

Symposium: Shifting Powers in the Federal Courts

The Lower Federal Courts and the War on Terrorism

Erwin Chemerinsky

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**THE LOWER FEDERAL COURTS AND THE
WAR ON TERRORISM**

Erwin Chemerinsky*

It is now three and a half years since the tragic day of September 11. For a war, this is a relatively long period of time. World War II, for example, lasted only slightly longer, and three and a half years is longer than the amount of time that the United States was involved in World War I. It is certainly long enough to provide an opportunity for evaluating how the federal courts have done so far in balancing civil liberties with fighting the war on terrorism.

My thesis is that federal district courts have generally done better than the federal courts of appeals with regard to protecting civil liberties. In many instances, the federal district courts have ruled against the government and in favor of civil liberties, only to be overruled by the United States courts of appeals. To this point, there have been only three Supreme Court decisions concerning civil liberties and the war on terrorism, and they are mixed in terms of their results. So it is much harder to come to conclusions about the Supreme Court.¹ Besides, while there has been a great deal of attention paid to the Supreme Court's rulings, far too little attention has been paid to what the lower courts have done so far.

In this article, I focus primarily on the lower federal courts and their protection of civil liberties in the war on terrorism. I make three points. First, over the course of American history, in times of crisis the country has compromised civil liberties and only later come to recognize that the losses

* Alston & Bird Professor of Law, Duke University School of Law.

¹ *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (holding that United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (holding that the United States may detain an American citizen apprehended in Afghanistan and brought to the United States as an enemy combatant, but the government must accord the individual a meaningful opportunity to contest the factual basis for that decision before a neutral decisionmaker); *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (holding that an American citizen arrested in the United States for a crime in the United States held as an enemy combatant must bring his challenge in the federal judicial district where he is held).

of rights were tragic mistakes. This historical context is crucial in evaluating what has occurred since September 11. Second, I evaluate the federal courts' response since September 11 in cases involving civil liberties and the war on terrorism and demonstrate that the federal district courts have generally done better than the United States courts of appeals in protecting civil liberties. Third, I offer some tentative thoughts as to why this might be so.

I. THE HISTORICAL CONTEXT

Since September 11, 2001, one of the worst aspects of American history has been repeating itself. For over two hundred years, repression has been the response to threats to security. In hindsight, every such instance was clearly a grave error that restricted our most precious freedoms for no apparent gain. I have no doubt that the actions of the Bush Administration and the Ashcroft Justice Department will, in hindsight, be viewed in the same way.

The legacy of suppression in times of crisis began early in American history. In 1798, in response to concerns about survival of the country, Congress enacted the Alien and Sedition Act which made it a federal crime to make false criticisms of the government or its officials.² The law was used to persecute the government's critics and people were jailed for what today would be regarded as the mildest of statements. Within a few years, after the election of 1800, Congress repealed the law and President Thomas Jefferson pardoned those who had been convicted. The right to freedom of speech was lost and nothing was gained.

During the Civil War, President Abraham Lincoln suspended the writ of habeas corpus. Additionally, dissidents were imprisoned for criticizing the way the government was fighting the war. There is no evidence that this aided the fighting of the Civil War in any way. Ultimately, the Supreme Court declared unconstitutional Lincoln's suspension of the writ of habeas corpus.³

During World War I, the government aggressively prosecuted critics of the war. One man went to jail for ten years for circulating a leaflet arguing that the draft was unconstitutional;⁴ another, Socialist leader Eugene Debs, was sentenced to prison for simply saying to his audience, "You are good

² Sedition Act of July 14, 1798, 1 Stat. 596 (1798).

³ *Ex parte Milligan*, 71 U.S. 2 (1866).

⁴ *Schenck v. United States*, 249 U.S. 47 (1919).

for more than cannon fodder.”⁵ At about the same time, the successful Bolshevik revolution in Russia sparked great fear of communism in the United States. The U.S. Attorney General, Mitchell Palmer, launched a massive effort to round up and deport aliens in the United States. Individuals were summarily deported and separated from their families without any semblance of due process.

