

DETAINEES*

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It is an honor and a pleasure to be a part of this symposium and distinguished panel. I had the occasion to argue the very first case on behalf of the Guantanamo detainees, which was decided in February 2002, in the federal district court and then in the Ninth Circuit in July 2003. The case was called *Coalition of Clergy v. Bush*.¹ It was brought by a group of law professors, journalists and clergy as next-friends on behalf of the Guantanamo detainees. The district court ruled against us, largely based on Justice Jackson's opinion in *Johnson v. Eisentrager*,² that foreign nationals held in a foreign country do not have access to habeas corpus.³ In the Ninth Circuit, the focus was whether we had standing under the habeas corpus statute, which allowed habeas petitions to be brought on behalf of another.⁴ The argument focused on whether those in Guantanamo had access to the American courts.⁵ I found this to be a very frustrating argument. When I stood up on rebuttal, I said to the judges: "It seems that there is one of two possibilities with regard to those in Guantanamo. One is that they have not brought lawsuits so far because they like being held in prison. The other possibility is that lawsuits are not being brought on their behalf because their families do not know where they are. Their families are in Afghanistan, so the families do not have the resources to hire American lawyers. The latter seems far more plausible than the former."

The Ninth Circuit ruled that we lacked standing, in large part

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¹ 189 F. Supp. 2d 1036 (C.D. Cal. 2002).

² 339 U.S. 763 (1950).

³ *Coalition of Clergy*, 189 F. Supp. 2d at 1050.

⁴ See *Coalition of Clergy v. Bush*, 310 F.3d 1153, 1156 (9th Cir. 2002).

⁵ *Id.* at 1160-61.

because we could not show that those in Guantanamo lacked access to the American courts and needed a next-friend to represent them.⁶ I think the Ninth Circuit's opinion in this case was typical of many courts that have handled issues regarding the Guantanamo detainees and other detainees: evidencing a tremendous insensitivity to the reality that these are human beings being held in prison without any semblance of due process.

I would like to make three points with the remainder of my remarks. First, I will argue that since September 11th, the Bush Administration is engaged in an effort to detain human beings without due process. Second, I will argue that the Supreme Court basically got it half right in its decisions in June. They recognized a right of access to the courts,⁷ but did not go nearly far enough in protecting the need for due process for those being held. Third, I will talk about what remains, both in the courts and Congress.

With regard to my first point, we could start with the case of Jose Padilla, an American citizen who was apprehended at the Chicago Airport in May of 2002.⁸ Although he has been in prison now for twenty nine months, he has not been charged with any crime. He has not been indicted. He has not been tried. He has not been convicted. The Bush Administration has taken the position that he can be held indefinitely as an enemy combatant.⁹ The extent of the Bush Administration's position can be seen by reading the transcript of the oral argument in the case of *Rumsfeld v. Padilla*.¹⁰ The question was whether Padilla is entitled to any form of a hearing. The Deputy Solicitor General, Paul Clement, said the only hearing that Padilla is entitled to is one in which he responds to the questions that are put to him by his interrogators at his interrogation.¹¹ The government is taking the position that no matter how long he is held, no matter how he is treated, he has no right of access to the courts. There is no stopping point to the government's argument here. By their analysis, Timothy McVeigh and Terry Nichols could have been held as enemy combatants and

⁶ *Id.* at 1163.

⁷ *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2723–24 (2004).

⁸ *Id.* at 2715.

⁹ *Id.* at 2715–16.

¹⁰ *Id.* at 2715–16 n.2 (outlining the various reasons behind the President's determination that Padilla posed a threat).

¹¹ “[T]he government was using a legitimate weapon of wartime in removing Mr. Padilla from the battlefield, taking him to a naval brig in South Carolina and, without interference from defense lawyers, questioning him about his contacts with the Osama bin Laden-led group.” Mark Hamblett, *‘Padilla’ Tests Limits of Bush’s Powers in War*, N.Y.L.J., Nov. 18, 2003, at 1.

