General's office argued that the President had inherent authority to detain individuals as enemy combatants and that the courts had no power to review such detentions. The United States Court of Appeals for the District of Columbia Circuit had earlier ruled that no court had jurisdiction to hear habeas petitions brought by those held in Guantánamo,⁴ and the United States Court of Appeals for the Fourth Circuit had decided that Hamdi could be held as an enemy combatant and was not entitled to due process.⁵

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1. 124 S. Ct. 2686 (2004).
2. 124 S. Ct. 2633 (2004).
3. 124 S. Ct. 2711 (2004).
4. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).
5. *Hamdi v. Rumsfeld*, 316 F.3d 450, 475 (4th Cir. 2003).

If the Supreme Court had accepted these arguments, there would be nothing to keep the government from apprehending anyone and holding the person without access to the courts. Under the government's position, even if those being held in Guantánamo were subjected to the most horrible forms of torture, no court could hear their claims. The Supreme Court emphatically rejected this extreme position, and it held that courts can review detentions, even of those who are being held as part of the war on terrorism.

Nevertheless, the Supreme Court's opinions in these cases largely ignored the underlying separation of powers issues. In *Rasul*, the Court focused entirely on the habeas statute and whether it permits federal courts to hear habeas corpus petitions by those being held in Guantánamo. In *Hamdi*, Justice O'Connor's plurality opinion expressly said that it was not reaching the separation of powers question of whether the President has inherent authority to detain American citizens as enemy combatants.⁶ Only Justice Thomas's dissent, in which he argued that the President has such authority, expressly considered the issue of separation of powers in any depth.⁷

By avoiding careful examination of the separation of powers question, the Court failed to consider this basic underlying issue: under a Constitution based on checks and balances, does the executive branch have unreviewable authority to detain individuals? Merely asking the question suggests the answer. Separation of powers doctrine should have provided the foundation for opinions that clearly and even more emphatically rejected the Bush administration's unprecedented claims of broad inherent powers.

From the beginning of American history it has been recognized that the structure of government, including separation of powers and federalism, is a crucial protector of individual liberty. Nowhere is the relationship between separation of powers and freedom clearer than in the President's claim of authority to indefinitely imprison individuals without any judicial review.

In this article I argue that the Court should have conducted a thoroughgoing separation of powers analysis in *Rasul v. Bush*, *Hamdi v. Rumsfeld*, and *Rumsfeld v. Padilla*. Such an analysis would have provided a stronger basis for the Court's opinion in *Rasul* and would have led to different results in *Hamdi* and *Padilla*. In both of the latter cases, the Court should have concluded that the President has no authority to detain American citizens as enemy combatants.

Part I of the article briefly reviews the three decisions. Part II explains why the Court should have done a careful separation of powers analysis and why it would have changed the outcome in these cases.

6. 124 S. Ct. at 2639.

7. *Id.* at 2674-2685 (Thomas, J., dissenting).

I. THE DECISIONS

A. *Rasul v. Bush*

Since January 2002, the United States government has held more than 600 individuals as prisoners at a military facility at Guantánamo Bay Naval Base, Cuba. The case before the Supreme Court involved habeas corpus petitions filed by the father of an Australian detainee, the wife of another Australian, the father of a British detainee, and the mother of another British subject, all acting as next friends. The fathers and brothers of twelve Kuwaiti nationals held at the base also petitioned for the release of their relatives.

The government moved to dismiss the cases, contending that the federal courts lacked authority to hear the petitions. In March 2003, the United States Court of Appeals for the District of Columbia Circuit affirmed the district court's dismissal of the cases for lack of jurisdiction, and it ruled further that no court in the country could hear the petitions brought by the Guantánamo detainees.⁸ The court of appeals based this conclusion on the Supreme Court's 1950 decision in *Johnson v. Eisentrager*.⁹ In that case, twenty-one German nationals sought habeas corpus in a federal district court. They had been taken into custody by the United States Army in China and convicted by a United States military commission of violating the laws of war by engaging in continued military activity on behalf of the Japanese government after Germany's surrender. They were then repatriated to Germany to serve their sentences in a prison whose custodian was an American Army officer. The Supreme Court found that the federal courts lacked jurisdiction to hear their petition.