During World War II, 110,000 Japanese-Americans were forcibly interned in what President Franklin Roosevelt called “concentration camps.”⁶ Adults and children, aliens and citizens, were uprooted from their lifelong homes and placed behind barbed wire. Not one Japanese-American was ever charged with espionage, treason, or any other crime that threatened security. There is no evidence that the unprecedented invasion of rights accomplished anything useful. Nonetheless, the Supreme Court, in *Korematsu v. United States*,⁷ expressed the need for deference to the executive in wartime and upheld the removal of Japanese-Americans from the west coast.⁸

The McCarthy era saw enormous persecution of suspected communists. Jobs were lost and lives were ruined on the flimsiest of allegations. In the leading case during the era, *United States v. Dennis*,⁹ the Court approved a twenty-year prison sentence for the crime of “conspiracy to organize the Communist party and to teach and advocate the overthrow of the government” by teaching the works of Marx and Lenin.¹⁰

This brief recitation of history should give pause to any efforts to take away civil liberties in this new time of crisis. It is crucial to appraise what has occurred since September 11 in this context.

II. COMPARING THE DISTRICT COURTS AND THE COURTS OF APPEALS IN BALANCING CIVIL LIBERTIES AND NATIONAL SECURITY

There now have been many cases challenging aspects of the United States government’s war on terrorism. An interesting pattern is emerging: Federal district courts are often more protective of civil liberties than the United States courts of appeals. There are a number of cases where district court rulings in favor of civil liberties have been overruled by the courts of

⁵ *Debs v. United States*, 249 U.S. 211, 214 (1919).

⁶ WILLIAM MANCHESTER, *THE GLORY AND THE DREAM* 300 (1974).

⁷ 323 U.S. 214 (1944).

⁸ *Id.* at 223.

⁹ 341 U.S. 494 (1951).

¹⁰ *Id.* at 517.

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appeals, but there are almost no rulings where district court decisions in favor of the government have been overruled.¹¹

To develop this thesis, I give five examples where the district courts ruled for civil liberties only to be reversed by the court of appeals. I intentionally have chosen these from five different circuits so that it will not seem that this trend is the product of one circuit's views.

A. *D.C. Circuit: Center for National Security Studies v. United States Department of Justice*

How many individuals were arrested and detained by the federal government after September 11? How many individuals are now being detained? Who are the detainees and why are they being held? Astoundingly, the answers to these questions remain unknown. The Bush Administration and the Justice Department have steadfastly refused to answer these basic inquiries, so that no one knows how many people have been held in custody and for what reasons. A federal district court ruled in favor of the plaintiffs in a lawsuit that would have provided much of this information, but the Court of Appeals for the District of Columbia Circuit reversed. On January 12, 2004, the Supreme Court denied certiorari. The effect of the Court's denial of review in *Center for National Security Studies v. United States Department of Justice*¹² is that there is no way to learn the most basic information about the government's actions in the last two and a half years.

The lawsuit was brought by a coalition of public interest groups, including the Center for National Security Studies, the ACLU, People for the American Way, the American-Arab Anti-Discrimination Committee, and Reporters Committee for Freedom of the Press. As the district court explained, the lawsuit resulted from the fact that "the Government refused to make public the number of people arrested, their names, their lawyers, the reasons for their detention, and other information relating to their whereabouts and circumstances."¹³

¹¹ One case where the court of appeals did reverse the district court and was more protective of civil liberties was *Gherebi v. Bush*, 262 F. Supp. 2d 1064 (C.D. Cal. 2003), *rev'd* 352 F.3d 1278 (9th Cir. 2003), *granted, vacated and remanded by* 124 S. Ct. 2932 (2004), where the Ninth Circuit held that the federal court had jurisdiction to hear a habeas corpus petition by a detainee at Guantanamo Bay, Cuba.

¹² 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004).

¹³ *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94, 96 (D.D.C. 2002).

The plaintiffs sued seeking basic information, including the following: the identities of those being held and the circumstances of their arrest, including the dates of any arrest and release and the nature of any charges filed against them; the identities of lawyers representing any of these individuals; the identity of any courts that were requested to enter any sealing orders with regard to proceedings against these individuals; and all policy directives issued to government officials about these individuals and what may be said to the press about them.

