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I. INTRODUCTORY

On May 8, 2002, Jose Padilla, an American citizen, was arrested under a material witness warrant by federal authorities in Chicago as he disembarked a flight from Pakistan.[1] Padilla's arrest was subsequently

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1. Padilla v. Rumsfeld, ("*Padilla III* ") 352 F.3d 695, 699 (2d Cir. 2003). For convenience of reference, the twelve federal court decisions involving Jose Padilla are numbered I through X I (including IIA).

announced on June 10 by no less a personage than the Attorney General of the United States, who happened to be in Russia at the time.[2]

Attorney General Ashcroft charged that Padilla was an al Qaeda operative, planning to set off a radioactive "dirty" bomb somewhere in the United States.[3] President Bush quickly signed an order designating him an "enemy combatant."[4] Padilla was imprisoned in New York.[5]

When, on April 3, 2006, the Supreme Court of the United States denied certiorari in the case of *Padilla v. Hanft* (*Padilla X*), it effectively held that an American citizen can be incarcerated for three years, ten months and twenty five days without a hearing or trial.[6] It left unanswered the question of the *right* of the executive branch to declare an American citizen an enemy combatant and hold him without administrative or judicial review of any kind, but it acceded to the *power*.

By this action, the Court capitulated to the administration's position that questions of status, when national security is involved, is outside the effective power of the courts. No person outside the executive branch has yet officially been made privy to the evidence incriminating Padilla, other than the selected morsels doled out by the executive branch. And now it appears almost certain that there will never be a definitive judicial decision on the legality of his incarceration and that there will never be a hearing of any kind to determine whether the facts justified his designation as an enemy combatant. To this day, the government remains committed to preventing either of these determinations from being made. Padilla's recent criminal indictment rests on assertions of offenses other than those announced as the justification for holding him.

This article reviews the several court opinions to date in Jose Padilla's case and analyzes the laws and regulations which have been cited in response to his habeas corpus applications. The case has generated twelve federal court decisions (and non-decisions) which have implicated a plethora of issues.

At the heart of the controversy is the power of the executive branch to act free of judicial oversight when it asserts the power to combat terrorism, set against a citizen's right to due process. The constitutional issues

2. Padilla ex rel. Newman v. Bush, ("*Padilla I*") 233 F. Supp. 2d 564, 573 (S.D.N.Y. 2002) (citing James Risen & Philip Shenon, *Traces of Terror: The Investigation; U.S. Says It Halted Qaeda Plot to Use Radioactive Bomb*, N.Y. TIMES, June 11, 2002, at A1).

3. *Id.*

4. *Id.* at 572.

5. *Id.* at 571.

6. Padilla v. Hanft, ("*Padilla X*") 126 S. Ct. 1649 (2006).

include separation of powers and due process of law. Subsidiary considerations include the Non-Detention Act, the government's efforts to delay the case and to deny Padilla counsel, suppress the evidence against him, and circumvent the rules of evidence.[7]

The ultimate question is whether Jose Padilla has received due process of law under the United States Constitution. At all times it must be kept in mind that the merits of the charges against him were not at issue, but solely his right to a hearing with respect to those assertions.

II. JOSE PADILLA[8]

Jose Padilla was born in New York in 1970 and moved to Chicago at the age of four.[9] He was raised on the west side of the city and became involved with gangs there.[10] His first arrest was at the age of fourteen for assault, and he spent some time in juvenile detention.[11]

After his release he settled in Florida, where he was arrested in 1991 on a gun charge.[12] Released from prison the next year, he was free from encounters with the law for five years.[13]

During that five-year period he and his fiancée converted to Islam, and he adopted a Muslim identity, Abdul al Mujahir, a warrior name.[14] He married, but the marriage was short-lived.[15] When his wife testified at the divorce hearing in 2000, she said that she had not heard from him in two years, and that he had moved to Cairo.[16]

Federal authorities said that during this period he was at an al Qaeda training camp in Afghanistan, and later at a safe house in Lahore,

7. *See* Hanft v. Padilla, (*Padilla IX*) 126 S. Ct. 978 (2006); *Padilla X*, 126 S. Ct. 1649; Padilla v. Hanft, (*Padilla VI*) 545 U.S. 1123 (2005); Rumsfeld v. Padilla, (*Padilla IV*) 542 U.S. 426 (2004); *Padilla III*, 352 F. 3d 695; Padilla v. Hanft, (*Padilla VII*) 423 F.3d 386 (4th Cir. 2005); Padilla v. Hanft, (*Padilla VIII*) 432 F.3d 582 (4th Cir. 2005); Padilla v. Hanft, (*Padilla V*) 389 F. Supp. 2d 678 (D.S.C. 2005); Padilla v. Rumsfeld, (*Padilla II*) 243 F. Supp. 2d 42 (S.D.N.Y. 2003); *Padilla I*, 233 F. Supp. 2d 564.

8. This section is compressed from Seamus McGraw, *All About Jose Padilla*, http://www.crimelibrary.com/terrorists_spies/terrorists/jose_padilla/4.html, and /5.html (last visited June 23, 2006); Deborah Sontag, *Terror Suspect's Path From Streets to Brig*, N.Y. TIMES, Apr. 25, 2004, at 1 (giving a detailed account of Padilla's life and travels).

9. McGraw, *supra* note 8.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id*; *see also* Sontag, *supra* note 8, at 4.

15. McGraw, *supra* note 8.

16. *Id.*

Pakistan.[17] Attorney General Ashcroft said that Padilla trained at these locations, including instruction on explosive devices.[18]

The FBI first noticed him when he applied for a replacement passport at the consulate in Cairo in 2001.[19] At about the same time, an al Qaeda deputy arrested by the Pakistanis gave information which suggested that Padilla, whom he could only describe, not identify by name, had said that he planned to detonate a dirty bomb in the United States.[20] Those facts put Padilla on the American watch list, which resulted in his arrest when he deplaned in Chicago.[21]

III. THE OPINIONS

A. PADILLA I.

On May 22, 2002, fourteen days after Padilla's arrest, a public defender appointed to represent him by the federal district court in New York moved to vacate the material witness warrant under which he was being held.[22] A conference on the motion, which had been briefed, was scheduled for June 11.[23] On June 9, the Government caused Padilla to be moved from New York to a naval prison in South Carolina.[24] The Secretary of Defense, on order of the President, issued an order designating him an enemy combatant.[25] On June 11, the first habeas corpus action on

17. *Id.*

18. *Id.*

19. *Id.*

20. Sontag, *supra* note 8, at 6. Abu Zubaydah, a high ranking al Qaeda official being held by the CIA, was convinced that he should do something to help his captors. He described Padilla to his interrogators. RON SUSKIND, ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11 117 (2006). The New York Times article paints a picture of Padilla during the period of his travels in the Middle East as devoted to his family and his religion, and with no known propensity to violence. It implies, but does not state, that a question exists whether the person described by Zubaydah was in fact Padilla. Sontag, *supra* note 8, at 6.

21. McGraw, *supra* note 8.

22. *Padilla I*, 233 F. Supp. 2d at 571. The government's justification for attempting to deny counsel are discussed in Part III, *Padilla II*, 243 F. Supp. 2d at 42.

23. *Padilla III*, 352 F.3d 695, 700 (2d Cir. 2003).

24. *Id.*

25. *Padilla I*, 233 F. Supp. 2d 564, 572 (S.D.N.Y. 2002). According to the New York Times, the decision to designate him an enemy combatant "was a conscious tactical decision at the very highest level of the American government." Sontag, *supra* note 8. The decision was made because the administration was concerned about the intervention by the judiciary in its incarceration and interrogation of terrorist suspects, in which it wanted a free hand. *Padilla III*, 352 F.3d at 700.

his behalf was filed in the United States District Court for the Southern District of New York.[26]

Defending the habeas action, the government attacked the venue of the action, arguing that the prisoner had been moved out of the district.[27] It opposed Padilla's application to meet with his attorney and asserted the right to hold him indefinitely without a hearing.[28]

The government's evidence was submitted in the form of an affidavit, the Mobbs Declaration.[29] The declaration was sealed and access to it was denied to Padilla's counsel.[30] It recites Padilla's travels, asserts that he conferred with senior al Qaeda operatives about detonating a dirty bomb and the detonation of explosives at gas stations, and says that he was sent to the United States to conduct attacks on behalf of al Qaeda.[31]

A footnote comments on the "two detained sources," of this information:

> It is believed that these confidential sources have not been completely candid about their association with al Qaeda and their terrorist activities. Much of the information from these sources has, however, been corroborated and proven accurate and reliable. Some of the information provided by the sources, for example . . . recanted some of the information [the source] had provided, but most of this information has been corroborated by other sources. In addition, at the time of being interviewed by U.S. officials,[32] one of the sources was being treated with various types of drugs to treat medical conditions.[33]

In other words, the evidence was hearsay from a source no one believed to be completely reliable.

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26. *Padilla I*, 233 F. Supp. 2d at 571. Was either party engaged in forum shopping? The original habeas filing in the Second Circuit was made on June 11, 2002, the day after the government informed counsel of the transfer. The government admitted the transfer to the military was intended to avoid the scheduled June 11 hearing. Donna R. Newman, *The Jose Padilla Story*, 48 N.Y.L. SCH. L. REV. 39, 42 (2004).

27. Newman, *supra* note 26, at 43.

28. *Id.* at 43-44, 47. The President's authority was asserted on three bases: that the Constitution designates him as Commander-in-Chief, the Authorization for the Use of Military Force (AUMF) and the precedent of *Ex Parte Quirin*, 317 U.S. 1 (1942).

29. *See* Appendix 3.

30. *Padilla I*, 233 F. Supp. 2d at 572.

31. *Id.* at 573.

32. As of early 2004, the Mobbs Declaration was the sole source of information released by the government justifying Padilla's detention.

33. Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, Declaration, at 2 n.1 (Aug. 27, 2002), *available at* http://www.cnss.org/Mobbs Declaration.pdf. *See also Padilla I*, 233 F. Supp. 2d at 572.

The District Court was required to consider the prime issue in the case, the import of the 1971 Non-Detention Act.[34] "That brings us to the central issue presented in this case: whether the President has the authority to designate as an unlawful combatant an American citizen, captured on American soil, and to detain him without trial."[35]

The court analyzed *Ex Parte Milligan*[36] which, Padilla contended, prohibited such detention while the courts were open.[37] It found *Milligan* limited by the World War II case of *Ex Parte Quirin*, which authorized such detention when the detainee was determined to be an unlawful combatant.[38] The district court held that Congress, by adopting the law of war, had authorized trial by military authorities; however the case also suggested that Presidential authority justified the result.[39] *Quirin* antedates the Non-Detention Act, and did in fact provide for a hearing.[40]

The district court's analysis of Presidential authority adopted Justice Jackson's celebrated three-tier test, set forth in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.[41] The President's authority is at its peak when he acts under Constitutional power and under the authority of an act of Congress.[42] The court found this situation to exist, and held that the Joint Resolution authorized such action.[43]

The court rejected the government's contentions on counsel and venue, finding in favor of Padilla's right to counsel, and upholding its own venue.[44] It then held that it would resolve the ultimate question by considering only whether the President had "*some evidence* to support his finding that Padilla was an enemy combatant and whether that evidence has been mooted by events subsequent to his detention."[45] The district court's consideration of the factual issue on that minimal standard of proof was

34. 18 U.S.C. § 4001(a) (2000). *See Padilla I*, 233 F. Supp. 2d at 596 (specifically Part III of the case).

35. *Padilla I*, 233 F. Supp. 2d at 593 (citing Ex Parte Milligan, 71 U.S. 2 (1866)).

36. *Ex Parte Milligan*, 71 U.S. at 2.

37. *Padilla I*, 233 F. Supp. 2d at 593 (citing *Ex Parte Milligan*, 71 U.S. at 121).

38. Ex Parte Quirin, 317 U.S. 1, 11 (1942). Although the saboteurs executed in *Quirin* were German, one had been born in the United States and was therefore a U.S. citizen. *Id.*

39. *Padilla I*, 233 F. Supp. 2d at 596 (citing Ex Parte Quirin 317 U.S. at 29).

40. *Ex Parte Quirin*, 317 U.S. 1.

41. *Padilla I*, 233 F. Supp. 2d at 606 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Jackson, J., concurring)).

42. *Id.* at 635.

43. *Id.* at 607.

44. *Id.* at 610.

45. *Id.* (emphasis added). The "some evidence" standard which the district court intended to apply was expressly disapproved by the Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004). The Court emphasized the detainee's right to refute his classification.

preempted by the acceptance of an interlocutory appeal by the Second Circuit.[46] As a result, the ultimate issue of the right to a hearing was not argued before or decided by the first court to hear the habeas petition.

