Padilla v Rumsfeld
03-2235
December 18, 2003

WESLEY, *Circuit Judge*, concurring in part, dissenting in part:

I respectfully dissent from that aspect of the majority's opinion that concludes the President is without authority from Congress or the Constitution to order the detention and interrogation of Mr. Padilla.[1] In my view, the President as Commander in Chief has the inherent authority to thwart acts of belligerency at home or abroad that would do harm to United States citizens. But even if Mr. Padilla's status as a United States citizen on United States soil somehow changes the constitutional calculus, I cannot see how the Non-Detention Act precludes an affirmance.

Because I would affirm the thoughtful and thorough decision of Chief Judge Mukasey, a brief examination of his opinion is appropriate. After examining the President's inherent powers under the Constitution, as explained in *The Brig Amy Warwick,* 67 U.S. (2 Black) 635 (1862) ("*The Prize Cases*"), and subsequent case law, the district court held Padilla's detention is not unlawful, as the President is authorized under the Constitution to repel belligerent acts that threaten the safety of United States citizens. The court also held that the detention is authorized by Congress' Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("Joint Resolution"). Chief Judge Mukasey noted that 18 U.S.C. § 4001(a) did not preclude this result in that the Joint Resolution identified a specific group of belligerents.

Relying on the Third Geneva Convention, the district court examined the distinction

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[1] I concur in the majority's analysis that Newman can serve as Padilla's next friend, that Secretary Rumsfeld is an appropriate respondent and that the district court had personal jurisdiction over the Secretary.

between lawful and unlawful combatants and ultimately concluded that either could be detained. *See Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 594-95 (S.D.N.Y. 2002). The court concluded that the President's ability to detain Padilla as an unlawful enemy combatant was not altered by Padilla's citizenship. *See id.* at 594 (citing *Ex Parte Quirin,* 317 U.S. 1 (1942)). The court distinguished *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), by noting that the citizens in *Milligan* were neither part of, nor associated with, the armed forces of the Confederacy. *See id.* Thus, they were not enemy combatants subject to the laws of war.

Much of Chief Judge Mukasey's work is not the focus of the majority's analytical resolution of this case. I offer that not as a criticism but merely as a note of limitation. Our task here is confined to the interplay between the President's Article II responsibilities as Commander in Chief and the authority of Congress to regulate domestic activity, even in a time of war, pursuant to Article I of the Constitution.

My disagreement with the majority is two-fold. In my view, the President, as Commander in Chief, has inherent authority to thwart acts of belligerency on U.S. soil that would cause harm to U.S. citizens, and, in this case, Congress through the Joint Resolution specifically and directly authorized the President to take the actions herein contested. The majority concludes the President is without inherent authority to detain Padilla. They agree that "great deference is afforded the President's exercise of his authority as Commander-in-Chief," **Maj. at 27** (citing *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988)), and concede the judiciary has no authority to determine the political question of whether the nation is at war. *Id*. They recognize that the President and Congress often work cooperatively during times of armed conflict. However, the majority contends that separation of powers concerns are heightened when the President's powers are exercised in the "domestic sphere" and that Congress, not the

Executive, controls utilization of war powers when invoked as an instrument of domestic policy. **Maj. at 28**.

It is true that Congress plays the primary role in domestic policy even in a time of war. Congress does have the power to define and punish offenses committed on U.S. soil, *see* U.S. CONST. art. I, § 8, cl. 10, to suspend the Writ of Habeas Corpus, *see* U.S. CONST. art. I, § 9, cl. 2, and to determine when and if soldiers are to be quartered in private homes during a time of war, *see* U.S. CONST. amend. III. But none of those powers are in question here nor does the majority cite a specific constitutional provision in which Congress is given exclusive constitutional authority to determine how our military forces will deal with the acts of a belligerent on American soil. There is no well traveled road delineating the respective constitutional powers and limitations in this regard.

