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Winter 1-1-2005

## RUMSFELD v. PADILLA, 124 S. Ct. 2711 (2004)

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### Recommended Citation

*RUMSFELD v. PADILLA*, 124 S. Ct. 2711 (2004), 11 Wash. & Lee Race & Ethnic Anc. L. J. 251 (2005).  
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**RUMSFELD v. PADILLA,  
124 S. Ct. 2711 (2004)**

**FACTS**

On May 8, 2002, Jose Padilla, a United States citizen returning from Pakistan to Chicago's O'Hare International Airport, was arrested by federal agents executing a material witness warrant in connection with the September 11, 2001 terrorist attacks.<sup>1</sup> Padilla was transferred to New York and held under federal criminal custody.<sup>2</sup> On May 22, Padilla moved to vacate the material witness warrant.<sup>3</sup>

On June 9, while Padilla's motion was still pending, the President, invoking his authority as Commander-in-Chief of the United States Armed Forces<sup>4</sup> and pursuant to the Authorization for Use of Military Force Joint Resolution (AUMF),<sup>5</sup> issued an order to Secretary of Defense Donald Rumsfeld to detain Padilla under military custody as an enemy combatant.<sup>6</sup> Subsequently, Department of Defense officials took Padilla into custody and transported him to the Consolidated Naval Brig in Charleston, South Carolina.<sup>7</sup>

Two days later, Padilla's appointed counsel filed a habeas corpus petition in the United States District Court for the Southern District of New York (Southern District). The petition alleged that Padilla's military detention violated the Fourth,<sup>8</sup> Fifth<sup>9</sup> and Sixth<sup>10</sup> Amendments and the Suspension Clause<sup>11</sup> of the United States Constitution.<sup>12</sup> The petition named as respondents President George W. Bush, Secretary of Defense Donald Rumsfeld, and Commander Melaine Marr of the Consolidated Naval Brig.<sup>13</sup> The Government moved to dismiss, arguing that the only proper respondent was Commander Marr, Padilla's immediate custodian, and that the Southern

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<sup>1</sup> Rumsfeld v. Padilla, 124 S. Ct. 2711, 2715 (2004).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> U.S. CONST. art. II, § 2, cl. 1 ("The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States . . .").

<sup>5</sup> Authorization for Use of Military Force Joint Resolution Pub. L. No. 107-40, 115 Stat. 224 (2001) ("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").

<sup>6</sup> *Rumsfeld*, 124 S. Ct. at 2715.

<sup>7</sup> *Id.* at 2716.

<sup>8</sup> U.S. CONST. amend. IV.

<sup>9</sup> U.S. CONST. amend V.

<sup>10</sup> U.S. CONST. amend VI.

<sup>11</sup> U.S. CONST. art. I, § 9, cl. 2 ("The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it").

<sup>12</sup> *Rumsfeld*, 124 S. Ct. at 2716.

<sup>13</sup> *Id.*

District lacked jurisdiction over her.<sup>14</sup> The Government further contended that the President had the authority to detain Padilla as an enemy combatant pursuant to the Commander in Chief Clause of the Constitution,<sup>15</sup> the AUMF,<sup>16</sup> and *Ex parte Quirin*.<sup>17</sup>

The Southern District held that Secretary Rumsfeld was a proper respondent to the habeas petition because of his personal involvement in Padilla's military detention, and that jurisdiction over the Secretary could be asserted under New York's long-arm statute.<sup>18</sup> However, the Southern District accepted the Government's contentions on the merits that the President has authority to detain Padilla, a citizen arrested on American soil, as an enemy combatant.<sup>19</sup>

The Court of Appeals for the Second Circuit affirmed in part and reversed in part.<sup>20</sup> On the question of the proper respondent, the appellate court agreed with the Southern District.<sup>21</sup> It held that on these unique facts, Secretary Rumsfeld was Padilla's custodian because of his personal involvement in Padilla's detention, finding that he exercised "the legal reality of control" over Padilla.<sup>22</sup> The court also affirmed the Southern District's holding that New York's long-arm statute provides jurisdiction over Secretary Rumsfeld.<sup>23</sup>