B. PADILLA II.

When *Padilla I* was before the district court in New York, the government opposed the appointment of counsel to represent him.[47] In fact, a public defender had already been assigned the case, and had filed the writ as next friend.[48] The government sought reconsideration by the district court of its holding on his right to counsel.[49] The court denied the motion on March 11, 2003.[50] The district court upheld both that designation and Padilla's right to an attorney.[51]

The government then moved for reconsideration of the grant of the right to consult with counsel.[52] It argued that it could "jeopardize the two core purposes of detaining enemy combatants-gathering intelligence about the enemy, and preventing the detainee from aiding any further attacks against America."[53] A declaration in support of the government's motion stated:

> DIA's [Defense Intelligence Agency] approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and the interrogator. Developing that kind of relationship . . . is a process that can take a significant amount of time . . . . Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel . . . for example, even if only for a limited duration or for a specific purpose-can undo months of work.[54]

Further, the subject may not cooperate if he believes an attorney may intercede.[55] Only once he decides that "help is not on the way" can the government expect to get information from him.[56]

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46. Padilla v. Rumsfeld, (*Padilla IIA*) 256 F. Supp. 2d 218, 223-24 (S.D.N.Y. 2003); *Padilla III*, 352 F.3d at 702.
47. *Padilla I*, 233 F. Supp. 2d at 599.
48. *Id.* at 571, 575.
49. *Padilla II*, 243 F. Supp. 2d 42, 43 (S.D.N.Y. 2003).
50. *Id.*
51. *Padilla I*, 233 F. Supp. 2d at 616.
52. *Padilla II*, 243 F. Supp. 2d at 43.
53. *Id.* at 44.
54. *Id.* at 49.
55. *Id.* at 50.
56. *Id.* The Declaration of Vice Admiral Lowell E. Jacoby (USN) Director of the Defense Intelligence Agency, January 9, 2003, details the interrogation techniques of the DIA, and the arguments against allowing contact with counsel.

The district court was not persuaded. It found the declaration to lack specifics about the past interrogations and found the forecast of conduct speculative.[57] Ultimately, the court held that even if it agreed with the Declaration as to its predictions, it would not deny Padilla counsel on that basis.[58] He had the undisputed right to bring a habeas corpus, and the right to present facts if he chose.[59] Finding no practical way for him to vindicate that right without a lawyer, the court ruled in favor of the right to counsel.[60] The court ordered that the parties meet to agree on the details governing Padilla's meetings with counsel, and ruled that absent agreement, the court would impose conditions.[61]

C. PADILLA IIA

After the district court affirmed Padilla's right to counsel, over the government's continuing objections, the government moved to certify an interlocutory appeal.[62] It was clear by then that its arguments were not moving the district court in New York, and its lawyering skills were not leaving a positive impression.[63]

Federal law provides for appeal prior to final judgment where the district judge "shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."[64]

Padilla opposed the motion, arguing that the government was attempting to delay the case and avoid the injunction enforcing the right to counsel ruling that he was seeking.[65] The court found that even if it granted the injunction Padilla was seeking, and declined to stay it, the injunction itself would be appealable, and clearly the Second Circuit would stay the

57. *Padilla II*, 243 F. Supp. 2d at 53-54.

58. *Id.* at 54.

59. *Id.* at 53-54.

60. *Id.* at 54.

61. *Id.* at 57. The court emphasized its affirmation of the right to counsel, saying,:

> Lest any confusion remain, this is not a suggestion or a request that Padilla be permitted to consult with counsel, and it is certainly not an invitation to conduct a further 'dialogue' about whether he will be permitted to do so. It is a ruling—a determination—that he will be permitted to do so.

Id.

62. *Padilla IIA*, 256 F. Supp. 2d 218 (S.D.N.Y. 2003).

63. *Id.* at 47. For example, "[t]he government's arguments here are permeated with the pinched legalism one usually expects from non-lawyers." *Id.*

64. *Padilla IIA*, 256 F. Supp. 2d 218, 218 (S.D.N.Y. 2003) (citing 28 U.S.C. § 1292(b) (2000)).

65. *Padilla II*, 243 F. Supp. 2d at 48.

injunction pending its appeal.[66] Thus, an interlocutory appeal would move the case along more rapidly than further action by the district court.[67]

The court, therefore, granted the motion, and listed six questions of law which it found to be substantial grounds for difference of opinion, namely:

> 1. Is the Secretary of Defense, Donald Rumsfeld, a proper respondent in this case?
>
> 2. Does this court have personal jurisdiction over Donald Rumsfeld?
>
> 3. Does the President have the authority to designate as an enemy combatant an American citizen captured within the United States, and, through the Secretary of Defense, to detain him for the duration of the armed conflict with al Qaeda?
>
> 4. What burden must the government meet to detain petitioner as an enemy combatant?
>
> 5. Does petitioner have the right to present facts in support of his habeas corpus petition?
>
> 6. Was it a proper exercise of this court's discretionary authority under the All Writs Act to direct that petitioner be afforded access to counsel for the purpose of presenting facts in support of his petition?[68]

D. PADILLA III.

The Second Circuit panel which heard the appeal ruled in Padilla's favor on all issues by a two-to-one vote.[69]

The court analyzed the President's power under the template created by Justice Jackson's concurring opinion in *Youngstown Sheet & Tube v. Sawyer*.[70] That opinion posited three levels of Presidential power in descending order, (1) when he acts with Congress' authorization,[71] (2) when there has been no such grant or denial of power, and (3) where his actions are not compatible with "the express or implied will of Congress."[72]

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66. *Padilla IIA*, 256 F. Supp. 2d at 222.

67. *See id.* at 223.

68. *Id.* Questions 1 and 2 were answered in the negative in *Padilla IV*, 542 U.S. 426 (2004); questions 5 and 6 were resolved in Padilla's favor; and questions 3 and 4 were never authoritatively decided.

69. *Padilla III*, 352 F.3d 695. Circuit Judges Pooler and B.D. Parker constituted the majority. Judge Wesley dissented only on the issue of Presidential power. *Id.*

70. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

71. *Id.* at 635-36 (Jackson, J., concurring).

72. *Id.* at 635-38 (Jackson, J., concurring).

The court found that the President has no inherent power to detain Padilla, an American citizen arrested on U.S. soil.[73] The Separation of Powers Doctrine requires that laws be adopted by Congress, and the court found no such adoption here.[74] Although reciting deference, it found that deference should be limited when powers are exercised in the domestic sphere.[75]

In support of this reasoning, it cited three constitutional provisions affecting national defense in the domestic area, each of which relies on Congressional action: the power to define offenses against the law of nations (U.S. Const. art. I, § 8, cl. 10); the suspension of the writ of habeas corpus (U.S. Const. art I, § 9, cl. 2), and the prohibition on the quartering of troops (U.S. Const. amend. III).[76]

To complete its *Youngstown* analysis, the court held that the Non-Detention Act[77] denied the President the power to detain without express Congressional authorization, rejecting the government's assertion that the Act did not apply to military detentions.[78] It further rejected the government's assertion that the Joint Resolution authorized the detention, finding that nothing in the text suggested any such power.[79]

Having found neither inherent Presidential power nor Congressional authorization, the court held that the third alternative of Justice Jackson's template applied: the President had taken action "incompatible with the express or implied will of Congress," placing his power at its lowest ebb.[80] The court further ruled that Padilla was entitled to counsel, with even the dissenting judge concurring in that ruling.[81] The case was remanded with

73. *Padilla III*, 352 F.3d at 714-15.

74. *Id.* at 715.

75. *Id.*

76. *Id.* at 714.

77. 18 U.S.C. § 4001(a) (2000).

78. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 648-49 (Jackson, J., concurring).

79. *Padilla III*, 352 F.3d at 715-16.

80. *See id.* at 711.

81. *Id.* at 724. Despite the ruling, the government did not allow his attorneys to meet with him until March 3, 2004, when his two court-appointed attorneys, Donna Newman and Andrew Patel, were allowed to confer with him. At the time, the case was being appealed to the Supreme Court. Sontag, *supra* note 8. Newman says of that meeting, "The conditions of the meeting were extremely restrictive. We were restricted to the subjects we could discuss. The meeting was monitored and videotaped. Accordingly we did not engage in any confidential discussion. The materials we sent to him were reviewed by the Department of Defense and redactions were made." Newman, *supra* note 26, at n.3.

instructions to release Padilla from military custody within thirty days.[82] Transfer to civilian control for trial was clearly contemplated.[83]

E. PADILLA IV.

The government applied for a writ of certiorari to the United States Supreme Court; the writ was granted.[84] The case was heard on April 28, 2004, with two other cases involving individuals being held as enemy combatants, *Rasul v. Busch*[85] and *Hamdi v. Rumsfeld*.[86]

Hamdi had been captured on the battlefield in Afghanistan; he was, like Padilla, an American citizen by birth.[87] In *Hamdi* the Court held that individuals [citizens] held as asserted enemy combatants must receive "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."[88] The fact that Hamdi and Padilla were both citizens being held as enemy combatants suggested that consistent application of the law would mandate the same result in Padilla's case.[89]

Padilla's case was argued in the Supreme Court on April 28, 2004.[90] On June 1, thirty-three days after argument and twenty-seven days before the opinion issued, and presumably while the case was under consideration, James Comey, a U.S. Attorney familiar with the case, held a press conference, at which he disclosed the government's evidence against Padilla.[91] That evidence may or may not have been part of the record before the Court.[92] It can be inferred, or at least suspected, that the timing of the release was intended to influence the Supreme Court.

The *Hamdi* holding should have flat out controlled Padilla's case, but the Supreme Court ducked that issue. It held by a five-to-four vote that Padilla's suit had to be dismissed because the Southern District of New York did not have jurisdiction over the South Carolina jailer, and that she,

82. *Padilla III*, 352 F.3d at 724.
83. *See id.*
84. *Padilla IV*, 542 U.S. 426, 434 (2004).
85. Rasul v. Bush, 542 U.S. 466 (2004). Rasul was not an American citizen, and the holding is not relevant to Padilla.
86. Hamdi v. Rumsfeld, 542 U.S. 507 (2004). .
87. *Id.* at 510.
88. *Id.* at 533 (citing Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985)). The *Hamdi* case is discussed in more detail in Part V.
89. *See Padilla IV*, 542 U.S. at 431; *Hamdi*, 542 U.S. at 512.
90. *Padilla IV*, 542 U.S. 426.
91. *See infra* Part VI.
92. *See infra* Part V.

and not Secretary Rumsfeld, was the only proper respondent to the writ.[93] The Court was unimpressed by the argument that Padilla had been removed from the jurisdiction two days before the habeas hearing, or by arguments that New York's long-arm statute could be invoked to provide jurisdiction over the Secretary of Defense.[94]

Chief Justice Rehnquist interpreted the language of the habeas corpus statute, which refers to "the person who has custody over the petitioner," to hold that the statute requires the petition to be brought against the person having physical charge of the prisoner at the location of his incarceration.[95] That person is the one with immediate custody of the prisoner, where he is being held, not "the Attorney General or some remote supervisory official."[96] No exception to that rule was found to apply.[97]

The Court of Appeals had accepted the argument that the proceeding could be brought against the person exercising the "legal reality of control."[98] The Supreme Court could find no basis in the statutory language or its precedent supporting such an exception.[99]

In a situation where the defendant is being held at the insistence of the head of the government, to treat a local warden as the person required to justify the custody makes little sense. The Court gave a literal reading to a law written to apply to incarceration in a state; the issue here existed at the national level and was of constitutional import.

Ex Parte Endo, a Japanese internment case, supported Padilla's petition.[100] The Court there allowed jurisdiction to remain in a court despite the fact that the government had spirited the petitioner out of the court's jurisdiction.[101] In *Padilla IV*, the Court distinguished *Endo* because it turned on the fact that the petitioner had already filed the petition before the transfer.[102] Padilla missed by two days.[103]

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93. *Padilla IV*, 542 U.S. at 442.

94. *Id.* In *Padilla I*, the government moved to transfer the case to South Carolina; the district court found that it could entertain the petition, despite the absence of the defendant (Rumsfeld) from the District. *Padilla I*, 233 F. Supp. 2d 564, 569 (S.D.N.Y. 2002). The decision on venue in *Padilla IV* is criticized as giving the government, with its power to move persons in military custody at will, free choice of venues and an almost unlimited ability to forum shop. *The Supreme Court, 2003 Term—Leading Cases*, 118 HARV. L. REV. 416, 425 (2004).

95. *Padilla IV*, 542 U.S. at 434-35.

96. *Id.* at 435.

97. *Id.*

98. *Padilla III*, 352 F.3d 695, 705-07 (2d Cir. 2003).

99. *Padilla IV*, 542 U.S. at 442.

100. *See* Ex parte Endo, 323 U.S. 283 (1944).

101. *Padilla IV*, 542 U.S. at 440 (citing *Ex Parte Endo*, 323 U.S. at 307).

102. *Id.* at 441.

103. *See supra* Part III.