In 2003, the court of appeals found that the Guantánamo detainees were like the petitioners in *Eisentrager*, and it held that their petitions should accordingly be dismissed. The Supreme Court voted 6-to-3 to reverse the court of appeals. It held that a federal court may hear the detainees' habeas corpus petitions. Justice John Paul Stevens, writing for the Court, emphasized that *Johnson v. Eisentrager* is distinguishable in several important respects. In *Eisentrager*, he noted, those detained were accorded a trial in a military tribunal, while those held in Guantánamo had never had any form of trial or due process. He also stressed that while the defendants in *Eisentrager* were tried by a military commission in China and confined in Germany, the Guantánamo Bay Naval Base is functionally under the control and sovereignty of the United States government.

8. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

9. 339 U.S. 763 (1950).

The Court in *Rasul v. Bush* did not say what type of hearing ultimately must be accorded to the Guantánamo detainees. Rather, its ruling was limited to the issue of whether a federal court could hear their habeas corpus petitions. In all likelihood, the courts will say that some form of meaningful factual hearing before a military tribunal is sufficient, but the case is enormously significant in according the Guantánamo prisoners a right to be heard in federal court and in giving the federal courts a role in prescribing the procedures that must be followed.

As of this writing, in early 2005, habeas petitions for a number of those being held in Guantánamo have been filed in the United States District Court for the District of Columbia.¹⁰ District Judge Richard J. Leon recently dismissed the cases pending before him on the ground that “no viable legal theory exists” upon which relief could be granted,¹¹ while District Judge Joyce Hens Green reached a contrary conclusion in the cases referred to her for coordination.¹²

B. *Hamdi v. Rumsfeld*

Yaser Hamdi was an American citizen who was apprehended in Afghanistan and brought to Guantánamo Bay Naval Base. When it was discovered that he was an American citizen, he was transferred to a military prison in South Carolina. He was held as an enemy combatant and was never charged with any crime. His situation stands in contrast to that of John Walker Lindh, who was indicted and who pleaded guilty to various crimes.¹³

The United States Court of Appeals for the Fourth Circuit ruled that an American citizen apprehended in a foreign country could be detained solely on the basis of the cryptic affidavit of a government official asserting that he was an enemy combatant.¹⁴ The Supreme Court reversed, although without a majority opinion.

10. Charles Lane & John Mintz, *Detainees Lose Bid for Release; Ruling Keeps 7 in Guantanamo Prison*, WASH. POST, Jan. 20, 2005, at A3 (the cases of more than 67 detainees have been assigned to six different federal district judges in the District of Columbia).

11. *Khalid v. Bush*, Civ. No. 1:04-1142 (RJL), slip op. 2 (D.D.C. Jan. 19, 2005).

12. *In re Guantanamo Detainee Cases*, Civil Nos. 02-CV-0299 (CKK), et al. (D.D.C. Jan. 31, 2005).

13. *See United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002).

14. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003). The Fourth Circuit court also ruled that Hamdi did not have a right to consult with his attorney. *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002). However, the day that its opposition to certiorari was due, the United States announced that it would allow Hamdi to have access to his attorney. This mooted the right to counsel issue, which thus was not addressed by the Supreme Court. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2652 (2004).

There were two issues before the Supreme Court. First, does the federal government have the authority to hold an American citizen apprehended in a foreign country as an enemy combatant? A divided Court decided in favor of the government. Justice O'Connor wrote the plurality opinion, which was joined by Chief Justice Rehnquist and Justices Kennedy and Breyer.