The United States District Court for the District of Columbia largely ruled in favor of the plaintiffs based on the Freedom of Information Act ("FOIA"). The district court ordered the Department of Justice to disclose the names of the detainees, the identity of counsel representing detainees, and any policy directives to government officials about making public statements or disclosures regarding the detainees. The district court, however, held that the Department of Justice did not have to reveal the dates and locations of arrest, detention, and release. The most significant effect of the district court's order is that we finally would know how many people are being detained and, by contacting them, why they are being held and how they are being treated. Only through this information can it be learned if the government has significantly abused its power to arrest and detain individuals.

The United States Court of Appeals for the District of Columbia Circuit reversed in a 2-1 decision.¹⁴ The court of appeals decision repeatedly emphasized the need for great deference to the Executive Branch. For example, the court said that "the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security" and that the "need for deference in this case is just as strong as in earlier cases. America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore."¹⁵

Specifically, the court of appeals rejected the argument that there is a First Amendment right to the information and concluded that the information is protected from disclosure under exemption 7(A) of the FOIA, which exempts from disclosure information that "could reasonably be expected to interfere with enforcement proceedings."¹⁶ Specifically, the court accepted the government's argument "that disclosure of the detainees' names would enable al Qaeda or other terrorist groups to map the course of the investigation and thus the means to impede it. . . . Moreover, disclosure

¹⁴ *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 918.

¹⁵ *Id.* at 928.

¹⁶ 5 U.S.C. § 552(b)(7)(A, C & F) (2000).

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would inform terrorists of which members were compromised and which were not.”¹⁷ The court said that the names of attorneys should not be disclosed because that could lead to learning the identity of those detained.

The court of appeals decision is wrong as a matter of law and policy, and therefore it is very unfortunate that the Supreme Court denied review. First, there is no basis for believing that revealing the number held or their names would compromise investigations in any way. For example, there is no imaginable reason why the government will not disclose the number of people who have been held as material witnesses. Nor is the government’s argument against disclosing the names even logical. Terrorist organizations surely know which of their members have been arrested. Disclosing the names of those individuals arrested who are not affiliated with terrorism will not provide terrorist organizations with any useful information. Nor is there any privacy interest in keeping the names secret; the identity of those arrested is usually a matter of public record.

Second, the court of appeals expressed a degree of nearly complete deference to the executive that is inconsistent with the text and purpose of the FOIA, which creates a strong presumption in favor of disclosing government records. As Judge Tatel expressed in his dissent to the court of appeals decision: “the court’s uncritical deference to the government’s vague, poorly explained arguments for withholding broad categories of information about the detainees, as well as its willingness to fill in the factual and logical gaps in the government’s case, eviscerates both FOIA itself and the principles of openness in government that FOIA embodies.”¹⁸ As Judge Tatel powerfully declared, “this court has converted deference into acquiescence.”¹⁹

Third, the court of appeals erred by giving no weight to the strong public interest in learning how the government has used its power to arrest and detain individuals. The plaintiffs alleged that the government has abused its powers by wrongly detaining hundreds or thousands of individuals, many solely because of their religion or ethnicity. The government is preventing scrutiny of its conduct by invoking secrecy. As Judge Tatel expressed: “[j]ust as the government has a compelling interest in ensuring citizens’ safety, so do citizens have a compelling interest in

¹⁷ *Ctr. for Nat’l Sec. Studies*, 331 F.3d at 928.

¹⁸ *Id.* at 937 (Tatel, J., dissenting).

¹⁹ *Id.* at 938.

ensuring that their government does not, in discharging its duties, abuse one of its most awesome powers, the power to arrest and jail.”²⁰

A couple of years ago, I debated Michael Chertoff, then the Assistant Attorney General for the Criminal Division and now Secretary of the Department of Homeland Security. I asked him how many people have been held, particularly as material witnesses. He said that he could not disclose the information because of national security. I asked how knowing the number held, whether it is dozens or hundreds or thousands, could reveal anything remotely harmful to national security. There was no answer.

The Supreme Court should have granted certiorari in *Center for National Security Studies v. United States Department of Justice* to protect the right to information under the First Amendment and the FOIA. Secrecy of the sort claimed by the Bush Administration and the Ashcroft Justice Department hides and encourages serious abuses of power. Again, the government has applied its traditional powers for secrecy regarding national security to domestic law enforcement.