The Chief Justice denied that this case justified extending the *Endo* rule.[104] According to the Court, there was nothing unique about the case; there was no attempt by the government to manipulate the case by the transfer, and no attempt by the government to hide the fact of transfer from Padilla's lawyer.[105]

The Court then asked whether the Southern District of New York had jurisdiction over Commander Marr, the South Carolina jailer.[106] The Court concluded that it did not, finding that only the district of confinement had jurisdiction to hear the writ under the "immediate confinement" rule.[107] It ultimately concluded that such a rule, strictly enforced, is necessary to prevent "rampant forum shopping."[108] This, of course, ignored the fact that the government had already engaged in forum shopping when it transferred the prisoner. Because it ruled on the jurisdictional/venue ground, the five-justice majority did not reach the substantive issue of the right to a hearing.[109]

Four dissenting justices (Stevens, writing for himself and Justices Souter, Ginsburg and Breyer) would have affirmed the Second Circuit, on both its procedural and substantive holdings.[110] The dissent began by calling the questions raised by the case to be of "profound importance to the nation. The arguments set forth by the Court do not justify our duty to answer these questions."[111]

Justice Stevens argued that this was not an ordinary case, and that "special circumstances" can justify deviation from the normal venue rules, taking that phrase from an earlier Scalia opinion.[112] In support of the position that exceptions should apply, the dissent pointed out that Padilla had been removed from New York without notice to his lawyer, who would have filed immediately had she been informed.[113] Because she had not been informed where he had been taken at the date of filing, she could not have filed in the new venue.[114] The dissent also asked "why should a New

104. *Padilla IV*, 542 U.S. at 441.
105. *Id.*
106. *Id.* at 442.
107. *Id.* at 443.
108. *Id.* at 447.
109. *See Padilla IV*, 542 U.S. 426.
110. *Id.* at 455-65 (Stevens, J., dissenting).
111. *Id.* at 455 (Stevens, J., dissenting).
112. *Id.* at 458 (Stevens, J., dissenting).
113. *Id.* at 458-59 (Stevens, J., dissenting).
114. *Id.* (Stevens, J., dissenting).

York court not have the authority to determine the legitimacy of the government's removal of the respondent beyond that court's borders?"[115]

Justice Stevens examined the many exceptions to the custody rules in habeas corpus cases that the Chief Justice has cited and had declined to apply, and found that the exceptions demonstrate the rule not to be ironclad.[116] He argued that a more functional rule that focused on "the person with the power to produce the body" would allow the court to reach the actor in fact ultimately responsible for the detention, the Secretary of Defense.[117]

After disagreeing on the venue/jurisdictional point, the dissent took less than one page to opine that "[t]here is, however, only one possible answer to the question whether [Padilla] is entitled to a hearing on the justification for his detention."[118] Its agreement with the Second Circuit that the Non-Detention Act applies and that the Joint Resolution is not authorization for the President to detain an American citizen, is expressed in a single footnote.[119]

By its 5-4 venue decision, the Court sentenced Padilla to another two years of confinement without a hearing.[120] It ducked a substantive decision on a critical question by a questionable ruling on a procedural point.

F. PADILLA V.

The dismissal required a new habeas filing, in the venue mandated by the Supreme Court's opinion.[121] An application for a writ of habeas corpus, an entirely new case, was brought in the district court for South Carolina on July 2, 2004.[122]

115. *Id.* at 459 n.3 (Stevens, J., dissenting).

116. *Id.* at 460-61 (Stevens, J., dissenting).

117. *Id.* at 461 (Stevens, J., dissenting). "[T]his case is singular not only because it calls into question decisions made by the Secretary himself, but also because those decisions have created a unique and unprecedented threat to the freedom of every American citizen." *Id.* (Stevens, J., dissenting).

118. *Id.* at 464 (Stevens, J., dissenting).

119. *Id.* at 464 n.8 (Stevens, J., dissenting). Justice Stevens goes on to wax eloquent: "At stake in this case is nothing less than the essence of a free society." *Id.* (Stevens, J., dissenting).

120. *Padilla IV*, 542 U.S. 426.

121. *Padilla V*, 389 F. Supp. 2d 678. The Miami Daily Business Journal reported on June 29, 2004, the day after the Supreme Court's opinion was issued, that the local U.S. Attorney office was preparing to indict Padilla. Dan Christensen, *Miami Prosecutors Draft Charges Against Accused Dirty Bomber*, MIAMI DAILY BUS. REV., June 29, 2004, at 1.

122. Christensen, *supra* note 121.

That filing resulted in the district court decision in *Padilla V*, on February 28, 2005.[123] There the court was relieved from consideration of the collateral issues previously raised, and ruled on stipulated facts, recited from *Padilla IV*.[124] Going directly to the point, it held for Padilla on the issue of entitlement to a hearing to determine the legitimacy of his characterization as an enemy combatant.[125] It denied the contention of inherent Presidential power, found the Non-Detention Act controlling, and held that the Joint Resolution did not constitute Congressional authorization of Presidential power.[126]

The court distinguished *Hamdi* on the basis of the place of capture, agreeing with the Second Circuit that a capture on the battlefield, with the circumstances of combat involved, could not be compared with an arrest at O'Hare Airport within the United States.[127] Nor did it accept the argument that the AUMF gave authority to arrest an American citizen where the "necessary and appropriate force" authorized by that action was not involved.[128] In short, it agreed with the Second Circuit.

G. PADILLA VI.

On April 7, 2005, Padilla filed a request for certiorari before judgment in the Supreme Court, in an attempt to bypass the Court of Appeals, and expedite Supreme Court review.[129] The petition cited the length of time the prisoner had been held without a hearing, and argued that the case had been fully briefed and argued in the Second Circuit Court of Appeals in *Padilla III*.[130]

The government's opposition cited Supreme Court Rule 11, that such petitions will be granted "only upon a showing that the case is of such imperative public importance as to justify deviation from the normal appellate practice and to require immediate determination in this Court."[131] Padilla's incarceration without a hearing did not create urgency, it argued,

123. *See id.* (citing the date of the *Padilla V* decision).
124. *Padilla V*, 389 F. Supp. 2d at 679-81.
125. *Id.* at 691-92.
126. *Id.* at 690.
127. *Id.* at 685.
128. *Id.* at 685-86.
129. Brief for Petitioner for Writ of Certiorari Before Judgment, *Padilla VI*, 545 U.S. 1123 (No. 04-1342).
130. *Id.* at *4-5.
131. Brief for Respondent in Opposition at *6, *Padilla VI*, 545 U.S. 1123 (No. 04-1342) (citing Sup. Ct. R. 11).

since if released by the Department of Defense, he would simply be turned over to civilian authorities for trial.[132]

In addition, the opposition cited new facts, contained in the "Rapp Declaration."[133] That declaration recited that Padilla attended training camp in Afghanistan in 2000, tracked his travels in the Middle East and meetings with al Qaeda leaders, and recited his intention to blow up apartment houses in the United States.[134]

The application was denied without comment or dissent by the Supreme Court in *Padilla VI* on June 13, 2005.[135]

No legal or factual issues needed to be heard by the Court of Appeals, all had been fully explored in the four plenary opinions in the case prior to that date. The Court offered no explanation for denying the request, which the government had opposed.[136] The denial was without dissent.[137] The Supreme Court had again lengthened Padilla's incarceration without a hearing.

The government at every stage of these proceedings took every possible action to delay resolution of the habeas petition. Early on it contested the right of the public defender to act as Padilla's next friend in the litigation, objected to his having counsel, contended that the court lacked jurisdiction over the defendant, and made its ultimately successful venue argument.[138]

When the government opposed Padilla's petition to bypass the Fourth Circuit and hear his appeal at once, the Court's acquiescence and application of its own discretionary rules assured at least another year of incarceration without a hearing.[139]

H. PADILLA VII.

On September 9, 2005, a panel of the Fourth Circuit Court of Appeals, in Richmond, Virginia, reversed the District Court, and held that the President did in fact have authority to hold Padilla under the Joint Resolution.[140]

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132. *Id.* at *10.
133. *See* Appendix 4.
134. *Id.*
135. *Padilla VI*, 545 U.S. 1123.
136. *Id.*
137. *Id.*
138. *Padilla I*, 223 F. Supp. 2d 564, 569-70 (S.D.N.Y. 2002).
139. *Padilla VII*, 423 F.3d 386, 397 (4th Cir. 2005).
140. *Id.*

The opinion, by Chief Judge Michael Luttig, characterized Padilla as a person who:

> [was] closely associated with al Qaeda, an entity with which the United States is at war; who took up arms on behalf of that enemy and against our country in a foreign combat zone of that war; and who thereafter traveled to the United States for the avowed purpose of further prosecuting that war on American soil, against American citizens and targets.[141]

The court addressed the duration of the detention only in a footnote, acknowledging that the power to detain, under *Hamdi*, is "not a power to detain indefinitely" but would be limited to the duration of the hostilities which caused the detention.[142] "Because the United States remains engaged in the conflict with al Qaeda in Afghanistan, Padilla's detention has not exceeded the duration authorized by the AUMF."[143]

It is difficult to recognize the *Hamdi* holding in the Fourth Circuit's opinion; the court finds that it authorizes Padilla's detention.[144] The opinion uses *Hamdi* largely to knock down Padilla's contentions. The first of these was that having been arrested on American soil, the case is distinguishable from the circumstances of Hamdi's arrest in Afghanistan.[145] The opinion found the locus of capture to not be relevant to the issue at hand, and cited *Quirin*, in which an American citizen was arrested on United States soil and found to be subject to trial by a military tribunal.[146]

The court further rejected the argument that Padilla being subject to criminal trial precluded military detention.[147] Padilla's argument that as an American citizen he was protected by the Non-Detention Act was rejected on the basis that the AUMF is a clear statement of congressional authorization of the detention.[148]

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141. *Id.* at 389.

142. *Id.* at 392 n.3.

143. *Id.* Because there was no hearing, the issue of the length of detention never arose. The open ended nature of the "War on Terror" suggests that detention could have been indefinite. The questions arising from indefinite detention of terrorism suspects are discussed in detail in Richard Raimond, *The Role of Indefinite Detention in Antiterrorism Legislation*, 54 U. KAN. L. REV. 515 (2006).

144. *Padilla VII*, 423 F.3d at 393.

145. *Id.*

146. *Id.* at 394 (citing Ex Parte Quirin, 317 U.S. 1 (1942)). In *Ex Parte Quirin*, the status of the defendants was not in issue. They were clearly enemy combatants under the laws of war.

147. *Id.* Justice Scalia, concurring in *Hamdi*, would have ruled that the government was required to either prosecute him as a criminal, or release him. Justice Stevens agreed with this view. *See Hamdi*, 542 U.S. at 564.

148. *Padilla VII*, 423 F.3d at 395. *See infra* Part IV.

And the final argument that *Ex Parte Milligan*[149] guaranteed him a civil court hearing was rejected, citing *Quirin*.[150]

The Fourth Circuit, far more attuned to the administration's position than the Second Circuit, validated the administration's movement of *Padilla* from New York to South Carolina.[151] The cavalier manner in which the Fourth Circuit addresses the fact that *Padilla* may be held indefinitely without a judicial determination of his status evidences the depth of the court's willingness to accommodate the government position.[152]

I. PADILLA VIII AND IX.

The next segment consists of a series of bizarre events.

Padilla filed a petition for certiorari in the United States Supreme Court on October 25, 2005.[153] On November 22, the Justice Department reported that Padilla had been indicted by a grand jury in Miami on charges involving terrorism and conspiracy.[154] It advised that the administration intended to release him from military custody to the Florida courts to be tried on those charges.[155] The President's order stated that it superseded the earlier order designating Padilla an "enemy combatant" with consequent military detention.[156] The charges in the indictment bore no relationship to those on which Padilla had been held to that date.[157] The announcement was accompanied by what was viewed as a pro forma request to the Fourth Circuit to authorize his transfer to Florida.[158]

149. *Id.* at 396 (citing Ex Parte Milligan, 71 U.S. 2 (1866)).

150. *Id.* at 396-97 (citing *Ex Parte Quirin*, 317 U.S. 1).

151. Could Padilla have been accused of forum shopping? The original habeas filing in the Second Circuit was made two days after his transfer, at a time when Padilla's attorney did not know whence he had been moved. The government's forum shopping is self-evident.

152. *Padilla VII*, 423 F.3d at 397. At the time of the decision, Judge Luttig was widely reported to be on the administration's short list for the two Supreme Court vacancies then existing. He wrote for a panel of three judges, finding for the government. Suspicious minds might conjecture that a contrary holding would have taken him off the short list, but that is a different subject.

153. Brief of Petitioner for Writ of Certiorari, *Padilla IX*, 126 S. Ct. 1649 (No. 05-533).

154. *Padilla VIII*, 432 F.3d 582, 584 (4th Cir. 2005).

155. *Id.*

156. It is unclear whether the designation of Padilla as an enemy combatant was revoked by the President. Justice Ginsburg's dissent from the denial of certiorari states that despite the Miami indictment, "nothing prevents the Executive from returning to the road it earlier constructed and defended." *Padilla X*, 126 S. Ct. 1649, 1651 (2006) (Ginsburg, J., dissenting).

157. *Padilla VIII*, 432 F.3d at 584.