Hamdi contended that his detention violated the Non-Detention Act, which states that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”¹⁵ But the plurality concluded that Hamdi’s detention was authorized by an act of Congress, namely, the Authorization for Use of Military Force¹⁶ that was passed on September 18, 2001. Justice O’Connor stated that this resolution constituted sufficient congressional authorization to meet the requirements of the Non-Detention Act and to permit the detention of an American citizen apprehended in a foreign country as an enemy combatant. Justice Thomas provided the fifth vote for the government on this issue.¹⁷

The other four Justices vehemently disagreed. Justice Souter, concurring in part and dissenting in part, joined by Justice Ginsburg, contended that holding an American citizen as an enemy combatant violates the Non-Detention Act.¹⁸ These two Justices disagreed with the plurality’s claim that the resolution authorizing the use of military force after September 11 was sufficient to meet the requirements of the Non-Detention Act. Justice Scalia, in a powerful dissenting opinion joined by Justice Stevens, argued that there is no authority to hold an American citizen in the United States as an enemy combatant without charges or trial unless Congress expressly suspends the writ of habeas corpus.¹⁹

The second issue before the Court was what process, if any, was due to Hamdi. Every member of the Court agreed that Hamdi must be accorded some form of due process. Justice O’Connor explained that imprisoning a person is obviously the most basic form of deprivation of liberty²⁰ and that Hamdi was entitled to have his habeas petition heard in federal court.²¹ Due process, she declared, requires application of the three-part balancing test in *Mathews v. Eldridge*,²² which instructs courts to weigh the importance of the interest to the individual, the risk of an erroneous deprivation and the capacity

15. 18 U.S.C. §4001(a) (2000).

16. Pub. L. No. 107-40, 115 Stat. 224 (2001).

17. *Hamdi*, 124 S. Ct. at 2679 (Thomas, J., dissenting).

18. *Id.* at 2653-2659 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

19. *Id.* at 2660-2674 (Scalia, J., dissenting).

20. *Id.* at 2646.

21. *Id.* at 2644.

22. 424 U.S. 319 (1976).

of additional procedural safeguards to reduce that risk, and the government's interests.²³

Although the Court did not specify the procedures to be followed in Hamdi's case, all but one of the Justices agreed that Hamdi should be given a meaningful factual hearing.²⁴ At a minimum, according to the plurality, this includes notice of the charges, the right to respond, and the right to be represented by an attorney.²⁵ The Court suggested, however, that hearsay evidence might be admissible and that the burden of proof could even be placed on Hamdi.²⁶ Only Justice Thomas accepted the government's argument that the President could detain enemy combatants without any of the process described by other members of the Court.²⁷

In September 2004, the Bush administration reached a deal with Hamdi. In exchange for his renunciation of American citizenship and his promise not to return to this country for at least ten years or take up arms against it, Hamdi was released from custody.²⁸ Thus, this case will not be the vehicle for resolving the undecided questions about the procedures that must be followed when the government detains an American citizen apprehended in a foreign country.

C. *Padilla v. Rumsfeld*

José Padilla is an American citizen who was apprehended at Chicago's O'Hare Airport in May 2002 on a material witness warrant.²⁹ He allegedly was planning to build and detonate a "dirty bomb" in the United States. Although at this writing he has been imprisoned for more than two years, he has not been indicted or tried for any crime. Instead, the government is holding him as an enemy combatant. Padilla's situation is different from Hamdi's, because Padilla was arrested in the United States in connection with an investigation into the September 11 terrorist attacks and subsequently held because of his alleged role in a planned future attack.

23. *Hamdi*, 124 S. Ct. at 2646.

24. *Id.* at 2648-2650 (O'Connor, J., for the Court), 2660 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment), 2660-2673 (Scalia, J., dissenting).

25. *Id.* at 2648-2649, 2652.

26. *Id.* at 2649.

27. *Id.* at 2674 (Thomas, J., dissenting).

28. The Agreement, Stipulation of Dismissal, and related documents may be found at <http://notablecases.vaed.uscourts.gov/2:02-cv-00439/DocketSheet.html>.

29. *See Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2715 (2004).