2005]

Detainees

1121

did not need to be tried. By their analysis, any drug dealer could be held as an enemy combatant as a part of the war on drugs. The government essentially claims that the President has the authority to suspend the Fourth Amendment, which requires arrest warrants issued by judges; the Fifth Amendment, which requires grand jury indictments by neutral grand juries; and the Sixth Amendment, which requires trial by jury and proof beyond a reasonable doubt in situations involving American citizens apprehended in the United States. Ambassador Prosper has referred to the Constitution as being a peacetime document.¹² The Constitution governs us in both war and peace and that is why the government's position in *Padilla* is so outrageous.

The second case involves Yaser Esam Hamdi.¹³ Hamdi is an American citizen who was apprehended in Afghanistan and brought to Guantanamo Bay. It was discovered that he was an American citizen. He was then briefly taken to a military prison in Virginia and, ultimately, to a military prison in South Carolina. The government took the position that he could be held indefinitely as an enemy combatant and he would have no access to the courts to review that status. The United States Court of Appeals for the Fourth Circuit agreed with the government here.¹⁴

Finally, as pointed out by the Ambassador, at times as many as 650, and currently about 556 individuals are being held in Guantanamo. We can certainly argue over what international law requires here. We can talk about the International Covenant on Civil and Political Rights¹⁵ and when it requires that individuals be given due process. We can talk about Article 5 of the Third Geneva Convention, which talks about the need to provide a competent tribunal to resolve doubts about status. In the spring of 2002, none other than the Secretary of State, Colin Powell, said that there was a need for competent tribunals to determine the status of those who were held in Guantanamo. Yet, as of June 28, 2004, the day the Supreme Court handed down its decision in *Rasul v. Bush*,¹⁶ no hearings had been provided to any of these individuals who are held in Guantanamo. In fact, on April 28, 2004, at the oral argument in

¹² See Pierre-Richard Prosper, *United States Policy and Practice for the Detention of Enemy Combatants in the War on Terror*, 68 ALB. L. REV. 1153 (2005).

¹³ Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004).

¹⁴ See Hamdi v. Rumsfeld, 316 F.3d 450, 459 (4th Cir. 2003).

¹⁵ International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171 (1966) (entered into force Mar. 23, 1976).

¹⁶ 124 S. Ct. 2686 (2004).

Hamdi, Justice Ginsburg asked Deputy Solicitor General Paul Clement whether the government was arguing that even if the detainees were to be held for the rest of their lives, they would have no right to a hearing in any court.¹⁷ She further questioned whether there would be a right of access to American courts if the detainees were tortured. Paul Clement responded by saying, of course, American soldiers would never torture detainees.¹⁸ By pure coincidence, the first documentary evidence of torture in an Iraqi prison came out that night.¹⁹ We will never know if that influenced the Supreme Court decision.

I would make an even more general point about the Bush Administration's claim with regard to detention. I want each of you to ask yourself a simple question. How many people are now being held or have been held by the government since September 11th, 2001, as part of the war on terror? Unless you have classified information, you do not know. The government has refused to tell us the number of people who have been held as material witnesses. About a year and a half ago, I had the occasion to debate Michael Chertoff, who was then the Assistant Attorney General for the Criminal Division of the Justice Department and now is a Third Circuit Judge.²⁰ I asked him the same question that I just posed to you. He responded: "I can't tell you because of national security information." I said: "I'm just a simple law professor, but I don't get it. How is telling whether fifty or five hundred or five thousand or ten thousand people are being detained going to harm national security?" He still said: "I can't tell you."

Second, I believe that the Supreme Court got it half right. They recognized a right of access to the courts. However, they do not go nearly far enough in specifying the rights that have to be accorded a detainee. There were, of course, three decisions on June 28, 2004. The first was *Rasul v. Bush*. The United States Court of Appeals for the District of Columbia had ruled that no federal court had jurisdiction over the habeas corpus petitions filed by those in Guantanamo.²¹ The D.C. Circuit relied on Justice Jackson's opinion in *Eisentrager*. That case involved some German nationals that we

¹⁷ Oral arguments at 23, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (No. 03-6696).