158. *Id.*

Then the Fourth Circuit got testy. Judge Luttig, staunch conservative that he is, was offended that the facts being asserted in the Florida indictment bore no relationship to those on which the government had relied in its argument in *Padilla VII*, on which he had based the court's opinion.[159] In a scathing opinion, the Fourth Circuit denied the government's request to transfer Padilla to Florida, and requested that the issue be briefed.[160]

The government responded by taking the position that the Fourth Circuit decision in *Padilla VII* should be "withdrawn entirely."[161]

The court gave two reasons for denying the request.[162] First, these actions, said the court, "have given rise to at least an appearance that [their purpose] may be to avoid consideration of our decision by the Supreme Court."[163] Judge Luttig pointed out that although the government had not informed his court of its reasons, immediately after it had declined to act, "those concerns were detailed in the press and attributed to former and current Administration officials speaking on condition of anonymity." [164]

Secondly, the court said that the issues raised by the pending case are "of sufficient national importance as to warrant consideration by the Supreme Court, even if that consideration concludes only in a denial of certiorari."[165]

> On an issue of such surpassing importance, we believe that the rule of law is best served by maintaining on appeal the status quo in all respects and allowing Supreme Court consideration of the case in the ordinary course, rather than by an eleventh-hour transfer and vacatur on grounds and under circumstances that dismissal may have been sought for the purpose of avoiding consideration by the Supreme Court.[166]

The Fourth Circuit had, of course, hit the nail on the head. The administration did not want another *Hamdi* decision. Its clear intent was to

159. Michael C. Dorf, *Hell Hath No Fury Like a Conservative Jurist Scorned: The Government's Overreaching in the Case of Jose Padilla*, FINDLAW LEGAL NEWS AND COMMENTARY, Jan. 4, 2006 http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/dorf/20060104.html.

160. *Padilla VIII*, 432 F.3d at 587. The two Supreme Court vacancies had been filled by this date.

161. *Id.* at 584-85.

162. *Id.* at 585.

163. *Id.* Judge Luttig at least got that one right.

164. *Id.* at 585. The reference is presumably to the disclosures discussed in Part V.

165. *Id.* at 586.

166. *Id.* at 587.

keep the question of judicially unreviewed detention of American citizens from the Supreme Court.

The government then asked the Supreme Court to order Padilla's transfer to Florida.[167] On January 4, 2006, the Supreme Court granted the Solicitor General's request to transfer Padilla to the control of the Florida courts.[168] In its one page order the Court said that it would consider Padilla's pending certiorari petition "in due course."[169]

That action left at least two, and possibly three judicial proceedings possible: consideration of the petition for certiorari, a criminal trial in Florida, and (perhaps) the substantive issue of Padilla's status in the District Court in South Carolina. Recall that *Padilla VII* did not resolve the factual issue of his designation as an enemy combatant, only the question of Presidential power to detain him under that designation.

J. PADILLA X.

Five months after the petition for certiorari was filed by Padilla, and more than three months after the filing of the government's opposition brief, the Supreme Court denied the petition.[170] That action temporarily, at least, ended Padilla's attempt to secure a hearing on his status in the federal courts, but may have raised more questions than it answered. What is clear is that for the second time, the Supreme Court had ducked the basic question raised by Padilla's incarceration.

Clearly the government's second attempt at forum shopping worked. When the Supreme Court denied certiorari, the Justice Department had again effectively selected the forum in which Padilla's case would be heard, this time the federal court in Florida.[171] The denial of certiorari means that not only will the legal issue of the President's asserted abuse of authority not be decided, but the factual basis on which Padilla was imprisoned for almost four years may never be judged.

The separation of powers which the Constitution mandates requires that each of the three branches of government limit its authority to their proper role. Issues of guilt, innocence and status are assigned to the judiciary as "cases and controversies" in Article III.[172]

167. *Id.* at 584.
168. *Padilla IX*, 126 S. Ct. 978.
169. *Id.*
170. *Padilla X*, 126 S. Ct. 1649.
171. *Id.* at 1650.
172. U.S. CONST. art. III, § 2 cl. 1.

Although there is no opinion of the Court on a denial of certiorari, dissents and concurrences can be recorded. Both a dissent and a concurrence were issued with the order of denial.

Three justices, one short of the number required to grant certiorari, dissented from the denial: Justices Souter and Breyer without comment, and Justice Ginsburg.[173] The last wrote a one page dissent, invoking the language of Justice Stevens in *Padilla IV* that the case involved a "question of profound importance to the nation."[174] The dissent disagreed that the case was moot, in that the government remained free to continue to assert enemy combatant status should Padilla be acquitted by the civilian court; thus he remained in jeopardy.[175]

Three justices joined in an opinion concurring in the denial, Chief Justice Roberts, and Justices Stevens and Kennedy.[176] Kennedy's concurring opinion held that the denial was the proper exercise of discretion, "in light of the circumstances of the case."[177]

Kennedy did not attempt to resolve the mootness argument, citing strong prudential arguments:

> Even if the Court were to rule in Padilla's favor, his present custody status [in the civilian courts in Florida] would be unaffected. Padilla is scheduled to be tried on criminal charges. Any consideration of what rights he might be able to assert if he were returned to military custody would be hypothetical, and to no effect, at this stage of the proceedings.[178]

Moreover, Kennedy continued, if Padilla's continuing concern that his status might change again arises, it can be addressed at that time.[179] The opinion then expressed a warning to the government:

> In the course of its supervision over Padilla's custody, the District Court will be obliged to afford him the protection, including the right to a speedy trial, guaranteed to all federal criminal defendants . . . . Were the government to seek to change the status or condition of

173. *Padilla X*, 126 S. Ct. at 1649, 1651.

174. *Id.* at 1651 (Ginsburg, J. dissenting).

175. *Id.* (Ginsburg, J. dissenting). The President's Memorandum for the Secretary of Defense (November, 2005) (*available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/padilla/gwb112005memo.jpg). This memo of November 20, 2005, contained a determination that it was in the best interests of the country to release Padilla from detention by the Secretary of Defense, for the purpose of allowing his criminal prosecution to go forward. It therefore ordered the Secretary of Defense to transfer Padilla's custody to the Attorney General, upon the Attorney General's request. The Memo contains no reference to Padilla's status as an unlawful combatant.

176. *Id.* at 1649.

177. *Id.* (Kennedy, J., concurring).

178. *Id.* at 1650 (Kennedy, J., concurring).

179. *Id.* (Kennedy, J., concurring).

> Padilla's custody, that court would be in a position to rule promptly on any responsive filings submitted by Padilla. In such an event, the District Court, as well as other courts of competent jurisdiction, should act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised. Padilla, moreover, retains the option of seeking a writ of habeas corpus in this Court.[180]

The decision on the legality of Padilla's detention, supposedly decided as a matter of law in *Hamdi*, was ducked again.

The lineup of justices did not follow earlier patterns. Justice Stevens, despite his strong dissent in *Padilla IV*, would have been expected to join his usual companions in voting to hear the case. He limited himself to joining in Justice Kennedy's concurring opinion.[181] Chief Justice Roberts separated himself from Justices Scalia and Thomas when he joined the concurring opinion.[182] And Scalia, whose concurring opinion in *Hamdi* appeared to foreclose continued custody without a hearing for American citizens, silently joined the majority.[183]

The question remains whether the warning in the concurring opinion should be interpreted as limited to Jose Padilla. At this time there are apparently no other American citizens being held as enemy combatants. Would the warning in the concurring opinion apply to a new case, or would it apply only after four years of confinement?

The two trips up the ladder to the Supreme Court can be summarized. Padilla won, in the sense of a decision that he should have a hearing on his status, in two courts, the Second Circuit, and the District of South Carolina. He lost in two courts, the Southern District of New York, and the Fourth Circuit. There were two no-decisions, effectively losses, in the United States Supreme Court. The second no-decision kept the Fourth Circuit opinion in place, and sealed his fate.

K. PADILLA XI.

When the Fourth Circuit in *Padilla VIII* declined to honor the government's request to transfer Padilla to the custody of the federal court in Florida, it directed both parties to address whether the mandate of the court should be recalled and the opinion vacated.[184] The mandate of the

180. *Id.*
181. *Id.* at 1649.
182. *Id.*
183. *Id.*
184. *Padilla VIII*, 423 F.3d 582 (4th Cir. 2005).

court was to return the case to the District Court; the opinion of the court reversed the lower court.[185]

The Supreme Court having declined the case, the effect of such an action, if left undisturbed, would be reinstatement of the opinion of the district court in *Padilla V*, which granted Padilla's petition for a writ of habeas corpus. The order of that court directed the federal government to release Padilla from his custody within forty-five days.[186]

The district court conceded that Padilla could be held on criminal charges or as a material witness.[187] In any event, the order was stayed by the appeal to the Fourth Circuit Court of Appeals.[188]

On May 26, 2006, Padilla filed a motion in the Fourth Circuit to recall the mandate and to vacate the opinion.[189] On June 12, the government filed its opposition.[190]

When the Fourth Circuit directed argument whether the mandate should be vacated, the government conceded that such an action was within the discretion of the court. In its reply it conceded that the discretion exists, but argued that in light of the passage of time since the opinion issued (September 9, 2005) that discretion should not be exercised.[191]

Padilla's argument rests on the exasperated comments of Judge Luttig when the government abandoned its defense of the habeas action and ordered his transfer to face criminal charges.[192] The judge's discontent derived from the fact that those charges included none of the charges on the basis of which he had been held for three years, and on which the Fourth Circuit had relied in deciding *Padilla VII*.[193] The motion simply quotes Judge Luttig's remarks about the "abrupt change of course" and the possible loss of the government's credibility before the court.[194]

185. *Padilla VII*, 423 F.3d 386, 387 (4th Cir. 2005).

186. *Padilla V*, 389 F. Supp. 2d 678, 692 (4th Cir. 2005).

187. *Id.* at n.14.

188. *Padilla VII*, 423 F.3d 386.

189. Motion of Jose Padilla to Recall the Mandate and to Vacate the Opinion, *Padilla VII*, 423 F.3d 386 (No. 05-6396).

190. Response to the Motion of Jose Padilla to Recall the Mandate and to Vacate the Opinion, *Padilla VII*, 423 F.3d 386 (No. 05-6396).

191. *Id.* at 5.

192. Motion of Jose Padilla to Recall the Mandate and to Vacate the Opinion, *Padilla VII*, 423 F.3d 386.

193. *Padilla VIII*, 432 F.3d 582, 584 (4th Cir. 2005).

194. Motion of Jose Padilla to Recall the Mandate and to Vacate the Opinion, *Padilla VII*, 423 F.3d 386. A footnote recites: "Indeed, any effort by the government to abandon its position and instead argue that this Court should not recall its mandate and vacatur its opinion would be estopped. Moreover, any such effort would underscore the very concerns outlined by Judge

The government response argues that the passage of time and the Supreme Court's having denied the application for certiorari without reaching the question of mootness militate against granting the motion.[195]

A case becomes moot when events subsequent to its filing render its issues no longer of importance, so that no "case or controversy" exists. It has never been decided whether the action of the Supreme Court in declining certiorari, after Padilla had been released from military custody, rendered the case moot. Nor is it at all clear whether, if the case is now moot, the earlier decisions of the courts should be withdrawn.[196]

It is unclear what effect a ruling for either party on the motion would have. Such a ruling could be extremely important if Padilla were to be acquitted in the Miami case.

IV. THE NON-DETENTION ACT

The opinions of the various courts which found against Padilla declined to give effect to the Non-Detention Act. The clear mandate of that statute should have decided the case.

The Non-Detention Act provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[197]

In its extended discussion of the issue of inherent presidential authority to hold Padilla, the district court in New York sidestepped the arguments against such authority, and moved the question to the Non-Detention Act.[198] Whether or not the President had inherent authority, the statute, applying the third of Justice Jackson's paradigms, would be read to limit it.[199]

Luttig in his opinion for this Court." Judge Luttig has now left the Court for private industry; his righteous indignation lives on. *Id.* at n.1.

195. Response to the Motion of Jose Padilla to Recall the Mandate and to Vacate the Opinion, *Padilla VII*, 423 F.3d 386.

196. When the government first asked the Fourth Circuit to transfer Padilla, it also requested that it withdraw its opinion in *Padilla VII*. That request, which occurred before the Supreme Court's denial of certiorari, is the basis for Padilla's contention that the government should be estopped to oppose the present motion. Motion of Jose Padilla to Recall the Mandate and to Vacate the Opinion, *Padilla VII*, 423 F.3d 386.

197. 18 U.S.C. § 4001(a) (2000).

198. *Padilla I*, 233 F. Supp. 2d 564, 596 (S.D.N.Y. 2002).

199. *Id.* at 597.

The Act was adopted in 1971, and should control any reading of *Quirin*.[200] In any event, there was in fact Congressional authority for Presidential action in *Quirin*, the formal adoption of the laws of war.[201]

The Second Circuit in *Padilla III* analyzed the legislative history of the Act.[202] That opinion concluded that the plain language of the statute had been upheld by the Supreme Court as prohibiting all detention of citizens, citing *Howe v. Smith*.[203]

The legislative history of the statute focused on the Japanese internment during World War II, with debate apparently acknowledging that the law did in fact tie the President's hands in some circumstances.[204] The specific provision, § 4001(a), was an amendment to a statute repealing the Emergency Detention Act of 1950, which allowed detention by the Attorney General on suspicion of intent to commit sabotage.[205] The Court utilized the legislative history in this statement:

> Congress' passage of the Railsback Amendment [§ 4001(a)] by a vote of 257 to 49 after ample warning that both the sponsor of the amendment and its primary opponent believed it would limit detentions in times of war and peace alike is strong evidence that the amendment means what it says, that no American citizen can be detained without a congressional act authorizing the detention.[206]

Emphasis in the debates on the Japanese internment convinced the Second Circuit panel that the law applied to military as well as civilian internments.[207] This interpretation of the Non-Detention Act renders unnecessary extended consideration of the older cases involving incarceration by Presidential order. Insofar as American citizens are concerned, Congressional authorization must be found for detention.