The Court of Appeals disagreed with the Southern District on the merits of the military detention, concluding that neither the President's Commander in Chief power nor the AUMF authorizes military detentions of

<sup>14</sup> *Id.*

<sup>15</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>16</sup> Authorization for Use of Military Force Joint Resolution Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>17</sup> *Ex parte Quirin*, 317 U.S. 1 (1942) (holding that the President had authority to order the detention four German saboteurs to be tried before a military commission). In *Quirin*, eight German-born United States residents were captured as they tried to enter the country during war time for the purpose of sabotage. *Id.* at 7. The President of the United States decreed that petitioners were to be tried before a military tribunal. *Id.* at 8. The petitioners challenged the President's authority, arguing that under the U.S. CONST. art. III, § 2, and U.S. CONST. amends. V and VI, petitioners had a right to demand a jury trial at common law in the civil courts. *Id.* at 9. The Court found that petitioners were unlawful belligerents and were not entitled to be tried in a civil proceeding. *Id.* at 16. The Court also determined that trying petitioners before a military court was not illegal and did not violate the U.S. CONST. amends. V and VI, relating to "crimes" and "criminal prosecutions." *Id.* Thus, the court affirmed the President's authority to try petitioners before a military tribunal without a jury. *Id.* at 18.

<sup>18</sup> *Rumsfeld*, 124 S. Ct. at 2715.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 2717 (citing *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003)).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (citing *Padilla v. Rumsfeld*, 352 F.3d 695, 707-08 (2d Cir. 2003)) (reasoning that in cases where the habeas petitioner is detained for other than federal criminal violations, the Supreme Court has recognized exceptions to the general rule of naming the immediate physical custodian as respondent).

<sup>23</sup> *Id.* (citing *Padilla v. Rumsfeld*, 352 F.3d 695, 708-10 (2d Cir. 2003))

American citizens captured on American soil.<sup>24</sup> Accordingly, the court ruled that the President lacked authority to place Padilla in military detention.<sup>25</sup> It granted the writ of habeas corpus and ordered Padilla's release within thirty days.<sup>26</sup> The Supreme Court of the United States granted certiorari to review the Court of Appeal's rulings on jurisdiction over the proper respondents and the merits of Padilla's military detention.<sup>27</sup>

### HOLDING

The Supreme Court of the United States reversed and dismissed the case without prejudice.<sup>28</sup> The Court held that a habeas challenge to physical custody must name the immediate custodian as respondent, in this case, Commander Marr.<sup>29</sup> Despite the unique circumstances surrounding Padilla's detention, the Court distinguished his case from a limited number of exceptions to the immediate custodian rule.<sup>30</sup> Furthermore, the Court held that the Southern District did not have jurisdiction over Commander Marr.<sup>31</sup> The Court did not reach the merits of Padilla's military detention because it answered the jurisdiction question in the negative.<sup>32</sup>

### ANALYSIS

The Court analyzed the two parts of the jurisdictional issue and decided that Padilla had improperly filed his habeas petition in the Southern District.<sup>33</sup> The first jurisdictional issue was whether the habeas petition was filed against the proper respondents.<sup>34</sup> Counsel for Padilla filed the petition under the federal habeas statute<sup>35</sup> and named President Bush, Secretary Rumsfeld, and Commander Marr as respondents.<sup>36</sup> The Court began its analysis with the language of the federal habeas statute, which provides that the proper respondent to a habeas petition is the "person who has custody

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<sup>24</sup> *Id.* (citing *Padilla v. Rumsfeld*, 352 F.3d 695, 712-18 (2d Cir. 2003)) (determining that in Supreme Court case law and in the Non-Detention Act, 18 U.S.C. § 4001(a) (1971), there is a strong presumption against domestic military detention of citizens absent explicit congressional authorization).

<sup>25</sup> *Id.* (citing *Padilla v. Rumsfeld*, 352 F.3d 695, 724 (2d Cir. 2003)).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 2722.

<sup>30</sup> *Id.* at 2715.