After his detention, Padilla was taken to New York. Counsel appointed by the United States District Court for the Southern District of New York met with him, and she moved to vacate the material witness warrant. Shortly before the day set by the district court for hearing the motions filed on Padilla's behalf, he was taken into custody by the Department of Defense and transferred to a military prison in South Carolina.³⁰ Padilla's counsel then filed a habeas corpus petition in the district court in New York, and the matter was later appealed to the Second Circuit.

The Supreme Court, in a 5-to-4 decision, with the majority opinion written by Chief Justice Rehnquist, concluded that the court in New York lacked jurisdiction to hear Padilla's habeas corpus petition.³¹ The Court said that a person must seek a writ of habeas corpus where he or she is being detained and against the person immediately responsible for the detention.³² The Court thus held that Padilla needed to file his habeas petition in South Carolina, and that he should have asked that the writ be directed to the head of the military prison there.

While Padilla must begin his legal challenge all over again, there seems no doubt that he has five votes on the Supreme Court for the proposition that it is illegal to hold him as an enemy combatant. In a footnote near the end of his dissenting opinion, Justice Stevens expressly stated that he agreed with the United States Court of Appeals for the Second Circuit that there was no legal authority to detain Padilla as an enemy combatant.³³ And Justice Scalia was emphatic in his dissent in *Hamdi* that an American citizen cannot be held without trial as an enemy combatant unless Congress suspends the writ of habeas corpus.³⁴

As of this writing, in January 2005, Padilla's habeas corpus petition is pending in the United States District Court for the District of South Carolina.³⁵ The government has moved to dismiss it on the grounds that the court does not have authority to review Padilla's status as an enemy combatant.³⁶ Given the course of litigation, it will be another year or maybe even two before the case returns to the Supreme Court. All the while, Padilla will remain imprisoned without charges or conviction.

30. The sequence of events is spelled out *id.* at 2730-2731.

31. *Id.* at 2722-2727.

32. *Id.* at 2717-2722.

33. *Id.* at 2735 n.8 (Stevens, J., dissenting).

34. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2660-2674 (2004) (Scalia, J., dissenting).

35. *Padilla v. Hanft*, No. 2:04CV2221 (D.S.C. filed July 2, 2004), *available at* <http://www.scd.uscourts.gov/Padilla/docket.asp>.

36. *Id.*, Respondent's Answer to the Petition for Writ of Habeas Corpus (Aug. 30, 2004).

II. WHY A SEPARATION OF POWERS APPROACH WOULD HAVE BEEN BETTER

A. *These Cases Raised Important Separation of Powers Issues*

The Supreme Court's decisions in these three cases gave the government significant victories. The Court ruled in *Hamdi* that American citizens apprehended in foreign countries can be detained as enemy combatants. The Court in *Padilla* made José Padilla begin the judicial process to secure his release all over again. The Court in *Rasul* gave no indication of what process must be accorded to those being held in Guantánamo.

None of the plurality or majority opinions contains a thoughtful analysis of separation of powers issues. Justice O'Connor's very deferential response to the Bush administration's separation of powers argument in *Hamdi* left the courts without a significant role to play,³⁷ and neither Justice Stevens' majority opinion in *Rasul*³⁸ nor Chief Justice Rehnquist's majority opinion in *Padilla*³⁹ even alluded to separation of powers concerns.

But ultimately the cases posed an enormously important separation of powers issue: what is the authority of the executive branch to detain individuals without the opportunity for judicial review? The core of the Bush administration's claim in the lower courts as well as the Supreme Court was that the President has the authority as Commander in Chief to indefinitely detain enemy combatants and that no court may review such detentions.

Long ago, James Madison, writing in the Federalist Papers, declared, "The accumulation of all powers legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."⁴⁰ Yet that is exactly what the Bush administration was claiming; it asserted that it could detain individuals based solely upon the inherent authority of the President. These cases thus are fundamentally about separation of powers. In the remainder of this section, I consider how a significant separation of powers analysis should have been conducted in these cases and why it would have made a substantial difference.