The New York district court in *Padilla I*, and the Fourth Circuit in *Hamdi* found such authority in the Military Force Authorization of September 18, 2001, the "AUMF."[208] Although not labeled an "Act," the district court found no "relevant constitutional difference" between a bill

200. *Padilla III*, 352 F.3d 695, 716 (2d Cir. 2003).

201. *Id.* *Quirin* would be questionable authority altogether but for the fact that one of the six German saboteurs was born in the United States, and was thus an American citizen, a fact not widely noted at the time.

202. *Id.* at 718-20.

203. *Id.* at 718 (citing Howe v. Smith, 452 U.S. 473, 479 n.3 (1981)).

204. *Id.* at 720.

205. *Id.* at 719.

206. *Id.* at 720.

207. *Id.*

208. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

and a joint resolution.[209] It was passed by both houses of Congress, and signed by the President, giving it all the formalities of legislation.[210] The operative language of the Resolution:

> The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks of September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of terrorism against the United States by such nations, organizations or persons.[211]

That language specifically addresses 9/11. Nothing in it suggests power of detention. It authorizes "force," meaning the use of military power, the clear objective of the resolution.

More significantly, nothing in the Resolution provides that it is effective notwithstanding any other laws, which would have been an obvious means of overriding the civil rights of citizens protected by statute.

The New York district court read the Resolution broadly, finding in it authority not only against those directly responsible for 9/11, but also against those who might engage in future acts as part of terrorist organizations.[212]

The South Carolina district court was willing to infer a power of detention from the Resolution, if applied on the battlefield where "detentions are necessary to carry out the war," but found that nothing in the Resolution suggested that Congress would have intended that it be applied to an American citizen held in this country:[213]

> To be more specific, whereas it may be a necessary and appropriate use of force to detain a United States citizen who is captured on the battlefield, this Court cannot find, in narrow circumstances of this case, that the same is true when a United States citizen is arrested in a civilian setting such as a United States airport.[214]

That court was correct in giving the word "force" its military meaning. The Resolution authorized the use of military force by the executive branch. Domestic application, as in this case, would not, in ordinary parlance, fall within that definition.

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209. *Padilla I*, 233 F. Supp. 2d 564, 598 (S.D.N.Y. 2002).
210. *Id.*
211. *Id.* (citing Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001)).
212. *Id.* at 589-99.
213. *Padilla V*, 389 F. Supp. 2d 678, 688-89 (D.S.C. 2005).
214. *Id.* at 689. *But see Padilla VII*, 423 F.3d 386, 393-94 (4th Cir. 2005) (discussing how the Fourth Circuit rejected any distinction based on place of capture).

The Supreme Court's plurality opinion in *Hamdi* found that the AUMF was sufficient authorization from Congress to meet the requirement of § 4001(a).[215] A fifth vote, Justice Thomas in dissent, agreed with the plurality on that point.[216] The governing opinion, however, required that a hearing be held, although without imposing any time limit.[217] Hamdi's repatriation avoided the question with respect to the timing of a hearing, and the venue holding avoided the question as to Padilla.

Although the five-vote majority skirted the issue in *Padilla IV*, the four justices dissenting (Stevens, Breyer, Ginsburg and Souter) clearly believed that Padilla was being wrongfully detained.[218] A footnote made short shrift of the question: "Consistent with the judgment of the Court of Appeals, I believe that the Non-Detention Act [18 U.S.C. § 4001] prohibits—and the Authorization for the Use of Military Force does not authorize—the protracted, incommunicado detention of American citizens arrested in the United States."[219] The plurality opinion rejected this position in *Hamdi*, holding that it:

> [was] of no moment that the AUMF does not use specific mention of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention *in the narrow circumstances considered here*.[220]

If the "narrow circumstances" referred to by the plurality included capture on the battlefield, they clearly did not apply in Jose Padilla's case.

V. A DIGRESSION: HAMDI AND PADILLA

Yasir Esam Hamdi was born an American citizen in 1980 and moved with his family to Saudi Arabia while still a child.[221] In 2001, he was in Afghanistan, where he was ultimately taken prisoner by the Northern Alliance (America's allies) and turned over to the United States.[222] After

215. *Hamdi*, 542 U.S. 507, 517 (2004).

216. *Id.* at 589 (Thomas, J., dissenting).

217. *Id.* at 533.

218. *Padilla IV*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting).

219. *Id.* at 465 n.8.

220. *Hamdi*, 542 U.S. at 519 (emphasis added). Justices Souter and Ginsburg, reading the Non-Detention Act "robustly" would have found that the law required Hamdi's release. *Id.* at 545. Neither Justice Scalia, in dissent, nor Justice Thomas, in dissent, discuss the Act. *Id.* at 554-99.

221. Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES, Oct.12, 2004, at A15.

222. *Hamdi*, 542 U.S. at 510. Hamdi later said that the Northern Alliance sold him to the Americans for $20,000.00. Brinkley & Lichtblau, *supra* note 221.

interrogation there, he was taken to Guantanamo, where it was learned that he was an American citizen.[223] He was then transferred to the naval brig in South Carolina.[224]

Hamdi's father sought a writ of habeas corpus on his behalf.[225] The case worked its way up to the Supreme Court, where it was decided on the same day as *Padilla IV*.[226] The Court held, by a plurality vote, that due process required that an American citizen held as an enemy combatant must "receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."[227]

The Court issued four opinions.[228] A plurality of four (Justice O'Connor, writing for herself, Chief Justice Rehnquist and Justices Kennedy and Breyer) held that the AUMF gave the President the authority needed under 4001(a) to hold an American citizen as an enemy combatant, but required a hearing be held to determine his status.[229] Justices Souter and Ginsburg denied that the AUMF gave that authority.[230]

Justice Scalia, for himself and Justice Stevens, found no such authority.[231] In Scalia's view, as long as Congress had not suspended habeas corpus, the only alternatives open to the government in the case of an American citizen was to try him in the civil courts, or release him.[232] Justice Thomas dissented alone, asserting that the President possessed the power claimed, and that the judicial branch had no power to question the status once declared by the executive branch.[233]

A five-to-four vote thus upheld the presidential power claimed, but subjected it to the citizen's right to a hearing to determine status.[234]

The Court split on what process would be required. O'Connor's plurality opinion held that a full trial was not required, that a more summary procedure would be adequate.[235] It referred to the *Mathews v.*

223. *Hamdi*, 542 U.S. at 510.
224. *Id.*
225. *Id.* at 511.
226. *Id.* at 507.
227. *Id.* at 533.
228. *Id.* at 507.
229. *Id.* at 517, 533.
230. *Id.* at 541.
231. *See id.* at 554-58.
232. *Id.* at 563-69.
233. *Id.* at 579.
234. *Id.* at 507.
235. *See id.* at 509-39.

Eldridge test, usually applied in an administrative law context.[236] That test determines required procedures by balancing the government's interest, the private interest, and the burden the government would face in providing greater process.[237]

The Court, without prescribing the procedure, suggested that hearsay evidence could be used in a hearing to determine status, as would a presumption in favor of the government, as long as the presumption was rebuttable. Moreover, shifting the burden to the detainee once the government had produced its evidence could be acceptable as part of the process.[238]

Justice Scalia, writing for himself and Justice Stevens, found this middle ground unacceptable. He found Hamdi to be entitled to immediate release, unless either criminal proceedings were promptly brought, or the writ of habeas corpus suspended.[239] In Scalia's view, without suspension of the writ, the executive branch had no wiggle room: it must either hand him over to civil authorities for trial, or release him.[240]

Eight justices of the Supreme Court agreed that Hamdi could not be held without a hearing on his status.[241] There should have been no way to avoid applying that ruling to Padilla.

The four dissenting Supreme Court justices in *Padilla IV* did not believe they needed to cite *Hamdi* to find that the incarceration of an American citizen without a hearing violates due process.[242]

Eight justices agreed on the unconstitutionality of holding an American citizen without trial or hearing.[243] But the government was able

236. *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976). Justice Scalia, dissenting, disparagingly refers to the citation of *Mathews* as "a case involving . . . *the withdrawal of disability benefits!*" *Hamdi*, 542 U.S. at 575 (Scalia, J., dissenting).

237. *Hamdi*, 542 U.S. at 529. The *Mathews* test applies to administrative law proceedings, to determine exactly what procedural protections an individual is entitled, most often where government benefits or employment rights are at issue. It should have no relevance in to an issue of incarceration, where the rights of an individual to his freedom are being determined, and the usual standard is proof beyond a reasonable doubt. Hence Scalia's scorn.

238. *Id.* at 533-34.

239. *Id.* at 573 (Scalia, J., dissenting).

240. *Id.* at 576 (Scalia, J., dissenting).

241. *Hamdi*, 542 U.S. 507. Justice Thomas alone would have declined to grant Hamdi some modicum of process outside the executive branch. Opining that the authority given the President entitled him to make "virtually conclusive factual findings," he stated: "In this context, due process requires nothing more than a good-faith executive determination." *Id.* at 590. In a footnote, he questions whether even good faith is required, citing *Moyer v. Peabody*, 212 U.S. 78, 85 (1909).

242. *Padilla IV*, 542 U.S. 426, 453 (2004) (Stevens, J., dissenting).

243. *Hamdi*, 542 U.S. at 509.

to avoid a Supreme Court decision in Jose Padilla's case, in part assisted by its choice of forums, most notably the Fourth Circuit.

Hamdi had strong family ties to Saudi Arabia, despite his U.S. citizenship, and apparently an influential family.[244] Agreement was reached between the Saudi and American governments, and he was allowed to leave the United States on condition that he renounce his citizenship and not attempt to return.[245]

Hamdi was allowed to leave the country promptly after the Supreme Court decision came down, after the terms of his departure were negotiated by his family, with the concurrence of the government of Saudi Arabia, a United States ally.[246] Jose Padilla was not so fortunate.

VI. THE CASE AGAINST PADILLA

Sheer speculation is required even to consider the possible result of a hearing on Padilla's status. Since no hearing was ever held, the evidence which would have been introduced is unknown. Moreover, the tribunal to which it would have been presented does not exist. There is no way of knowing who would have presided, what the standards for decision would have been, or what rules of evidence would have been applied.

But some things can be surmised. Recent disclosures have confirmed the suspicion that the government has all along seriously doubted its ability to make a case.[247]

Due process would require that a tribunal established to hold a hearing on the changes against Padilla would have to be subject to some rules of evidence. Although Justice O'Connor, writing for the plurality in *Hamdi*, stated (presumably as *obiter dictum*) that hearsay evidence could be utilized,[248] constitutional case law may preclude a conviction based on such evidence. The release of Padilla to the criminal courts makes it clear that much of the evidence charging him with terrorism is strictly hearsay, and from interested and unreliable sources. The sources are other detainees, whose live testimony could well be suspect if offered in open court, or even before a military tribunal.[249]

244. Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002).

245. Brinkley & Lichtblau, *supra* note 221.

246. *Id.*

247. *See infra* notes 263-269 and accompanying text.

248. *Hamdi*, 542 U.S. at 533-34 ("Hearsay, for example, may need to be accepted as the most reliable evidence from the Government in such a proceeding.").

249. Douglas Jehl & Eric Lichtblau, *Shift on Suspect is Linked to Role of Qaeda Figures*, N.Y. TIMES, Nov. 24, 2005, at A1. This is presumably the disclosure to which Judge Luttig referred to in *Padilla VII*. See *supra* Part III.

In *Crawford v. Washington*,[250] the Supreme Court held that the use of hearsay evidence in a criminal trial violated the defendant's Sixth Amendment right to confrontation of the witnesses against him.[251] It is constitutional doctrine that only if the declarant is unavailable, and the defendant has had the opportunity to cross-examine him/her, can out-of-court statements be admitted.[252] The case contains no limiting language and should apply to military tribunals as well as district courts.

If the case against Padilla can be proven only by the testimony of terrorists now in American hands, it is questionable whether such hearsay could pass even the rejected *Roberts* standard, which is based on indicia of reliability.[253] Certainly those in United States custody could have little to lose, and much to gain, by identifying and incriminating one of their already incarcerated brethren, a man who is presumably of no further use to their masters. And we have no way of knowing whether their testimony, as restated in declarations, is based on first hand knowledge, or is, in fact, hearsay on hearsay.