<sup>31</sup> *Id.* at 2727.

<sup>32</sup> *Id.* at 2715.

<sup>33</sup> *Id.* at 2717.

<sup>34</sup> *Id.*

<sup>35</sup> 28 U.S.C. § 2242 (1948).

<sup>36</sup> *Rumsfeld*, 124 S. Ct. at 2716.

over the petitioner."<sup>37</sup> The statute also provides that the habeas writ must be filed against the physical custodian of the prison.<sup>38</sup> The Court reasoned that because of the use of the definite article, "the," in reference to "custodian," there must generally be only one proper respondent to a habeas petition.<sup>39</sup> The custodian must be the person with the ability to produce the prisoner's body before the court.<sup>40</sup>

The Court cited *Wales v. Whitney*,<sup>41</sup> as an example of how case law has interpreted the language of the habeas statute for over one hundred years.<sup>42</sup> In *Wales*, the Court characterized the statute by stating, "these provisions contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the Court or judge, that he be liberated if no sufficient reason is shown to the contrary."<sup>43</sup> According to the statutory language and the immediate custodian rule set forth in *Wales*, the default rule for a habeas challenge to present physical confinement is that the proper respondent must be the warden of the facility where the prisoner is being held.<sup>44</sup> After concluding that the proper respondent is Commander Marr, not Secretary Rumsfeld, the Court addressed the arguments raised by Padilla, the Court of Appeals, and Justice Stevens' dissent as to why the immediate custodian rule should not apply.<sup>45</sup>

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<sup>37</sup> *Id.* (citing 28 U.S.C. § 2242 (1948)).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 2717.

<sup>40</sup> *Id.*

<sup>41</sup> *Wales v. Whitney*, 114 U.S. 564 (1885) (holding that an military officer is not under personal physical restraint for purpose of habeas petition if the only restraint on his liberty was the moral restraint of obeying military orders to stay at his post pending a court-martial). In *Wales*, a Naval medical was served with notice that he was to face a court-martial for misconduct. *Id.* at 565. He was also ordered not to leave his station but was not physically restrained in any way. *Id.* In refusing his habeas petition, the Supreme Court of the United States held that the writ of habeas corpus historically and statutorily embraced situations where some type of physical, rather than merely moral, restraint had occurred. *Id.* at 571. As a military officer, petitioner was normally required to obtain a leave of absence to leave town; that situation did not change by the bringing of court-martial proceedings. *Id.* Because petitioner was not restrained of his liberty or in physical custody of the Navy, the Court affirmed dismissal of the petition for the writ. *Id.* at 573-575.

<sup>42</sup> *Rumsfeld*, 124 S. Ct. at 2716.

<sup>43</sup> *Wales*, 114 U.S. at 574.

<sup>44</sup> *Rumsfeld*, 124 S. Ct. at 2716.

<sup>45</sup> *Id.*

Padilla cited *Hensley v. Municipal Court*<sup>46</sup> as an exception to the immediate custodian rule.<sup>47</sup> Padilla argued that the Court in *Hensley* had adopted a more expansive definition of custody, such as a person released on his own recognizance is not in custody for habeas purposes.<sup>48</sup> The majority rejected this argument, reasoning that a definition of "custody" broadened to include restraints short of physical confinement, as articulated in *Hensley*, does not create an exception to the general rule of immediate custodian, as articulated in *Wales*.<sup>49</sup>

The Court also determined that the Court of Appeals erred in believing that in certain cases the immediate custodian rule can be relaxed to allow as a proper respondent the person exercising the "legal reality of control" over the petitioner.<sup>50</sup> Cases cited by Padilla applied only to habeas petitions challenging situations other than immediate physical confinement.<sup>51</sup> Padilla cited *Braden v. 30th Judicial Circuit Court of Kentucky*,<sup>52</sup> as an allowable exception to the immediate custodian rule. In *Braden*, a prisoner in Alabama filed a habeas petition against the Circuit Court in Kentucky.<sup>53</sup> The Court found that the habeas petition challenged the future detention of the prisoner in another state, not his present physical detention but allowed the petition to stand because only jurisdiction over the respondent court is required.<sup>54</sup> The exception in *Braden* is limited to habeas petitions, which