37. *Hamdi*, 124 S. Ct. at 2650-2651.

38. *Rasul v. Bush*, 124 S. Ct. 2686, 2690 (2004).

39. *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2715 (2004).

40. THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961).

B. Analyzing the Detentions from a Separation of Powers Perspective

Justice Lewis Powell provided a succinct and useful framework for analyzing separation of powers issues. He wrote, “Functionally, the doctrine [of separation of powers] may be violated in two ways. One branch may interfere impermissibly with the other’s performance of its constitutionally assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another.”⁴¹ James Madison remarked earlier that separation of powers “goes no farther than to prohibit any one of the entire departments from exercising the powers of another department.”⁴²

In *United States v. Nixon*⁴³ the issue before the Court was whether the President had an executive privilege that would permit him to refuse to disclose certain tape recordings and documents relating to his conversations with aides and advisors. The Supreme Court might have held that the President has no right to an executive privilege because the Constitution is silent on the issue, and no legislation recognized such a privilege. Instead, the Court concluded that there is a “presumptive privilege for Presidential communications.”⁴⁴ However, the Court denied President Nixon the privilege in this instance, because secrecy would have undermined the ability of courts to provide a fair criminal trial.⁴⁵ Allowing the President to resist compliance with a “subpoena essential to enforcement of criminal statutes . . . would upset the constitutional balance of ‘a workable government’ and gravely impair the role of the courts under Art. III.”⁴⁶ In denying Nixon’s claim, the Court implicitly held that the President may claim an inherent executive privilege until he infringes upon the functions of another branch of government. Using this approach, an analysis of a separation of powers problem requires consideration of the constitutional relationship of the various branches of government. Each branch may act until it usurps another’s power.

Thus, in *Nixon v. Administrator of General Services*⁴⁷ the Court considered whether Congress could require review and preservation of presidential papers. “In determining whether the [Presidential Recordings

41. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 963 (1983) (Powell, J., concurring in the judgment).

42. THE FEDERALIST NO. 47, at 328 (James Madison) (Jacob E. Cooke ed., 1961).

43. 418 U.S. 683 (1974).

44. *Id.* at 708. “The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” *Id.*

45. *Id.* at 711-713.

46. *Id.* at 707.

47. 433 U.S. 425 (1977).

and Materials Preservation] Act disrupts the proper balance between the coordinate branches,” the Court noted, “the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.”⁴⁸

From the perspective of these cases, the President’s action in detaining individuals as enemy combatants violates the separation of powers because it prevents the judiciary from carrying out its essential function of hearing the claims of individuals who contend that they are being wrongly detained. These claims go to the very heart of the judicial role as it was defined in *Marbury v. Madison* more than 200 years ago.⁴⁹ In *Marbury*, the Supreme Court stressed that we are a nation of laws, and that no one, not even the President, is above the law. *Marbury* unequivocally held that it is the power and duty of the federal judiciary to provide a remedy, even against the Executive, when rights of individuals are violated. Chief Justice John Marshall emphatically declared that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”⁵⁰

Put another way, the system of checks and balances in the Constitution requires that two branches of government concur for almost every major form of government action. Enacting a law generally requires both legislative and executive action. Putting a person in prison requires executive prosecution and judicial conviction. The fundamental flaw in the Bush administration’s claim of unreviewable authority to detain enemy combatants is that it obliterates any notion of checks and balances.

C. *The Arguments on the Other Side*

Those who disagree with my separation of powers analysis are likely to make three principal arguments. First, they may argue that separation of powers was met because Congress authorized detentions as part of the war on terrorism when it passed the Authorization for Use of Military Force.⁵¹ This, of course, was the basis for Justice O’Connor’s conclusion in *Hamdi* that American citizens apprehended in foreign counties can be held as enemy combatants. But as Justice Souter pointed out, nothing in the resolution authorizing military force sanctions or even mentions holding American

48. *Id.* at 443.