Interrogation of Abu Zubaydah, a senior official of al Qaeda in CIA captivity, in early 2002 resulted in his statement about a Latin American man and the dirty-bomb plot.[254] He did not identify Padilla by name, but provided enough information for American officials to fit the description to Padilla, who at the time was being detained in Pakistan on a passport violation.[255] A photograph was obtained and shown to Zubaydah, who identified Padilla. As a result, Padilla was tracked, and ultimately arrested in Chicago.[256]

At the time of the initial arrest, President Bush made findings that Padilla was an enemy combatant, was closely associated with al Qaeda, and had engaged in hostile acts which included preparation for acts of international terrorism.[257] These findings rested on the "Mobbs

250. Crawford v. Washington, 541 U.S. 36 (2004).

251. *Id.* at 69.

252. *Id.* at 59. Justice Scalia, writing for the Court, rests the decision on historical evidence, with many references to the practices at the date of adoption of the Bill of Rights. The decision overrules a 1980 precedent (*Ohio v. Roberts*, 448 U.S. 56 (1980)) which allowed hearsay statements in criminal cases if they passed a credibility test. *Crawford* is a paradigm of originalism employed to overrule a more recent controlling precedent.

253. *Roberts*, 448 U.S. at 66.

254. Jehl & Lichtblau, *Shift on Suspect is Linked to Role of Qaeda Figures*, *supra* note 249.

255. *Id.*

256. Sontag, *supra* note 8.

257. *Padilla I*, 233 F. Supp. 2d 564, 572 (S.D.N.Y. 2002).

Declaration," a summary of information about Padilla which was the basis for the court hearings through *Padilla V*.[258]

The Mobbs Declaration identifies its sources of information only as "government records and reports about Jose Padilla" and "multiple intelligence sources, including reports of interviews with several confidential sources."[259]

The declaration then recites Padilla's history of crime in this country and his travels abroad.[260] It states that Padilla consulted with al Qaeda in Afghanistan, and proposed to steal materials to build a "dirty bomb."[261] The declaration tells of his extended contacts with "senior al Qaeda members and operatives," and asserts that he received training and was sent to the United States for reconnaissance or other conduct on behalf of al Qaeda.[262]

There is a further document, referred to as the "Sealed Mobbs Declaration" which presumably contains more details of Padilla's activities.[263]

The Rapp Declaration, introduced at the time of the Fourth Circuit argument, adds specific details about Padilla's travels and plans. Jeffrey Rapp, a Defense Intelligence Officer, recites that the information contained in the declaration "is derived from the circumstances surrounding his arrest and Padilla's statements during post-capture interrogation."[264] Only those facts falling in the latter category would clearly be admissible as admissions in any proceeding. The facts recited are stated in narrative form, without disclosing their sources, except for two paragraphs that begin "Padilla admits." Those paragraphs deal with plans for Padilla to blow up an apartment building in the United States. The rest clearly are hearsay.

There is one odd statement: "While in Pakistan, he conducted what he called "research" on the construction of an atomic bomb at an al Qaeda safehouse in Pakistan."[265]

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258. *Id.* [Later supplemented by the Rapp Declaration].

259. *See* Appendix 3.

260. *Id.*

261. *Id.*

262. *Id.* at 572-73.

263. The sealed declaration apparently contains the information which has been redacted from the first declaration. The government discouraged court review of the sealed document, contending that the redacted version was sufficient for the courts' purposes. When the sealed portion of the Mobbs Declaration was unsealed by the court at the request of Padilla's lawyers, the information redacted turned out to be that "Mr. Padilla, in the opinion of the government's informants, was unwilling to die for the cause." Sontag, *supra* note 8.

264. *See* Appendix 4.

265. *Id.*

President Bush's statements at the time of Padilla's initial arrest may have prejudged the government's case in the court of public opinion. Once there is public exposition at the highest levels of exploding a dirty bomb in this country, very little else is likely to penetrate the public's perceptions.[266]

These perceptions were sharpened by the government's only detailed public statement of the case against Padilla. On June 1, 2004, thirty-three days after oral argument in *Padilla IV*, and twenty-seven days before the Supreme Court issued its opinion, James Comey, the U.S. Attorney for the Southern District of New York when Padilla was held there, held a press conference.[267] At that conference he provided further information about Padilla's alleged terrorist intentions.[268] As Julie Ashworth stated:

> That disclosure added details to the previously sketchy information.
>
> Comey also described the various acts of terrorism in which Padilla was planning to participate. For instance, at the request of Mohammed Atef, al Qaeda's military commander, he was planning to use natural gas to blow up high-rise apartment buildings in New York City, Washington, D.C., and possibly Florida. Padilla met with many of the top leaders of Al Qaeda to discuss his plans. In particular, he met with the mastermind of the terrorist attacks of September 11, 2001, and Ramzi Bin al-Shibh, the coordinator and organizer of the September 11 attacks.
>
> Comey also stated in his press conference that Padilla planned to detonate a "dirty bomb" in the United States. There are two types of dirty bombs that can be used by terrorists. The principal type involves a traditional explosive laced with radioactive material, which would not likely be strong enough to cause illness or death in people, but would cause mass chaos and panic. A second type of dirty bomb consists of powerful radioactive material hidden in a public place—people passing by would receive a significant amount of radiation without becoming aware of the presence of the bomb.[269]

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266. Tony Karon, *Person of the Week: Jose Padilla*, TIME, June 14, 2002 http://www.time.com/time/pow/article/0,8599,262269,00.html (last visited July 5, 2005) (making Padilla its Person of the Week "for incarnating the sum of our fears.")).

267. Julie Ashworth, *Were Deputy Attorney General James Comey's Comments About Jose Padilla Made in Violation of Model Rule 3.6?* 18 GEO. J. LEGAL ETHICS 571 (2005). The article emphasizes the professional responsibility aspects of Comey's comments, and concludes that, based on their timing, they violated the ABA Model Rule's proscription of statements by lawyers that could influence pending judicial matters.

268. *Id.* Comey released a seven page "Summary of Jose Padilla's Activities with Al Queda," which presumably recites information Padilla had provided while in custody. Several paragraphs begin "Padilla admits . . . ," and "Padilla has admitted . . . " and "Padilla's admissions are corroborated . . . ." DEPARTMENT OF JUSTICE, SUMMARY OF JOSE PADILLA'S ACTIVITIES WITH AL QUEDA (2004) *available at* http://www.fas.org/irp/news/2004/06padilla060104.pdf.

269. *See* Ashworth, *supra* note 267 at 577 (footnotes omitted). Comey denied that the purpose of releasing the information at that specific time was to influence the Court. *Id.* Comey

When arrested, Padilla had no material with him for use in a destructive mission.[270]

When the administration made the decision that it preferred the Miami criminal trial to Supreme Court decision, the New York Times detailed its reasons in an article relying on unnamed government sources.[271] These officials said that the main sources linking Padilla to bomb targets in the United States were two senior al Qaeda operatives, Khalid Shaikh Mohammed and Abu Zubaydah. Mohammed is believed to have been the mastermind of 9/11.[272]

The government concluded that neither of the two could be used as witnesses.[273] There was concern over claims that their earlier incriminating statements were the result of torture, and that their testimony would expose classified information.[274] Without their testimony, the government doubted its ability to prove its case.[275]

The Miami indictment of Padilla alleges that he, with four others, was recruited to participate in violent jihad, and traveled overseas for that purpose.[276] There is no charge relating to acts to be performed in the United States.[277] The charges against Padilla in Miami include none of those alleged as reasons for his detention. Padilla has moved in the Miami prosecution to suppress a cell phone, address book, and the cash on his

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said that his purpose in holding the press conference was to inform the court of public opinion about the reasons for detaining Padilla, so that the public would have a better understanding of why the government did what it did. *Id.* We have no way of knowing now whether the Supreme Court was in fact influenced by these ex cathedra comments.

270. *Padilla III*, 352 F.3d 695, 699 (2d Cir. 2003). He did have ten thousand dollars in cash on his person, which he has sought to have the judge in his criminal trial disallow as evidence. Curt Anderson, *Evidence is Tainted, Padilla Lawyers Say*, MIAMI HERALD, June 6, 2006, at 8B.

271. Jehl & Lichtblau, *Shift on Suspect is Linked to Role of Qaeda Figures*, *supra* note 249. This is presumably the disclosure to which Judge Luttig referred in *Padilla VII*. See *supra* Part III.

272. *Id.* Zubaydah is the al Qaeda operative who provided the initial information leading to Padilla's identification.

273. *Id.*

274. *Id.*

275. *Id.*

> One review, completed in spring 2004 by the C.I.A. inspector general, found that Mr. Mohammed had been subjected to excessive use of a technique involving near drowning in the first months after his capture, American officials said. Another review, completed in April 2003 by American intelligence agencies shortly after Mr. Mohammed's capture, described the quality of his information from initial questioning as "Precious Truths, Surrounded by a Bodyguard of Lies.

Id.

276. Associated Press, *Completed Qaeda Application Said to Be Filled Out by Padilla*, N.Y. TIMES, Jan. 14, 2006, at A13.

277. *Id.*

person when arrested in Chicago.[278] Presumably these items could be used as evidence in a hearing. The prosecutors have announced that they have a copy of Padilla's application to join al Qaeda.[279]

The contentions which could have been made at a hearing, and the evidence offered there can only be the subject of speculation. These could have included (1) his conversion to Islam; (2) his travels in the Middle East; (3) a failure to explain the source of the cash on his person at his arrest; (4) the application to join al Qaeda which the Miami prosecution claims to possess; (5) the other items sought to be suppressed in the Miami court, and (6) perhaps most importantly, any admissions made by Padilla during the period of his incarceration.

We have no way of knowing whether, despite the vulnerability of some of the evidence against him to searching evidentiary objections, the hearing sought for so long would have brought Jose Padilla any solace.[280]

VII. DETENTION FOR INTERROGATION

The Secretary of Defense was forthright from the beginning in identifying the government's interest in holding Padilla.

> Here is an individual who has intelligence information . . . . Our interest really in his case is not law enforcement, it is not punishment because he was a terrorist or working with the terrorists. Our interest at the moment is to try and find out everything he knows so that hopefully we can stop other terrorist acts.[281]

The justification for holding prisoners of war is to prevent their return to the battlefield. The corollary is that detention should last no longer than the hostilities.[282] Padilla was not a prisoner of war, he was being held as an enemy combatant, presumably for the purpose stated by the Secretary of Defense.[283]

But the *Hamdi* plurality stated as a no-brainer: "Certainly, we agree that indefinite detention for the purpose of interrogation is not

278. *See* Dahlia Lithwick, *Proof Negative*, SLATE, June 2, 2004, http://slate.com/id/2101632/.

279. Associated Press, *supra* note 276.

280. All this is apart from speculation that any government employee, civilian or military, who voted to exculpate Padilla after a hearing might find that his/her career progress had come to a screeching halt.

281. News Briefing, Department of Defense, 2002 WL 22026773 June 12, 2002 *cited in Padilla I*, 233 F. Supp. 2d 564, 573-74 (S.D.N.Y. 2002).

282. Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364, art. 118.

283. *Padilla I*, 233 F. Supp. 2d 564, 571 (S.D.N.Y. 2002).

authorized."[284] The legal basis for Padilla's detention can be questioned on that basis; the venue decision in *Padilla IV* allowed the Supreme Court to sidestep the issue.[285] The public has, of course, no way of knowing what Padilla knows, or what he has disclosed. That information could be divided into two categories.

The first would be information about al Qaeda abroad, its organization, and whatever he had learned about its future plans. The relevance of 2002 information in detention extending through 2006 is highly questionable. A further query could be how much intimate information would be confided in a recruit with no record of accomplishment on behalf of the organization that was being sent to the United States. The secret nature of such an enterprise suggests that very little would be communicated.

The second area would be contacts or sleeper cells in the United States. Whom was he to contact to build his bomb? When arrested he had no physical items or documents on his person that would be useful in carrying out a terrorist mission. The lack of announced arrests attributed to his disclosures suggests that little has been learned. It is known that a covert operation will tell its agents in place as little as possible about other agents in place for precisely the reasons that apply to Padilla. What he does not know he cannot tell.

These doubts remain speculation. The disclosures upon his release to Florida make it clear that the government continued to hold Padilla without a hearing, and opposed every effort to bring him to trial or allow a hearing, precisely because it knew it could not introduce admissible evidence to convict him of terrorist activity abroad.[286]

The day after the transfer of Padilla from New York to South Carolina a "person familiar with the case" said: "The evidence we have indicates that this is a very dangerous man, but we couldn't make the criminal case, and it's just not an acceptable option to let him go."[287] The statement

284. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004).

285. *See Padilla IV*, 542. U.S. 426 (holding that because the Court "answers the jurisdictional question in the negative, it does not reach the question whether the President has the authority to detain Padilla militarily.").

286. Michael Isikoff & Sarah Downey, *And Justice for All*, NEWSWEEK, Aug. 19, 2002, at 32. Three months after Padilla's arrest, Newsweek reported that the United States had found no evidence of intention to attack the U.S., and little evidence of support from al Qaeda leaders. No U.S. contact was found, and at least one U.S. intelligence official believed that the arrest had been "blown out of all proportion." *Id.*

287. Jesse Bravin et al., *Prisoner Helped U.S. to Identify Bomb-Plot Suspect*, WALL ST. J., June 12, 2002, at A2.

admits facially unconstitutional action. No opinion of the Supreme Court, save Justice Thomas's dissent in *Hamdi*, could fail to find it a violation of due process.[288]

None of these concerns address what should be the critical substantive question at issue: Are the charges against Padilla true? Did they justify the government's determination to deny him a hearing?