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<sup>46</sup> *Hensley v. Municipal Court*, San Jose Milpitas Judicial Dist., Santa Clara County., 411 U.S. 345 (1973) (holding that for purpose of habeas petition a prisoner was considered under custody because he was subject to restraints not shared by the public generally—an obligation to appear at all times and places as ordered by any court or magistrate of competent jurisdiction). In *Hensley*, the petitioner was convicted of a misdemeanor and sentenced to serve one year in jail and pay a fine. *Id.* at 347. After petitioner appealed his conviction and exhausted all available state remedies, he filed for relief under the federal habeas corpus statute. *Id.* The question presented was whether the conditions imposed upon petitioner as the price of his release constituted "custody" as that term was used in the habeas corpus statute. *Id.* at 350. The Court held that petitioner was in custody for purposes of the statute because petitioner was subject to restraints not shared by the public generally because he had an obligation to appear at all times and places as ordered by any court or magistrate of competent jurisdiction, and petitioner remained at large only by the grace of a stay entered first by the trial court and then extended by two Justices of the Court. *Id.* at 351-53.

<sup>47</sup> *Rumsfeld*, 124 S. Ct. at 2718.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 2719.

<sup>51</sup> *Id.*

<sup>52</sup> *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973) (holding that an Alabama prisoner may file a habeas petition against the Kentucky court because the challenge was against a "confinement that would be imposed in the future," thus the custodian for purpose of habeas petition was not the warden in Alabama but the court in Kentucky.) In *Braden*, the prisoner was confined to an Alabama prison when he applied to the District Court of the Western District of Kentucky for a writ of federal habeas corpus. *Id.* The Court ruled that the Kentucky district court had jurisdiction to rule on petitioner's federal writ of habeas corpus, as the court was only required to have jurisdiction over respondent court. *Id.* at 497-99.

<sup>53</sup> *Braden*, 410 U.S. at 484.

<sup>54</sup> *Id.* at 497-99.

challenge a form of custody other than present physical confinement.<sup>55</sup> Padilla's challenge was against his physical confinement in the Naval Brig, and *Braden* does not support a departure from the immediate custodian rule in Padilla's case.<sup>56</sup> The Court also pointed to the favorable citation of *Wales* in *Braden*, which "reiterated the traditional rule that a prisoner seeking release from confinement must sue his jailer."<sup>57</sup>

Next, the Court addressed Padilla's reliance on *Strait v. Laird*.<sup>58</sup> In *Strait*, the Court held that a reservist's nominal custodian was an officer in Indiana who has his Army records.<sup>59</sup> Padilla argued that he should similarly be allowed to designate Secretary Rumsfeld as his "nominal" custodian.<sup>60</sup> *Strait* did not apply because the petitioner in *Strait* was not challenging his present physical confinement.<sup>61</sup> The majority reasoned that the immediate custodian rule did not apply in *Braden* and *Strait* because there were no "immediate custodians" germane to the petitioners' challenges.<sup>62</sup> In the present case, there should be no determination of "legal control custodian" or "nominal custodian," because Padilla's challenge was against his immediate detention in the Naval Brig, and Commander Marr had physical custody over Padilla.<sup>63</sup> The Court reasoned that to allow applications of "legal control" or "nominal" custodian tests in challenges to present physical custody would allow prisoners to name any State or United States Attorney General as a respondent.<sup>64</sup> This directly contradicts both the statutory language and case law.<sup>65</sup>

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<sup>55</sup> *Rumsfeld*, 124 S. Ct. at 2719.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* (citing *Braden*, 410 U.S. at 495).