B. *Second Circuit: United States v. Awadallah*

Apparently, many individuals have been detained since September 11 as “material witnesses.” The law does not accord the government unlimited discretion to hold individuals as material witnesses. Federal law sets both substantive and procedural requirements for holding an individual as a material witness. The federal material witness law, 18 U.S.C. § 3144, permits the government to arrest a material witness if there exists probable cause both that (1) the person has information material to a criminal proceeding and (2) at trial it may become impractical to secure the presence of the person by subpoena.²¹ Section 3144 requires an affidavit demonstrating probable cause as to both of these elements and necessitates a warrant prior to arrest. The impracticality inquiry is a fact-based analysis focusing on the witness’ ties to the community such as residency, employment, family, and the strength of each of these ties.²² I have heard many reports of individuals being arrested and imprisoned, not for any crimes they committed, but as material witnesses for grand jury proceedings. A federal district court in New York concluded that a grand jury proceeding is not a “criminal proceeding” for purposes of § 3144. In

²⁰ *Id.*

²¹ 18 U.S.C. § 3144 (2000).

²² *See Perkins v. Click*, 148 F. Supp. 2d 1177 (D.N.M. 2001).

United States v. Awadallah,²³ the district court ruled that the material witness statute could not be used to detain grand jury witnesses. The district court carefully reviewed the statute, its legislative history, and its uses and concluded that the government had no authority to use the law to detain individuals as material witnesses for grand jury proceedings.

The United States Court of Appeals for the Second Circuit reversed and broadly construed the government's power to detain material witnesses.²⁴ The court held that it was permissible to hold the defendant for several weeks as a material witness without taking his deposition or testimony during this time. This is a tremendous expansion of the power of the government to hold—indeed to imprison—individuals. The government was holding a person in prison even though there was no probable cause to arrest the person or to suspect the person of committing any crime. Unfortunately, in January 2005, the Supreme Court denied review.²⁵

C. *Third Circuit: North Jersey Media Group, Inc. v. Ashcroft*

Since September 11, proceedings involving detainees have been closed to an unprecedented extent. This raises grave issues concerning the protection of the rights of detainees, as well as the rights of the press and the public.

On September 21, 2001, Chief Immigration Judge Creppy issued a memorandum to all immigration judges and court administrators, explaining that “the Attorney General has implemented additional security procedures for certain cases in the Immigration Court.”²⁶ Among other procedures, judges are supposed to close the hearing to the public and avoid disclosing any information about the case to anyone outside the immigration court. The memorandum also restricts immigration officials from confirming or denying whether any particular case exists on the docket.²⁷ Essentially, Creppy imposed a blanket secrecy requirement for “cases requiring special procedures.”

This order is at odds with federal regulations that require openness of immigration proceedings. Specifically, 8 C.F.R. § 3.27 provides:

²³ 202 F. Supp. 2d 82 (S.D.N.Y. 2002).

²⁴ *United States v. Awadallah*, 349 F.3d 42 (2d Cir. 2003).

²⁵ *Awadallah v. United States*, 125 S. Ct. 861 (2005).

²⁶ Memorandum from Chief Immigration Judge Michael Creppy, to all immigration judges and court administrators (September 21, 2001), available at http://www.usdoj.gov/eoir/efoia/ocij/oppm99/99_3.pdf.

²⁷ See, e.g., *id.* at Procedure 5 (“This restriction on information includes confirming or denying whether such a case is on the docket or scheduled for hearing.”).

All hearings, other than exclusion hearings, shall be open to the public, except that: (a) depending upon physical facilities, the Immigration Judge may place reasonable limitations upon the number in attendance at any one time with priority being given to the press over the general public; and (b) for the purpose of protecting witnesses, parties, or the public interest, the Immigration Judge may limit attendance or hold a closed hearing.²⁸

Additionally, 8 C.F.R. § 240.10(b) provides that “removal hearings shall be open to the public, except that the immigration judge may, in his or her discretion, close proceedings as provided in § 3.27 of this chapter.”²⁹ Thus, there is a strong presumption of openness under federal regulations.