VIII. CONCLUSION

Incarceration exists in time. Any period of time a defendant is kept in custody and denied a hearing, he is being subjected to a denial of his liberty. The Constitution requires a "speedy and public trial" in all criminal cases.[289]

Justice William Brennan has written:

> There is considerably less to be proud about, and a good deal to be embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of war and perceived threats to its national security.
>
> For adamant as my country has been about civil liberties during peacetime, it has a long history of failing to preserve civil liberties when it perceived its national security threatened . . . . After each security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.[290]

The Supreme Court's failure to require basic due process in the Padilla case is not inconsistent with what history has taught us about liberty in a time of crisis.

From the World War I incitement cases,[291] to the criminal syndicalism cases of the twenties,[292] the internment of United States citizens approved in *Korematsu*,[293] and the trial of the Communist Party leaders in *Dennis*,[294] the Court has been reluctant to uphold the Constitution against popular

288. *Hamdi*, 542 U.S. at 579 (Thomas, J., dissenting).

289. U.S. CONST. amend. VI.

290. William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, 18 ISR. Y. B. RTS. 11 (1988).

291. *See* Abrams v. United States, 250 U.S. 616 (1919); Schenck v. United States, 249 U.S. 47 (1919).

292. Gitlow v. United States, 268 U.S. 652 (1925); Whitney v. United States, 274 U.S. 357 (1927).

293. Korematsu v. United States, 323 U.S. 214 (1944).

294. Dennis v. United States, 341 U.S. 94 (1951).

sentiment when public opinion has been sufficiently emphatic. Then when the crisis has passed, the Court covered its tracks.

The incitement cases and the criminal syndicalism cases are relegated to the casebooks (see *Brandenburg*[295]), *Korematsu* is one of the three most reviled Supreme Court decisions in history, and the cases following *Dennis* (*Yates*,[296] *Scales*,[297] and *Noto*[298]) ended such prosecutions, presumably permanently.

While Jose Padilla's case winded its way through the courts, the war against terrorism occupied the public mind. The Court was willing to find in favor of one accused terrorist that wanted only to return to Saudi Arabia, but was unwilling to grant a hearing to a defendant whom the executive branch of the federal government has described in language characterized as "the sum of our fears."[299]

Judge Luttig, the author of *Padilla VII* in the Fourth Circuit, was clearly offended by the government's action in turning Padilla over to the civilian courts, which he regarded as a transparent attempt to avoid Supreme Court review of a fundamental issue.[300] But clearly the government's second forum shop worked. When the Supreme Court denied certiorari, the Justice Department had once again effectively selected the forum in which Padilla's defense will be heard, this time the federal court in Florida. The denial of certiorari means that not only will the legal issue of the President's asserted abuse of authority not be decided, but the factual basis on which Padilla was held for three and one half years may never be judged.

The separation of powers which the Constitution mandates requires that each of the three branches of government limit its authority to its proper role. Issues of guilt, innocence and punishment are to be decided by courts. When the executive is successful in avoiding that oversight, the constitution and the rule of law have been badly bruised. When the courts countenance the denial of a hearing after four years of incarceration, due process of law has been violated.

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295. Brandenburg v. United States, 395 U.S. 444 (1969).

296. Yates v. United States, 354 U.S. 298 (1957).

297. Scales v. United States, 367 U.S. 203 (1961).

298. Noto v. United States, 367 U.S. 290 (1961).

299. *See* Karon, *supra* note 266. "For incarnating the sum of our fears, the former Chicago thug-turned-terrorist is our person of the week." The article's text casts doubt on the importance of Padilla's arrest.

300. *Padilla VII*, 423 F.3d 386.

The concurring opinion in *Padilla X*,[301] denying review of the Fourth Circuit decision, has been taken by commentators as a warning to the government that the Court will not be willing to grant it a pass in the next such episode. Perhaps, but such an interpretation ignores the consideration that due process exists one case at a time, and that what governs treatment of the greatest among us (say, Donald Rumsfeld or Bill Gates) should govern treatment of the least among us (say, Jose Padilla).

APPENDIX 1

On November 17, 2006, Jose Padilla was indicted by the United States District Court for the Southern District of Florida, with four other defendants on three counts: Conspiracy to Murder, Kidnap, and Maim Persons in a foreign country; Conspiracy to Provide Material Support to Terrorists; and Material Support for Terrorists. It charges that Padilla was recruited by a North American support cell "to participate in violent jihad, and traveled overseas for that purpose."[302]

The conspiracy charge involved recruiting *mujahadeen* warriors, raising money to support and train them, transferring money outside the United States to support violent jihad, providing communications equipment, publishing statements encouraging and inducing violent jihad, using humanitarian, educational and other non-governmental agencies to cover their tracks, and using codes and other techniques to disguise their purposes.

Padilla has pleaded "not guilty".

On January 12, 2006, the Miami prosecutor produced a document asserted to be Padilla's application to join al Qaeda. Padilla has been denied bail, and if convicted, faces life in prison.

As of January 2007, the trial is scheduled for April 16, 2007.[303]

As of January 25, 2007, three major issues remain to be resolved before trial:

The defense has filed a motion to dismiss the case, on the basis of Padilla's treatment while incarcerated, alleging "outrageous government conduct." The government has denied the charge. That motion has not yet been ruled on.[304] The defense has put Padilla's mental condition in issue.

301. *Padilla X*, 126 S. Ct. 1649 (Kennedy, J., concurring).

302. United States v. Padilla, No. 04-60001-CR-Cooke (S.D. Fla. Jan. 2007).

303. Jay Weaver, *Trial of Terror Suspect Padilla Delayed Until April*, HERALD, Jan. 13, 2007, http://www.miami.com/mld/miamiherald/news.

304. *Padilla Lawyers Seek Dismissal of Terror Case*, WASH. POST, Oct. 7, 2006.

The court has ordered a mental examination to decide if he is competent to stand trial.[305] The court has dismissed the most serious charges against the defendants, that they conspired to murder, kidnap and maim people in a foreign country. Conviction of that offense could result in a life sentence. The government's appeal of that ruling is pending.[306]

APPENDIX 2[307]

One blog enumerated several questions which could impact Jose Padilla's ultimate fate, raising issues which could once again occupy the federal courts:

In the criminal action:

1. A motion to dismiss for want of a speedy trial, arguing that one should count from his detention in Chicago.

2. The issue of whether Padilla would get credit for time served.

3. In the context of how the enemy combatant declaration should be treated in voir dire, argument by counsel, and permissible testimony. Likewise, who is properly dismissed for cause?

4. The admissibility, if any, of material obtained from Padilla while detained, or otherwise. In particular, fruit of the poisonous tree discovery.

5. Would Padilla profit from introducing "changing story" evidence on the part of the government's justification for his detention to show that this is just one more changed story.

6. What evidence will be allowed regarding his detention should he choose to testify at trial?

7. If an enemy combatant threat is raised in plea negotiations, would that make the issue ripe for the Miami judge to decide on the legality or ethics of such a threat?

8. In a sentencing hearing, the government would obviously like to show that Padilla was a really bad guy with evidence beyond the scope of what the jury heard. To what extent would the judge allow that?

305. Jay Weaver, *Terror Suspect Padilla to Undergo Mental Testing*, HERALD, Dec. 19, 2006, http://www.miami.com/mld/miamiherald/news/local.htm?template+contentModules.

306. Errin Haines, *Appeals Court Weighs Padilla Charge*, MYWAY, Jan. 10, 2007, http://apnews.myway.com.article/20070110/D8MIGTKO0.html (last visited Jan. 11, 2007). The text of these motions can be obtained by Pacer subscribers through http://www.flds.uccourts.gov.

307. Scotusblog.com, http://www.scotusblog.com/movabletype/archives/2006/04/reading_padilla.htm (last visited Jan. 25, 2006). *See also Padilla*, No. 04-60001-CR-Cooke.

In a civil case: It would seem that even if he is convicted, Padilla would have a bona fide basis for a 1983 claim in connection with his prior detention. Is that precluded by the 4th circuit ruling?

There are still several ways that these [issues relating to Padilla] could resurface and be presented squarely to the Supreme Court.

[Posted by ohwilleke 4/3/06 1:49 pm. Andrew Oh-Willeke is an attorney in Denver, Colorado. Reprinted by permission.]

APPENDIX 3[308]

DECLARATION OF MICHAEL H. MOBBS SPECIAL ADVISOR TO THE UNDER SECRETARY OF DEFENSE FOR POLICY

Pursuant to 28 U.S.C. § 1746, I, Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, hereby declare that, to the best of my knowledge, information and belief, and under the penalty of perjury, the following is true and correct:

1. I am a government employee (GS-15) of the U.S. Department of Defense and serve as a Special Advisor to the Under Secretary of Defense for Policy. The Under Secretary of Defense for Policy is appointed by the President and confirmed by the Senate. He is the principal staff assistant and advisor to the Secretary and Deputy Secretary of Defense for all matters concerning the formulation of national security and defense policy and the integration and oversight of DoD policy and plans to achieve national security objectives. The Under Secretary of Defense for Policy has directed me to head his Detainee Policy Group. Since mid-February 2002, I have been substantially involved with matters related to the detention of enemy combatants in the current war against the Al Qaeda terrorists and those who support and harbor them (including the Taliban).

2. As part of my official duties, I have reviewed government records and reports about Jose Padilla (also known as "Abdullah al Muhajir" and "Ibrahim Padilla") relevant to the President's June 9, 2002 determination that Padilla is an enemy combatant and the President's order that Padilla be detained by U.S. military forces as an enemy combatant.

3. The following information about Padilla's activities with the Al Qaeda terrorist network was provided to the President in connection with

308. Humanrightsfirst.org, http://www.humanrightsfirst.info/pdf/051027-usls-cert-petition-padilla.pdf (last visited Jan. 25, 2007). This declaration is an exhibit to the government's petition for certiorari to the Supreme Court in *Padilla VI*.

his June 9, 2002 determination. This information is derived from multiple intelligence sources, including reports of interviews with several confidential sources, two of whom were detained at locations outside of the United States.[1] The confidential sources have direct connections with the Al Qaeda terrorist network and claim to have knowledge of the events described. Certain aspects of these reports were also corroborated by other intelligence information when available.

4. Padilla was born in New York. He was convicted of murder in Chicago in approximately 1983 and incarcerated until his eighteenth birthday. In Florida in 1991, he was convicted of a handgun charge and sent to prison. After his release from prison, Padilla began referring to himself as Ibrahim Padilla.[2] In 1998, he moved to Egypt and was subsequently known as Abdullah Al Muhajir.

In 1999 or 2000 Padilla traveled to Pakistan. He also traveled to Saudi Arabia and Afghanistan.

1. Based on the information developed by U.S. Intelligence and law enforcement agencies, it is believed that the two detained confidential sources have been involved with the Al Qaeda terrorist network. One of the sources has been involved with Al Qaeda for several years and is believed to have been involved in planning and preparing for terrorist activities of Al Qaeda. It is believed that these confidential sources have not been completely candid about their association with Al Qaeda and their terrorist activities. Much of the information from these sources has, however, been corroborated and proven accurate and reliable. Some information provided by the sources remains uncorroborated and may be part of an effort to mislead or confuse U.S. officials. One of the sources, for example, in a subsequent interview with a U.S. law enforcement official recanted some of the information that he had provided, but most of this information has been independently corroborated by other sources. In addition, at the time of being interviewed by U.S. officials, one of the sources was being treated with various types of drugs to treat medical conditions.

2. Padilla's use of the name "Ibrahim Padilla" was not included in the information provided to the President on June, 9, 2002.

3. During his time in the Middle East and Southwest Asia, Padilla has been closely associated with known members and leaders of the Al Qaeda terrorist network.

4. While in Afghanistan in 2001, Padilla met with senior Usama Bin Laden lieutenant Abu Zubaydah. Padilla and an associate approached Zubaydah with their proposal to conduct terrorist operations within the

United States. Zubaydah directed Padilla and his associate to travel to Pakistan for training from Al Qaeda operatives in wiring explosives.

5. Padilla and his associate conducted research in the construction of a "uranium-enhanced" explosive device. In particular, they engaged in research on this topic at one of the Al Qaeda safehouses in Lahore, Pakistan.

6. Padilla's discussions with Zubaydah specifically included the plan of Padilla and his associate to build and detonate a "radiological dispersal device" (also known as a "dirty bomb") within the United States, possibly in Washington, DC. The plan included stealing radioactive material for the bomb within the United States. The "dirty bomb" plan of Padilla and his associate allegedly was still in the initial planning stages, and there was no specific time set for the operation to occur.

7. In 2002, at Zubaydah's direction, Padilla traveled to Karachi, Pakistan to meet with senior Al Qaeda operative to discuss Padilla's involvement and participation in terrorist operations targeting the United States. These discussions included the noted "dirty bomb" plan and other operations including the detonation of explosives in hotel rooms and gas stations. The Al Qaeda officials held several meetings with Padilla. It is believed that Al Qaeda members directed Padilla to return to the United States to conduct reconnaissance and/or other attacks on behalf of Al Qaeda.