<sup>58</sup> *Strait v. Laird*, 406 U.S. 341 (1972) (holding that a California reservist's nominal custodian was his commanding officer in Indiana who had charge of the petitioner's Army records). In *Strait*, a reserve officer filed a petition for writ of habeas corpus in California. *Id.* The court determined that it was in California that the reserve officer had his only meaningful contact with the Army. *Id.* at 345. To say that his custodian was amenable to process only in Indiana, where the Army chose to locate its recordkeeping center, would exalt fiction over reality. *Id.* The reserve officer's commanding officer was present in California through officers who processed his discharge application. *Id.* at 345-347. The concepts of "custody" and "custodian" were sufficiently broad to say that the commanding officer in Indiana, operating through officers in California in processing his claim, was in California for the limited purpose of habeas corpus jurisdiction. *Id.*

<sup>59</sup> *Strait*, 406 U.S. at 342.

<sup>60</sup> *Rumsfeld*, 124 S. Ct. at 2719.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 2720.

<sup>65</sup> *Id.*

Padilla and Justice Stevens' dissent also cited *Ex parte Endo*<sup>66</sup> as an exception which allows a prisoner to properly name someone other than his immediate physical custodian in a habeas petition.<sup>67</sup> In *Endo*, a habeas petition filed in California, naming the then custodian of Endo as respondent, was allowed to stand after the petitioner was removed to Utah.<sup>68</sup> The Court reasoned that while *Endo* involved a petitioner challenging her present physical confinement against someone other than her immediate custodian, it could be distinguished from Padilla's case because in *Endo* the Northern District of California acquired jurisdiction before the government removed Endo.<sup>69</sup> In the present case, however, the government transferred Padilla before his lawyers filed the habeas petition in the Southern District of New York.<sup>70</sup> *Endo*, therefore, provides a limited exception to the immediate custodian rule.<sup>71</sup> According to *Endo*, when the habeas petitioner is moved after properly filing a petition naming her immediate custodian, the original district court retains jurisdiction over the writ.<sup>72</sup> In Padilla's case, the Southern District never acquired jurisdiction over his petition.<sup>73</sup>

Finally, the Court addressed Padilla's argument that the unique facts of the case mandate a new exception to the immediate custodian rule.<sup>74</sup> The majority dismissed this argument because, even though Padilla's detention is unique in many respects, his habeas petition still challenged the physical detention by the Executive.<sup>75</sup> Thus, the Court determined that Padilla's petition was not unique in any way that would permit an exception from the immediate custodian rule, such as pertained in *Braden*, *Strait* or *Endo*.<sup>76</sup> Accordingly, Commander Marr, not Secretary Rumsfeld, was the only proper respondent to the habeas petition.<sup>77</sup>

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<sup>66</sup> *Ex parte Endo*, 323 U.S. 283 (1944). (holding that even if the prisoner's immediate physical custodian was no longer within the jurisdiction of the District Court, and the prisoner's removal after filing the petition did not cause the District Court to lose jurisdiction over the named respondent, who was in the District Court's jurisdiction). In *Endo*, a Japanese-American citizen interned in California by the War Relocation Authority was allowed to file a habeas petition against the Authority's Assistant Director, even after being moved to Utah. *Id.* at 306. In support of its ruling, the Supreme Court held that that whatever power the War Relocation Authority may have had to detain classes of citizens, pursuant to Exec. Order No. 9066, 7 Fed. Reg. 1,407 (Feb. 19, 1942), it had no authority to subject citizens who were concededly loyal to its leave procedure. *Ex parte Endo*, 323 U.S. at 306.

<sup>67</sup> *Rumsfeld*, 124 S. Ct. at 2721.

<sup>68</sup> *Ex parte Endo*, 323 U.S. at 306.

<sup>69</sup> *Rumsfeld*, 124 S. Ct. at 2721.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 2722.