The majority relies on *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), as its analytical guide in determining the President's constitutional authority in this matter. However, this is a different case. In *Youngstown*, the Supreme Court was confronted with two opposing claims of constitutional authority. The President argued he had the authority to seize the steel mills in question by virtue of his constitutional responsibilities as Commander in Chief and as Chief Executive. *Id*. at 582. The President contended that a steady supply of steel was necessary to sustain the war effort in Korea. *See id*. at 582-83. The steel mills argued that at its core the dispute was a labor matter – an area clearly reserved for congressional regulation. *See id*. at 582. The Court sided with the steel mills, *id*. at 589, and with good reason – the President's attempt to link the seizure to prosecuting the war in Korea was far too attenuated. In this case the President's authority is directly tied to his responsibilities as Commander in Chief.

In *The Prize Cases* the Supreme Court rejected a challenge to the President's authority to

impose a blockade on the secessionist states absent a declaration of war. *See* 67 U.S. at 668. As I read *The Prize Cases*, it is clear that common sense and the Constitution allow the Commander in Chief to protect the nation when met with belligerency and to determine what degree of responsive force is necessary. *See id*. at 669-70. The President has "no power to initiate or declare a war" but "[i]f a war be made by invasion . . ., the President is not only authorized but bound to resist force by force. He . . . is bound to accept the challenge without waiting for any special legislative authority." *Id*. at 668. Regardless the title given the force, the President, in fulfilling his duties as Commander in Chief to suppress insurrection and to deal with belligerents aligned against the nation, is entitled to determine the appropriate response. *See id.* at 669-70.

In reaching this conclusion the Court noted the President's decision regarding the level of force necessary is a political not a judicial decision. *Id*. at 670. Thus, as courts have previously recognized, *The Prize Cases* stands "for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected." *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, *J*., concurring); *see also Padilla*, 233 F. Supp. 2d at 589. "[T]he authority to decide whether the exigency has arisen, belongs exclusively to the President, and . . . his decision is conclusive upon all other persons." *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827).[2] *The Prize Cases* demonstrates that congressional authorization is not necessary for the Executive to exercise his constitutional authority to prosecute armed conflicts when, as on September 11, 2001, the United States is attacked.

My colleagues appear to agree with this premise but conclude that somehow the President

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[2] *Quirin* spoke to the issue of Presidential authority as well. In that case, the Court found the President's decision to try the saboteurs before a military tribunal rested in part on an exercise of his Presidential authority under Article II of the Constitution. *See Quirin*, 317 U.S. at 28.

has no power to deal with acts of a belligerent on U.S. soil "away from a zone of combat" absent express authorization from Congress. **Maj. at 4, 26, 43**. That would seem to imply that the President does have some war power authority to detain a citizen on U.S. soil if the "zone of combat" was the United States. The majority does not tell us who has the authority to define a "zone of combat" or to designate a geopolitical area as such. Given the majority's view that "the Constitution lodges . . . [inherent national emergency powers] with Congress, not the President," **Maj. at 31**, it would seem that the majority views this responsibility as also the singular province of Congress. That produces a startling conclusion. The President would be without any authority to detain a terrorist citizen dangerously close to a violent or destructive act on U.S. soil unless Congress declared the area in question a zone of combat or authorized the detention. Curiously, even Mr. Padilla's attorney conceded that the President could detain a terrorist without Congressional authorization if the attack were imminent. *See* Oral Argument Tr. at 51.

But the scope of the President's inherent war powers under Article II does not end the matter, for in my view Congress clearly and specifically authorized the President's actions here.[3] As Chief Judge Mukasey noted, the Joint Resolution, passed by both houses of Congress, "authorizes the President to use necessary and appropriate force in order, among other things, 'to prevent any future acts of international terrorism against the United States,' and thereby engages the President's full powers as Commander in Chief." *Padilla*, 233 F. Supp. 2d at 590 (quoting Pub. L. No. 107-40, 115 Stat. 224); *cf. Quirin*, 317 U.S. at 29 (finding it "unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power . . . [f]or here Congress has authorized [his actions]"). *Youngstown* fully supports that

[3] Of course, the majority must delineate the President's war powers as Commander in Chief; if the President acted within his inherent authority, the scope of the Joint Resolution and the proscription of § 4001(a) is irrelevant.

view. "When the President acts pursuant to an *express* or *implied* authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." 343 U.S. at 635 (Jackson, *J.*, concurring) (emphasis added). The Joint Resolution authorized the President to take the action herein challenged; his powers were at their apogee.