8. Although one confidential source stated that he did not believe that Padilla was a "member" of Al Qaeda, Padilla has had significant and extended contacts with senior Al Qaeda members and operatives. As noted, he acted under the direction of Zubaydah and other senior Al Qaeda operatives, received training from Al Qaeda operatives in furtherance of terrorist activities, and was sent to the United States to conduct reconnaissance and/or other attacks on their behalf.

9. Padilla traveled from Pakistan to Chicago via Switzerland and was apprehended by federal officials on May 8, 2002, upon arrival in the United States. Pursuant to court order, Padilla was held by the U.S. Marshals Service as a material witness in a grand jury investigation.

10. On June 9, 2002, George W. Bush, as President of the United States and Commander in Chief of the U.S. armed forces, determined that Jose Padilla is, and was at the time he entered the United States in May 2002, an enemy combatant in the ongoing war against international terrorism, including the Al Qaeda international terrorist organization. A redacted version of the President's determination is attached at Tab 1.

11. The President specifically determined that Padilla engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States.

12. These attacks were to involve multiple, simultaneous attacks on such targets, and also included train stations. The additional facts in this footnote were not included in the information provided to the President on June 9, 2002.

13. The President further determined that Padilla posed a continuing, present and grave danger to the national security of the United States, and that detention of Padilla as an enemy combatant was necessary to prevent him from aiding Al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens.

14. On June 9, 2002, the President directed the Secretary of Defense to detain Padilla as an enemy combatant.

15. On June 9, 2002, acting on the President's direction, the Secretary of Defense ordered the U.S. armed forces to take control of Padilla as an enemy combatant and to hold him at the Naval Consolidated Brig, Charleston, South Carolina.

[Signed]
/MICHAEL H. MOBBS/
Special Advisor to the
Under Secretary of Defense for Policy
Dated: 27 August 2002

APPENDIX 4[309]

DECLARATION OF MR. JEFFREY N. RAPP
DIRECTOR, JOINT INTELLIGENCE TASK FORCE FOR COMBATING TERRORISM

1. Pursuant to 28 U.S.C. § 1746. I, Jeffrey N. Rapp, hereby declare, to the best of my knowledge, information, and belief, and under penalty of perjury, that the following is true and correct:

PREAMBLE

2. I submit this Declaration for the Court's consideration in the matter of Jose Padilla v. Commander C.T. Hanft, USN, Commander, Consolidated Naval Brig, Case Number 04-CV-2221-26AJ, pending in the United States District Court for the District of South Carolina.

3. Based on information that I have acquired in the course of my official duties, I am familiar with all the matters discussed in this Declaration. I am also familiar with the circumstances surrounding Jose Padilla's ("Padilla") arrest at Chicago's O'Hare International Airport and interrogations by agents of the Department of Defense ("DoD") after DoD took control of Padilla on 9 June 2002. The information in this declaration concerning Padilla and his activities with the al-Qaeda terrorist organization is derived from the circumstances surrounding his arrest and Padilla's statements during post-capture interrogation.

PROFESSIONAL EXPERIENCE AS AN INTELLIGENCE OFFICER

4. I am a career Defense Intelligence Agency Defense Intelligence Senior Executive Service member appointed by the Director of the Defense Intelligence Agency. I report to the Director of the Defense Intelligence Agency. My current assignment is as the Director of the Joint Intelligence Task Force for Combating Terrorism (JITF-CT). JITF-CT directs collection, exploitation, analysis, fusion, and dissemination of the all-source foreign terrorism intelligence effort within DoD. In addition to my current assignment, I have previously served as the first Director of the National Media Exploitation Center and as the civilian Deputy Director for the Iraq Survey Group in Qatar.

5. My active duty military intelligence career in the United States Army included service as the senior intelligence officer for 1st Infantry Division, when deployed to Bosnia-Herzegovina. Commander of the 101st

309. *Id.*

Military Intelligence Battalion, 1st Infantry Division, Fort Riley, Kansas, and the forward-deployed 205th Military Intelligence Brigade in Europe, and Deputy Director for the Battle Command Battle Lab, U.S. Army Intelligence Center at Fort Huachuca, Arizona. I also directed a South Asia regional analytic division in the Defense Intelligence Agency Directorate for Analysis and Production that was awarded the National Intelligence Meritorious Unit Citation for its accomplishments.

6. My military decorations include the Legion of Merit, Defense Superior Service Medal, Defense Meritorious Service Medal, and Army Meritorious Service Medal. I am a graduate of the U.S. Army War College. I hold a Masters degree in strategic intelligence from the Joint Military Intelligence College.

PADILLA'S BACKGROUND

Padilla, also known as Abdullah al Muhajir, is a U.S. citizen of Hispanic ethnicity who spent time in a juvenile facility as a teenager. He joined a local street gang when he was 13 years old, and was arrested for murder in 1985. During his early life in Chicago and Florida he was arrested for a number of offenses including cannabis possession, weapons charges, and assault. In 1995, he converted to Islam while serving a state prison sentence in Florida. After his release from prison, he joined a mosque in Florida that sponsored his first trip to Egypt in September 1998. While in Egypt, Padilla agreed to an arranged marriage to an Egyptian woman and fathered two sons. He has another son as a result of a previous relationship in Chicago. Padilla studied Arabic in Cairo while earning a subsistence income as a handyman working odd jobs. In February 2000, he traveled to Mecca, Saudi Arabia to complete the Muslim Hajj pilgrimage. At that time, he met with an al Qaeda recruiter, and discussed training opportunities in Afghanistan. In June 2000, Padilla traveled to Yemen to continue his Islamic studies.

OVERVIEW OF PADILLA'S AL QAEDA ACTIVITIES

8. In the summer of 2000, Padilla first entered Pakistan, and traveled to a Taliban safehouse in Quetta. From there, he traveled across the border to Kandahar, Afghanistan in the company of Taliban operatives and five other recruits to train for Jihad. In July 2000, Padilla completed a training camp application using his alias, Abdullah al Muhajir. Padilla then traveled to the al Qaeda-affiliated training camp, al-Farouq, north of Kandahar. In September and October of 2000, at al-Farouq, he received training in the use of firearms and other weapons, explosives, land

navigation, camouflage techniques, communications, and physical conditioning. While at the camp, Padilla met several times with Mohammed Atef ("Atef"), who was a senior al Qaeda operative and military commander. After completing this initial training, Padilla and other recruits were returned to Kandahar and later transported to Kabul. For approximately three months in the fall of 2000, Padilla and other recruits guarded what he understood to be a Taliban outpost north of Kabul. Padilla was armed with a Kalashnikov assault rife and ammunition for that purpose. He subsequently returned to Pakistan and, from there, traveled back to Egypt to reunite with his wife in the spring of 2001.

9. In June 2001, Padilla gain left his family in Egypt and traveled to Quetta where he stayed in an al Qaeda safehouse before traveling back to Kandahar. During the summer, Padilla received additional training relating to future plots to attack U.S.-based apartment buildings described below. In the fall of 2001, Padilla was staying at an al Qaeda safehouse in or near Kandahar when he and his fellow al Qaeda operatives learned of the September 11 terrorist attacks on the United States. Padilla spent much of September 2001, including after the September 11 attacks, with Atef at an al Qaeda safehouse in or near Kandahar. Once the United States commenced combat operations against the Taliban and al Qaeda in Afghanistan, Padilla and his fellow al Qaeda operatives began moving from safehouse to safehouse in an effort to avoid being bombed or captured by U.S. or coalition forces.

10. In mid-November 2001, an air strike destroyed a safehouse in Afghanistan and killed Atef. Padilla was staying at a different al Qaeda safehouse that day, but he and other al Qaeda operatives participated in an attempt to rescue survivors and retrieve Atef's body from the rubble. After this attack, Padilla, armed with an assault rife, along with numerous other al Qaeda operatives, began moving toward the mountainous border with Pakistan near Khowst, Afghanistan, in a further effort to avoid U.S. air strikes and capture by U.S. forces. Padilla was thus armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States and its coalition partners. After taking cover in a network of caves and bunkers near Khowst, the al Qaeda operatives, including Padilla, were escorted by Taliban personnel across the border into Pakistan in groups of 15 to 20. Padilla crossed into Pakistan in January 2002. After crossing into Pakistan, Padilla met with senior Osama bin Laden lieutenant Abu Zubaydah ("Zubaydah") at a safehouse in Lahore, Pakistan, and met Zubaydah again at a safehouse in Faisalabad, Pakistan. Padilla discussed with Zubaydah the idea of conducting terrorist operations involving the detonations of explosive devices in the United

States. While in Pakistan, he conducted what he called, "research" on the construction of an atomic bomb at an al Qaeda safehouse in Pakistan.

PADILLA'S PLAN TO KILL APARTMENT BUILDING RESIDENTS

11. Padilla admits that he was first tasked with an operation to blow up apartment building in the United States with natural gas by Atef at a meeting in Kandahar in the summer of 2001. Padilla accepted this tasking. Atef advised Padilla that he was sending Padilla to a location outside the Kandahar Airport where Padilla would train with, a still at large, senior al Qaeda explosives expert ("Explosives Expert") and another, still at large al Qaeda operative, El Shukri Jumah ("Jumah") aka Jaffar al-Tayyar. Padilla and Jumah trained with Explosives Expert at the Kandahar Airport on switches, circuits, and timers. Padilla recognized Jumah as someone he had met in the United States before departing for Egypt. Padilla and Jumah also spent time learning how to prepare and seal an apartment in order to obtain the highest explosive yield, and thereby obtain the highest number of casualties among apartment residents. However, the mission was apparently abandoned after the training because Padilla and Jumah could not get along and Padilla told Atef he could not do the operation on his own.

12. Padilla admits that the apartment building plan was resurrected when he first met senior al Qaeda operational planner and 11 September 2001 mastermind Khalid Sheikh Mohammad ("MSM") in Karachi, Pakistan after Zubaydah sent Padilla and another accomplice, ("Accomplice"), an al-Qaeda operative, there in March 2002 to present the atomic bomb operation. Zubaydah gave Padilla money and wrote a reference letter to KSM about Padilla. Padilla was taken to a safehouse by al Qaeda facilitator and planner Ammar al-Baluchi ("al-Baluchi"). Al-Baluchi is also a nephew of KSM. Padilla presented the atomic bomb idea to KSM, who advised that the idea was a little too complicated. KSM wanted Padilla to revive the plan to kill apartment building residents originally discussed with Atef. KSM wanted Padilla to his targets in New York City, although Florida and Washington, D.C. were discussed as well. Padilla had discretion in the selection of apartment buildings. KSM gave Padilla full authority to conduct the operation if Padilla and Accomplice were successful in entering the United States. Padilla admits that he accepted the mission. Al Qaeda operative and unindicted 9/11 co-conspirator Ramzi Bin al Shibh ("al-Shibh") trained Padilla on telephone call security and e-mail protocol. KSM gave Padilla $5,000 for the operation and al-Baluchi gave him $10,000, travel documentation, a cell-phone, and an e-mail address to notify him when Padilla arrived in the

United states. Al-Baluchi instructed Padilla to leave on the mission through Bangladesh. Al-Baluchi told Padilla to call him before entering the Karachi airport. The night before his departure, Padilla and Accomplice attended a dinner with KSM, al-Baluchi, and al-Shibh.

OPERATIONAL DEPLOYMENT TO THE UNITED STATES

13. Padilla departed Pakistan on 5 April 2002, bound for the United States. After spending a month in Egypt, Padilla entered the United States at Chicago's O'Hare International Airport on 8 May 2002. Padilla was carrying $10,526 in U.S. currency he had received from al Qaeda, but declared only approximately $8,000. Padilla had in his possession the cell-phone provided to him by al-Baluchi, the names and telephone numbers of his recruiter and his sponsor, and e-mail addresses for al-Baluchi and Accomplice. At the time of his capture by the FBI at O'Hare International Airport, Padilla was an operative of the al Qaeda terrorist organization with which the United States is at war.

14. When interviewed by FBI agents upon his arrival in Chicago, Padilla falsely denied he had ever been to Afghanistan. Padilla also lied about the source of the money he was carrying and the purpose of his return to the United States. Padilla was arrested by the FBI on a material witness warrant. On 9 June 2002, Padilla was transferred to DoD custody after the President of the United States determined that Padilla is an enemy combatant.

CONCLUSION

15. As an al Qaeda operative, Padilla participated in numerous al Qaeda activities, over a nearly two-year period, including military training and armed battlefield activities in Afghanistan, and plans to attach the United States for the purpose of killing large numbers of American civilians. He admits to meeting with numerous key al-Qaeda leadership figures and senior operational planners, and to planning plots against the United States with them. Padilla proposed using an atomic bomb in the United States and explosives and natural gas to blow up apartment buildings in the United States.

Signature /Jeffrey N. Rapp/

Director, Joint Intelligence Task Force for Combating Terrorism

Executed on 27 August 2004 at the Pentagon, Washington, D.C.