49. 5 U.S. (1 Cranch) 137 (1803).

50. *Id.* at 163.

51. *See supra* text accompanying note 16.

citizens as enemy combatants.⁵² Nor, he declared, should such authority be inferred.⁵³ Justice Souter explained:

The defining character of American constitutional government is its constant tension between security and liberty, serving both by partial helpings of each. In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch Hence the need for an assessment by Congress before citizens are subject to lockup, and likewise the need for a clearly expressed congressional resolution of the competing claims.⁵⁴

A second argument on the other side may be that separation of powers was satisfied because the various detainees had their day in court when their cases were reviewed by the judicial branch. But separation of powers requires that a court conduct a truly meaningful inquiry into the legitimacy of the detention. Interpretation of the resolution authorizing the use of military force as permitting detentions of enemy combatants without such an inquiry sees the resolution as largely closing the courthouse doors to those being held; they can challenge whether they have been accorded adequate due process, but not the legality of the detentions themselves. This is inconsistent, however, with numerous Supreme Court decisions holding that such extensive bars on federal court jurisdiction will be allowed, if at all, only with express congressional preclusion. No such preclusion was included in the resolution authorizing the use of military force.

The Supreme Court always has gone out of its way to construe statutes that appear to foreclose all jurisdiction as nevertheless allowing a federal court to hear a matter. For example, in *Oestereich v. Selective Service System*

52. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2657 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

53. *Id.* at 2655-2657.

54. *Id.* at 2655.

*Local Board No. 11*⁵⁵ the Court interpreted a statutory provision that said there would be “no judicial review” of Selective Service classifications as not barring review, because it “is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims.”⁵⁶ Even more to the point in the recent detention cases, in *McNary v. Haitian Refugee Center, Inc.*⁵⁷ the Court interpreted a law that appeared to preclude judicial review of dispositions of applications for amnesty. The Court said that there is a “well-settled presumption favoring interpretation of statutes [to] allow judicial review” and that “it is most unlikely that Congress intended to foreclose all forms of *meaningful* judicial review.”⁵⁸

Most recently, in *Immigration and Naturalization Service v. St. Cyr*⁵⁹ the Supreme Court allowed those facing deportation to seek habeas corpus, even though the statutory language appeared to preclude all review. The Court stated that “if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ we are obligated to construe the statute to avoid such problems.”⁶⁰

Justice O’Connor’s conclusion in *Hamdi* that the resolution authorizing the use of military force permits the detention of enemy combatants is inconsistent with the many decisions holding that preclusion of meaningful judicial review must be explicit, not implied. It is also inconsistent with the basic principle embodied in the Non-Detention Act that authority to imprison individuals must be explicit and not implied.

A third possible argument against my position is that the President, as Commander in Chief, has the inherent authority to detain enemy combatants as part of waging war. However, as explained above, allowing such unchecked authority is inconsistent with the basic notions of checks and balances and separation of powers. No precedent in American history supports the authority of a President to imprison individuals without judicial review. More subtly, once it is concluded that the Non-Detention Act fails to authorize holding American citizens as enemy combatants, then the claim of presidential power is particularly untenable. Justice Souter made exactly this

55. 393 U.S. 233 (1968).

56. *Id.* at 243 n.6.

57. 498 U.S. 479 (1991).

58. *Id.* at 496 (emphasis added); *see also* *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987) (narrowly interpreting statute that precluded jurisdiction); *Johnson v. Robison*, 415 U.S. 361 (1974) (same).

59. 533 U.S. 289 (2001).

60. *Id.* at 299-300 (citation omitted).

point in *Hamdi*, invoking Justice Robert Jackson's analysis of separation of powers in *Youngstown Sheet & Tube Co. v. Sawyer*.⁶¹

In his concurring opinion, Justice Jackson identified three types of presidential actions. First, "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."⁶² Under such circumstances the President's acts are presumptively valid.⁶³ Second, "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."⁶⁴ Justice Jackson stated that in this area "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."⁶⁵ Finally, "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."⁶⁶ Such Presidential actions will be sustained only if they are in an area where Congress cannot lawfully act. Since the resolution authorizing the use of military force did not, for the reasons described above, permit the detention of American citizens as enemy combatants, and since the Non-Detention Act otherwise forbade such detention, the President's claim must fit in category three of Justice Jackson's analysis.