¹⁸ *Id.* at 41-42.

¹⁹ See David Crary, *CBS Obtains Photos Showing Alleged Abuse of Iraqi Prisoners by U.S. Soldiers*, ASSOCIATED PRESS, Apr. 28, 2004.

²⁰ On February 15, 2005, Judge Chertoff was sworn in as Secretary of the Department of Homeland Security.

²¹ *Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003), *rev'd sub nom Rasul v. Bush*, 124 S. Ct. 2686 (2004).

2005]

Detainees

1123

apprehended in China during World War II. They were tried in a military tribunal, convicted, subsequently repatriated and sent to an American military prison in Germany. They filed a habeas corpus petition in the United States Supreme Court, and Justice Jackson's opinion ruled that federal courts did not have the authority to hear their habeas petition. The D.C. Circuit relied on this decision to rule against the Guantanamo detainees. The Supreme Court, in a six to three decision written by Justice John Paul Stevens, reversed the D.C. Circuit.²² Justice Stevens' opinion was primarily about distinguishing *Eisentrager*. He pointed out that in *Eisentrager*, the individuals held were accorded a military tribunal proceeding.²³ Those in Guantanamo, as of that date, had been accorded no proceeding. He also said that under the terms of the United States' treaty with Cuba, Guantanamo is functionally under American sovereignty, and thus, those held are entitled to due process. But in the last paragraph of his opinion, Justice Stevens said that the Court does not have occasion to specify "what further proceedings may become necessary after [the government addresses] the merits of [Rasul's] claims. . .[but] only whether the federal courts have jurisdiction to determine the legality of . . . potentially indefinite detention . . ." ²⁴ That is, of course, now being litigated in a number of cases in the District of Columbia federal district court. One of these is a follow-up to *Coalition of Clergy*, a case called *Bush v. Gherebi*.²⁵ And I can tell you that what has happened since the Supreme Court's decision in June can be summarized in three words: delay, delay, delay. The government is doing everything imaginable to delay these proceedings, raising motions to change venue, motions to dismiss, motions to stay and everything else. And with every day of delay, the individuals in Guantanamo have lost freedom that they will never get back.

The second case was *Hamdi v. Rumsfeld*.²⁶ In the Supreme Court, there were two issues. First, can an American citizen apprehended in a foreign country be held as an enemy combatant? The issue here was whether the Non-Detention Act, which was largely about making sure that internments like those that occurred during World War II would never be repeated, applied in this conflict. The Supreme Court ruled five to four, without a majority

²² *Rasul*, 124 S. Ct. at 2690.

²³ *Id.* at 2693.

²⁴ *Id.* at 2699.

²⁵ 124 S. Ct. 2932 (2004).

²⁶ 124 S. Ct. 2633 (2004).

opinion, that the resolution authorizing military force after September 11th permitted the detention.²⁷ The most eloquent opinion was Justice Scalia's dissent.²⁸ It is not often that Justice Scalia is the most ardent civil libertarian on the Supreme Court, but here he said that there is never authority to hold an American citizen as an enemy combatant until and unless Congress suspends the writ of habeas corpus.²⁹

The Supreme Court then went on to the second issue, namely, can those such as Hamdi—American citizens apprehended in a foreign country—be held without due process or must due process be accorded them? Here, the Supreme Court ruled eight to one, with only Justice Thomas dissenting, that Hamdi must be accorded due process.³⁰ The Supreme Court, however, did not specify what process was required. Justice O'Connor's opinion said Hamdi must be given a meaningful factual hearing. He must be given notice of the charges, an opportunity to respond and be afforded counsel.³¹ But then, in a very troubling phrase, Justice O'Connor said perhaps the burden of proof can be put on Hamdi, rather than the government.³² In other words, Hamdi would have to prove that he is not an enemy combatant. How can someone prove a negative? How can I prove to you that I am not an enemy combatant? Now, this was just dicta. The Supreme Court has not faced the issues of procedure. There is only very troubling dicta that the burden of proof could be placed on a defendant in a proceeding like this. The Supreme Court did not specify the procedures necessary and now we will never find out in the *Hamdi* case, as Hamdi, in essence, has negotiated a plea and has been released.