Following the attacks of 9-11, the President declared a national emergency. *See* 50 U.S.C. § 1541(c)(3) (2003). On September 18, 2001, Congress passed Public Law 107-40 as a joint resolution. Pub. L. No. 107-40, 115 Stat. 224. That resolution, entitled "Authorization for Use of Military Force," notes the "acts of treacherous violence committed against the United States and its citizens," and the danger those acts posed to national security. *Id*. Moreover, the resolution recognizes "the President has authority *under the Constitution* to take action to deter and prevent acts of international terrorism against the United States." *Id*. (emphasis added). It provides:

> That 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 that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224.[4] Some of the belligerents covered by the Joint

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[4] The Joint Resolution also provides, in section 2(b)(1), that it is "intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." Pub. L. No. 107-40 § 2(b)(1), 115 Stat. 224, 224. As noted by Chief Judge Mukasey, 233 F. Supp. 2d at 571 n.3, the War Powers Resolution was enacted in 1973 over Presidential veto, and purported to limit the President's authority and discretion to commit American troops to actual or potential hostilities without specific congressional authorization. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541 et seq.). Although

Resolution are not nation states, they have no armies in the traditional sense – their "membership" consists of "soldiers" who rely on subterfuge and surprise. Congress recognized that these organizations are waging a war different from any our nation has faced. It authorized the President to employ the necessary and appropriate force to prevent future terrorist attacks.

It is quite clear from the President's Order of June 9, 2002 that Mr. Padilla falls within the Joint Resolution's intended sweep. **Appendix A at 50-51**. As relevant here, the Joint Resolution authorizes the President (1) to use appropriate and necessary force – detention would seem to be an appropriate level of force in Mr. Padilla's situation, (2) against those organizations that planned, authorized, or committed the terrorist attacks of 9-11 – none of us disputes al Qaeda is responsible for the carnage of that day, (3) in order to prevent future attacks of terrorism against the United States – Padilla is alleged to be closely associated with an al Qaeda plan to carry out an attack in the United States[5] and to possess information that if obtained by the U.S. would prevent future terrorist attacks.

The Joint Resolution has limits; it applies only to those subsets of persons, organizations and nations "[the President] determines planned, authorized, committed, or aided the terrorist attacks." Pub. L. No. 107-40, 115 Stat. 224. The President is not free to detain U.S. citizens

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President Bush signed the Joint Resolution the day it was passed, he did so noting "the longstanding position of the executive branch regarding the President's constitutional authority to use force, including the Armed Forces of the United States and regarding the Constitutionality of the War Powers Resolution." Press Release, Office of the Press Secretary, President Signs Authorization for Use of Military Force Bill (Sept. 18, 2001) (statement by the President), available at http://www.whitehouse.gov/news/releases/2001/09 20010918-10.html.

[5] The majority confirms that "the government had ample cause to suspect Padilla of involvement in a terrorist plot." Maj. at 6 n.2.

who are merely sympathetic to al Qaeda.[6] Nor is he broadly empowered to detain citizens based on their ethnic heritage. Rather, the Joint Resolution is a specific and direct mandate from Congress to stop al Qaeda from killing or harming Americans here or abroad.[7] The Joint Resolution is quite clear in its mandate. Congress noted that the 9-11 attacks made it "both necessary and appropriate that the United States exercise its rights to self-defense and to protect Unites States citizens both at home and abroad." *Id*. It seems clear to me that Congress understood that in light of the 9-11 attacks the United States had become a zone of combat.

Organizations such as al Qaeda are comprised of people. Congress could not have intended to limit the President's authority to only those al Qaeda operatives who actually planned or took part in 9-11. That would do little to prevent future attacks. The fate of the participants is well known. And surely Congress did not intend to limit the President to pursue only those individuals who were al Qaeda operatives as of September 11, 2001. But even if it did, Mr. Padilla fits within the class for by September of 2001, he had already been under the tutelage and direction of senior al Qaeda officers for three years. Clearly, Congress recognized that al Qaeda and those who now do its bidding are a continuing threat to the United States. Thus, the Joint

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[6] Compare the language of the Joint Resolution, *supra* at 6-7, with that of the Emergency Detention Act of 1950, former 50 U.S.C. §§ 811-26 (1970), which authorized the President to detain:

> persons who there is reasonable ground to believe probably will commit or conspire with others to commit espionage or sabotage . . ., in a time of internal security emergency, essential to the common defense and to the safety and security of the territory, the people and the Constitution of the United States.