The second jurisdictional issue was whether the Southern District has jurisdiction over the respondents.<sup>78</sup> 28 U.S.C. § 2241(a)<sup>79</sup> limits a district court's grant of habeas relief to its respective jurisdiction.<sup>80</sup> *Braden* interpreted this limitation to require that the court reviewing the habeas petition must have jurisdiction over the custodian named as respondent.<sup>81</sup> Accordingly, after determining that Commander Marr was the proper respondent to Padilla's petition, the Court turned to analyze whether the Southern District had jurisdiction over Commander Marr.<sup>82</sup>

To begin, the Court examined the construction of § 2241(a) in prior cases which held that habeas petitions can be filed only in the district of physical confinement.<sup>83</sup> In the majority's opinion, other sections of the federal habeas statute support this interpretation.<sup>84</sup> If a petitioner seeks habeas relief from the Court of Appeals, he must explain why he cannot file the petition in the district court in which he is held.<sup>85</sup> In addition, the court of appeals may decline review of the habeas petition and instead transfer it to the district court with jurisdiction over the prison.<sup>86</sup>

The majority also noted that Congress had crafted explicit exceptions to the rule in certain circumstances.<sup>87</sup> For example, if a petitioner is serving a sentence in a State that contains more than one district, he may file a habeas petition in the district that has custody or in the district where he was convicted and sentenced.<sup>88</sup> Similarly, federal criminal prisoners may file certain post conviction petitions in the sentencing district courts, as well as in the districts of confinement.<sup>89</sup> The Court reasoned that such explicit exceptions would not be necessary if the general habeas provisions allowed a petitioner to file a habeas challenge outside the district of confinement.<sup>90</sup> After determining that the general rule for habeas challenges limits them to the district of present physical confinement, the Court analyzed Padilla's argument for jurisdiction by service of process, based on *Braden* and *Strait*.<sup>91</sup>

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<sup>78</sup> *Id.*

<sup>79</sup> 28 U.S.C. § 2241(a) (1966) ("Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had").

<sup>80</sup> *Rumsfeld*, 124 S. Ct at 2722 (citing 28 U.S.C. § 2241(a) (1966)).

<sup>81</sup> *Id.* (citing *Braden*, 10 U.S. at 495).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (citing 28 U.S.C. § 2242 (1948)).

<sup>86</sup> *Id.* (citing 28 U.S.C. § 2241(b) (1966)).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* (citing 28 U.S.C. § 2241(d) (1966)).

<sup>89</sup> *Id.* (citing 28 U.S.C. § 2255 (1996)).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 2723.

Padilla argued that *Braden* allowed the assertion of jurisdiction by service of process, and that the Southern District had jurisdiction over Secretary Rumsfeld under New York's long-arm statute.<sup>92</sup> However, the Court reasoned that in *Braden*, the Western District of Kentucky had proper jurisdiction over an Alabama prisoner because the "respondent was properly served in that district,"<sup>93</sup> and that nothing in the service of process dicta authorizes the use of long-arm statutes to gain jurisdiction over custodians.<sup>94</sup> In the majority's opinion, the fact that the proper respondent to Padilla's petition is not present in the Southern District is "fatal to habeas jurisdiction."<sup>95</sup>

Padilla also cited *Strait* to support a state long-arm statute approach to habeas jurisdiction.<sup>96</sup> He argued that just as the court in *Strait* found the commanding officer of the petitioner to be "present" in California because of his position in the hierarchy of command, Secretary Rumsfeld should be found "present" in the Southern District through his subordinates who took Padilla into military custody.<sup>97</sup> The Court rejected this argument because the circumstances of *Strait* limited the holding of a custodian "present" in a district through the actions of his agents to instances where there is a question of nominal custodian.<sup>98</sup> In Padilla's case there is no such question.<sup>99</sup> His petition challenging present physical custody, distinguished from *Braden* and *Strait*, must follow the rule that when a petition for habeas relief challenges present physical custody, the petitioner must name his immediate warden as the respondent and file the petition in the district court of confinement.<sup>100</sup>

### CONCURRING OPINION

Justice Kennedy, joined by Justice O'Connor, analyzed the proper location and respondent for the habeas petition as a question of personal jurisdiction or venue.<sup>101</sup> Like personal jurisdiction or venue rules, violations of immediate custodian and territorial jurisdiction rules can be waived by the Government.<sup>102</sup> Unlike other civil lawsuits, habeas petitions are not

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 2724.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*, at 2728.