The final and most troubling case is *Rumsfeld v. Padilla*.³³ Here, the Supreme Court ruled five to four that Jose Padilla's habeas corpus petition had been filed in the wrong federal court, forcing Padilla to start all over again.³⁴ After Padilla was apprehended at the Chicago Airport, he was briefly taken to New York where he was held as a material witness and then taken to a military prison in South Carolina. While he was in New York, a lawyer, Donna Newman, filed a habeas corpus petition on his behalf. The case was

²⁷ *Id.* at 2635, 2639–40.

²⁸ *See id.* at 2660 (Scalia, J., dissenting).

²⁹ *Id.* at 2665 (Scalia, J., dissenting).

³⁰ *Id.* at 2635.

³¹ *Id.* at 2648, 2652.

³² *Id.* at 2649.

³³ 124 S. Ct. 2711 (2004).

³⁴ *Id.* at 2715.

2005]

Detainees

1125

then litigated in the Southern District of New York and the Second Circuit. The Supreme Court, in an opinion by Chief Justice Rehnquist, held that under the habeas statute, a habeas petition must be brought in the district where the prisoner is being held and must name the custodian as respondent.³⁵ And so, Padilla was required to file in South Carolina. But this was not subject matter jurisdiction. There is no doubt that the subject matter jurisdiction rests in the federal court. This is not even personal jurisdiction. Certainly, the President and the Secretary of Defense do not deny that the subject of personal jurisdiction is New York. This is about venue, and venue is always flexible. Venue is always in the interests of justice. As Justice Stevens powerfully argued, there is no reason to delay Padilla's case being heard and force him to start all over again.³⁶ The Supreme Court's decisions were important in recognizing the right of access to courts, but they did not go nearly far enough.

The third and final part of my remarks will illustrate that a great deal remains to be done, both in the courts and in Congress. The Supreme Court still has to face the issue of whether an American citizen apprehended in the United States can be held as an enemy combatant. That is the issue they did not decide in the *Padilla* case. The Supreme Court still has to decide what procedures must be accorded to those like Hamdi. And most importantly, the Court has to decide what procedures must be accorded to those being held in Guantanamo—issues that the Supreme Court expressly said, in *Rasul*, it was not resolving.

I think that there is a need for Congress to act. Congress needs to clarify that they meant what they said in the Non-Detention Act.³⁷ Unless there is an express statement of Congress authorizing detentions, no individual can be held. That is what Congress thought it was saying in the Non-Detention Act, but obviously, in light of what the Supreme Court said in *Hamdi*, the Supreme Court is saying that such an authorizing statement does not have to be explicit; it can be implied. And Congress needs to be clear that only the legislative branch can authorize individuals to be held.

I will conclude with the sentiments of two late Supreme Court Justices. To paraphrase a famous statement of the late Justice

³⁵ *Id.* at 2717, 2722.

³⁶ *See id.* at 2735 (Stevens, J., dissenting) (stating that "fairness and efficiency counsel in favor of preserving venue in the Southern District [of New York]").

³⁷ *See* 18 U.S.C. § 4001(a) (2000) ("No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.").

Robert H. Jackson, “the Constitution is not a suicide pact.”³⁸ He is correct, but his admonition must be taken together with the remarks of another late Supreme Court Justice, Louis Brandeis. Justice Brandeis said: “Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent.”³⁹ He continued: “Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”⁴⁰ Justice Louis Brandeis never knew John Ashcroft, but if he had, he could not pick better words to describe him.

³⁸ See *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (“There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”).

³⁹ *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

⁴⁰ *Id.*