Id. at § 811(14).

[7] In fact, some in Congress were concerned the "organization" prong of the Joint Resolution was too limited in its scope. They felt the Joint Resolution, as enacted, unnecessarily limited the President's ability to act against terrorist organizations such as Hamas, Hezbollah and Islamic Jihad. *See, e.g.*, 147 Cong. Rec. H5638, 5643 (2001) (statement of Representative Berman).

Resolution does have teeth and whether Padilla is a loaded weapon of al Qaeda would appear to be a fact question. A hearing, as ordered by the district court, would have settled the matter.

The majority suggests, however, that the President's actions are ultra vires because "the Joint Resolution does not specifically authorize detentions." **Maj. at 38, 44-47**. To read the resolution as the majority suggests would create a false distinction between the use of force and the ability to detain. It would be curious if the resolution authorized the interdiction and shooting of an al Qaeda operative but not the detention of that person.

The majority contends that 18 U.S.C. § 4001(a) prohibits detention of U.S. citizens on U.S. soil as enemy combatants absent a precise and specific statutory authorization from Congress. They offer a detailed history of the statute's enactment, which effectuated a repeal of the Emergency Detention Act of 1950, former 50 U.S.C. §§ 811-26 (1970). I share their view that the plain language of the statute appears to apply to military and civil detentions and that its placement in the U.S. Code does not rebut that conclusion. *See* **Maj. at 42-44**.[8] However, I find it somewhat puzzling that despite the statute's obvious and conceded clarity, the majority, based solely on the statement of one Member of Congress, *see* **Maj. at 41**, sees fit to add a condition not found in the words of the section. The statute is quite clear: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). The section neither defines an "Act of Congress" nor contains a requirement that the authorizing enactment use the word "detention." The majority does not contest that the Joint Resolution is an Act of Congress. However, they chafe at its lack of specificity. As noted above, I think it would be quite difficult to conclude that Congress did not envision that detaining a

[8] I also concur with my colleagues' rejection of the Secretary's argument that 10 U.S.C. § 956(5) constitutes an Act of Congress authorizing detentions such as Padilla's.

terrorist was a possibility. It is apparent from the legislative record of § 4001(a) and the Joint Resolution that the efforts of Congress in each instance meant and implied many different things to individual Members. That is not unusual. It would be quite a surprise to see that Congress was of one mind on any issue; that is the nature of a representative democracy. But one thing is clear, both enactments have the force of law. It is the words used, not the individual motives of legislators, that should serve as the guide. Thus, I think it best to trace a course of legislative intent using the plain and powerful language employed.

The problem with the majority's view of the Joint Resolution of September 18, 2001 is that it reduces the legislative efforts contained therein to a general policy statement notwithstanding the resolution's declaration invoking the War Powers Resolution of 1973. Following the events of 9-11 the President declared a national emergency, 66 Fed. Reg. 48199 (2001), thus triggering the President's war powers authority under The War Powers Resolution. *See* 50 U.S.C. 1541(c)(3). Nothing in the War Powers Resolution of 1973 constrains the President's utilization of his war powers.[9] Congress passed the Joint Resolution and agreed that the President should utilize his war powers with regard to an identified threat. Of course, identifying the threat made sense. Only days earlier the nation had been attacked – American lives had been lost on American soil. Congress responded and invested the President with authority to pursue those responsible for the attacks in order to prevent future attacks.[10] Contrary

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[9] Although the President may view the War Powers Resolution as an unconstitutional infringement on his constitutional authority to deal with belligerents, that fight need not be won here.