<sup>102</sup> *Id.*

governed by the venue rules and considerations of the Federal Rules of Civil Procedure.<sup>103</sup> Instead, the forum location rules for habeas petitions are based on the habeas statute and case law interpreting it.<sup>104</sup> Padilla's petition does not challenge nonphysical custody; it was not filed in the Southern District before Padilla's transfer; and there was no indication that the Government refused to tell Padilla's lawyer of his location.<sup>105</sup> Under these circumstances, the justices reasoned, the rules of immediate custodian and territorial jurisdiction apply, and Padilla's petition was properly dismissed.<sup>106</sup>

### DISSENTING OPINION

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, raised two issues that, in his opinion, should have persuaded the Court to rule in Padilla's favor.<sup>107</sup> First, Stevens pointed to possible government misconduct by failing to give fair notice of the transfer.<sup>108</sup> If the government had given fair notice to Padilla's counsel of the transfer to the Naval Brig, a habeas motion could have been filed two days earlier in the Southern District.<sup>109</sup> Consequently, similar to *Endo*, the Southern District should still retain proper jurisdiction over the petition.<sup>110</sup>

Second, Stevens focused on the exceptions to the immediate custodian and district of confinement rules.<sup>111</sup> Stevens argued that the "bright-line" rules drawn by the Court are no longer bright because of the "numerous exceptions."<sup>112</sup> In Stevens' opinion, the unique circumstances of Padilla's case require just such an exception.<sup>113</sup>

### CONCLUSION

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<sup>103</sup> *Id.* at 2728.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 2728.

<sup>107</sup> *Id.* at 2729.

<sup>108</sup> *Id.* at 2732.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* The majority had rejected this argument as "counterfactual," because there is no basis to punish the Government without any hint of misconduct or bad faith in transferring Padilla or giving fair notice to counsel. *Id.* at 2726.

<sup>111</sup> *Id.* at 2732.

<sup>112</sup> *Id.* at 2733.

<sup>113</sup> *Id.* The majority countered that the dissent does not cite any case to show that the Court has deviated from the rules as stated. *Id.* at 2727. To allow courts to make an ad hoc determination for exceptions based on the circumstances of any case would exceed their "respective jurisdictions" established by Congress. *Id.* at 2728. The majority concluded that Padilla's case did not present any allowable exception to the district of confinement rule as defined by the language of the federal habeas statute and court precedents; thus, the proper district for his habeas petition is the District of South Carolina, not the Southern District of New York. *Id.*

Padilla's continuing detention in military custody presented an important constitutional question, whether the Executive has the power to detain American citizens, arrested on American soil, as enemy combatants. A fundamental right of citizenship guaranteed under the Constitution is to be free from physical imprisonment without due process.<sup>114</sup> The habeas petition, the "Great Writ" as the Dissent calls it,<sup>115</sup> has been the traditional method for the prisoner to challenge an unlawful detention by the government. However, the reader will be greatly disappointed by the Court's decision to sidestep the constitutionality of Padilla's military detention and instead, focus on the procedural adequacy of his habeas petition. In the majority opinion, the Court repeatedly decried Padilla's argument that the very special circumstances of his case should qualify his petition for an exception to the requirements of the habeas statute as irrelevant. In doing so, the Court ignored the fact that the government supported its exercise of the extraordinary power to detain citizens as enemy combatants by arguing the special circumstances of Padilla's relations to possible terrorist attacks against the United States. It seems logical that Padilla should be able to argue for his freedom using the very facts and circumstances the government relied on to justify his indefinite detention.

The Court focused too narrowly on the form of the Padilla's habeas petition, rather than considering the sustenance of habeas protection, and in doing so, the Court missed an important opportunity to protect the most fundamental rights of an American citizen in times of national crisis. However, this failure may only represent a delay in answering the constitutional question—whether American citizens may be detained by the Executive without adequate due process. Several other cases before the Court similarly challenged the powers of the Executive and the military during times of war. An answer to this question may ultimately determine the outcome of our nation's efforts to combat global terrorism and the price we are willing to pay for success.

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<sup>114</sup> U.S. CONST. amend. XIV.

<sup>115</sup> *Id.* at 2730.