D. Applying Separation of Powers Analysis

How would it have mattered if the Supreme Court had applied a separation of powers analysis in *Rasul*, *Hamdi*, and *Padilla*? In all three cases the Court would have held that, as a matter of separation of powers, the judiciary has the constitutional duty to review much more aggressively than it did the legality of all detentions by the executive branch. The Court would have ruled that it is the judicial role to consider with far greater care the detainees' claims that they are being held in violation of the Constitution and laws of the United States. The Executive's assertion of unreviewable authority would have been even more emphatically rejected for usurping the judicial role. The Court should have repeated its language from *United States*

61. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2659 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment), citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643-644 (1952) (Jackson, J., concurring).

62. *Youngstown*, 343 U.S. at 635.

63. *Id.* at 637.

64. *Id.*

65. *Id.*

66. *Id.*

v. Nixon, noting that unreviewable executive detentions “would upset the constitutional balance of ‘a workable government’ and gravely impair the role of the courts under Art. III.”⁶⁷

In *Rasul*, the Court still would have needed to explain, as it did, why the habeas corpus statute applies to those being held outside of the United States and why *Johnson v. Eisentrager* is distinguishable. But the Court should have gone much farther. The Court should have emphasized that, based on separation of powers, the courts have the authority to review any detention by the United States government.

If the Court had followed a separation of powers approach in *Hamdi*, it would have ruled that the executive branch has no authority to detain an American citizen as an enemy combatant. This was the position taken by Justice Scalia, joined by Justice Stevens, in dissent. Under the Constitution, the only way a person can be held more than briefly, absent a suspension of the writ of habeas corpus, is by indictment, trial, and conviction in the courts. The Court’s actual ruling undermines the crucial role of the judiciary in the system of separation of powers.

In *Padilla*, too, a separation of powers analysis would have made a significant difference. There is no doubt that the federal district court in New York, where Padilla’s habeas petition was filed, had subject matter jurisdiction to hear his claim. The claim that his detention violated the laws and treaties of the United States presented a federal question, providing jurisdiction under Article III and 28 U.S.C. §1331. Nor is there doubt that the court in New York had personal jurisdiction over the respondents, including the Secretary of Defense. The United States and its top officials unquestionably have minimum contacts with every state. Therefore, at most, the issue in Padilla’s case was venue. But venue, unlike jurisdiction, is a flexible concept to be administered in the interests of justice.⁶⁸ The habeas statute is ambiguous about where claims need to be filed.⁶⁹ The Court should have interpreted it to facilitate the ultimate goal of separation of powers: checks and balances. José Padilla has been imprisoned for more than two and a half years, with no end in sight, and without any judicial review. There has not been an arrest warrant issued by a court, let alone an indictment by a grand jury or a conviction. This undermines the judiciary’s most important role under the Constitution.

67. 418 U.S. 683, 707 (1974).

68. See 28 U.S.C. §1404 (2000) (authority of federal courts to transfer cases in the interests of justice).

69. See 28 U.S.C. §2241(a) (2000) (“Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.”).

CONCLUSION

The actions of the government in holding enemy combatants without meaningful judicial review strike at the very heart of the rule of law. The government has claimed that its actions, no matter how egregious or how much in violation of the law, cannot be reviewed in any court. This contention conflicts with the most basic principle of American government – that no one, not even the President, is above the law, and that it is “emphatically the province and duty of the judicial department to say what the law is.”⁷⁰ Focusing on separation of powers makes clear the outrageous nature of the claims made by the Bush administration in *Rasul*, *Hamdi*, and *Padilla*.

70. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

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