[10] The majority concludes that Mr. Padilla's detention as a material witness "neutralized" the threat he presented. *See* **Maj. at 6, 37 n.27**. This of course overlooks a significant aspect of the President's Order of June 9, 2002. Padilla was not only a threat with regard to a specific terrorist plot, *see* **Maj. at 6 n.2**, he allegedly possesses information that could assist the United States in thwarting other terrorists plots in the U.S. and abroad.

to the implication of the majority, the Joint Resolution was not limited in geographic scope. It did not limit the President's authority to foreign theaters. Congress clearly recognized that the events of 9-11 signaled a war with al Qaeda that could be waged on U.S. soil.

The President's authority to detain an enemy combatant in wartime is undiminished by the individual's U.S. citizenship. *Quirin*, 317 U.S. at 37-38; *see also Rumsfeld v. Hamdi*, 296 F.3d 278, 281-83 (4th Cir. 2002). Consequently, Padilla's citizenship here is irrelevant. Moreover, the fact that he was captured on U.S. soil is a distinction without a difference. While Mr. Padilla's conduct may have been criminal, it was well within the threat identified in the Joint Resolution. The resolution recognizes the painful reality of 9-11; it seeks to protect U.S. citizens from terrorist attacks at home and abroad. "[E]ntry upon our territory in time of war by enemy belligerents, including those acting under the direction of armed forces of the enemy . . . is a warlike act." *Quirin*, 317 U.S. at 36-37.[11]

Congress presumably was aware of § 4001(a) when it passed the Joint Resolution. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184 (1988). The resolution was congressional confirmation that the nation was in crisis. Congress called upon the President to utilize his Article II war powers to deal with the emergency. By authorizing the President to use necessary and appropriate force against al Qaeda and its operatives, Congress had to know the President might detain someone who fell within the categories of identified belligerents in carrying out his charge. A different view requires a strained reading of the plain language of the resolution and cabins the theater of the President's powers as Commander in Chief to foreign soil. If that was

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[11] Under the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(4), 6 U.S.T. 3317, 75 U.N.T.S. 135, prisoners of war subject to capture include all "persons who accompany the armed forces without actually being members thereof."

the intent of Congress it was masked by the strong and direct language of the Joint Resolution. And if, as the majority asserts, § 4001(a) is an impenetrable barrier to the President detaining a U.S. citizen who is alleged to have ties to the belligerent and who is part of a plan for belligerency on U.S. soil, then § 4001(a), in my view, is unconstitutional.

Sadly, the majority's resolution of this matter fails to address the real weakness of the government's appeal. Padilla presses to have his day in court to rebut the government's factual assertions that he falls within the authority of the Joint Resolution. The government contends that Mr. Padilla can be held incommunicado for 18 months with no serious opportunity to put the government to its proof by an appropriate standard. The government fears that to do otherwise would compromise its ability both to gather important information from Mr. Padilla and to prevent him from communicating with other al Qaeda operatives in the United States.

While those concerns may be valid, they cannot withstand the force of another clause of the Constitution on which all three of us could surely agree. No one has suspended the Great Writ. *See* U.S. CONST. art. I, § 9, cl. 2. Padilla's right to pursue a remedy through the writ would be meaningless if he had to do so alone. I therefore would extend to him the right to counsel as Chief Judge Mukasey did. *See Padilla*, 233 F. Supp. 2d at 599-609. At the hearing, Padilla, assisted by counsel, would be able to contest whether he is actually an enemy combatant thereby falling within the President's constitutional and statutory authority.

One of the more troubling aspects of Mr. Padilla's detention is that it is undefined by statute or Presidential Order. *Compare Quirin*, 317 U.S. at 26-28, 35 (citing former 10 U.S.C. §§ 1553 and 1554 (1940)), *with* 66 Fed. Reg. 57833 (2001). Certainly, a court could inquire whether Padilla continues to possess information that was helpful to the President in prosecuting the war against al Qaeda. Presumably, if he does not, the President would be required to charge

Padilla criminally or delineate the appropriate process by which Padilla would remain under the President's control. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678 (2001).

Mr. Padilla's case reveals the unique dynamics of our constitutional government. Padilla is alleged to be a member of an organization that most Americans view with anger and distrust. Yet his legal claims receive careful and thoughtful attention and are examined not in the light of his cause – whatever it may be – but by the constitutional and statutory validity of the powers invoked against him. *See Youngstown*, 343 U.S. at 623 (Jackson, *J.*, concurring).