The Supreme Court never has determined whether there is a First Amendment right of access to immigration proceedings. In *Richmond Newspapers v. Virginia*,³⁰ the Supreme Court held that the press and the public have a First Amendment right to attend criminal trials. The Court emphasized that openness helps to ensure fair proceedings, as well as fulfilling the right of people to know what their government is doing.³¹

In *Press Enterprise v. Superior Court*,³² the Supreme Court said that the following two-part test is to be used in determining whether there is a right to attend government proceedings: (1) whether there is a tradition of access to the proceedings; and (2) whether public access plays a significant positive role in the functioning of the particular process. There is a tradition of open immigration proceedings as federal regulations have long required that they be open to the press and public except in narrow circumstances. Also, openness of immigration proceedings provides the same benefits as openness of criminal trials in helping to ensure a just and fair process.

The Court in *Press Enterprise* said that closure of proceedings is permissible only if it is “essential to preserve higher values and is narrowly tailored to serve that interest.”³³ Immigration proceedings should be closed only if there is a demonstrated need for secrecy in the specific case. Blanket closure, as has been imposed, is not desirable.

²⁸ 8 C.F.R. § 3.27 (2003).

²⁹ *Id.* § 240.10(b) (2003).

³⁰ 448 U.S. 555 (1980).

³¹ *Id.* at 569-70.

³² 478 U.S. 1 (1986).

³³ *Id.* at 9.

A federal district court in New Jersey concluded that the Creppy memo violated the First Amendment.³⁴ This was in accord with a ruling of a United States District Court in Michigan,³⁵ which was affirmed by the Sixth Circuit in *Detroit Free Press v. Ashcroft*.³⁶ A suit was brought by the press, as well as Congressman John Conyers, when the deportation hearings of Rabih Haddad were closed. The district court declared that "[o]penness is necessary for the public to maintain confidence in the value and soundness of the government's actions, as secrecy only breeds suspicion as to why the government is proceeding against Haddad and aliens like him."³⁷ The court concluded that the government's policy violates the First Amendment and noted that there is a long tradition of open court proceedings and administrative hearings, including deportation hearings. The court recognized that the right to open proceedings is not absolute, but held that closure is permissible only if strict scrutiny is met.

The United States Court of Appeals for the Sixth Circuit affirmed and wrote:

Against non-citizens, [the Executive Branch] seeks the power to secretly deport a class if it unilaterally calls them 'special interest' cases. The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door. Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately in deportation proceedings. When the government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment did not trust any government to separate the true from the false for us. They protected the people against secret government.³⁸

The Sixth Circuit held that the government may not impose blanket closure of a class of immigration proceedings, but instead must demonstrate the need for closure in a specific case.

³⁴ North Jersey Media Group, Inc. v. Ashcroft, 205 F. Supp. 2d 288 (D.N.J. 2002).

³⁵ Detroit Free Press v. Ashcroft, 221 F. Supp. 2d 799 (E.D. Mich. 2002).

³⁶ 303 F.3d 681 (6th Cir. 2002).

³⁷ Detroit Free Press, 221 F. Supp. 2d at 805.

³⁸ Detroit Free Press, 303 F.3d at 683.

The United States Court of Appeals for the Third Circuit, however, came to an opposite conclusion and reversed the New Jersey district court in *New Jersey Media Group, Inc. v. Ashcroft*.³⁹ The Third Circuit held that newspapers did not have a First Amendment right of access to deportation proceedings that were determined by the Attorney General to present significant national security concerns. The court said that there was not a sufficient history of open immigration proceedings to create a First Amendment right for the press to attend and that there was a risk that seemingly innocuous information could be used as part of a “mosaic” to aid terrorists.

D. Fourth Circuit: Hamdi v. Rumsfeld

Ysarr Hamdi is an American citizen who was apprehended in Afghanistan allegedly for fighting for the enemy. His situation is thus identical to that of John Walker Lindh. Like Lindh, Hamdi was brought to the United States and was held in a military prison in South Carolina. Unlike Lindh, the United States government had not filed charges against Hamdi and claimed that it could hold him forever as an enemy combatant.

The federal district court ruled that Hamdi had a right to consult with his attorney, but the United States Court of Appeals for the Fourth Circuit reversed.⁴⁰ The district court then promulgated a series of questions for the government to answer to justify holding Hamdi as an enemy combatant. Once more, the Fourth Circuit reversed.⁴¹ The court concluded that the President has broad power, as Commander-in-Chief, to detain as enemy combatants individuals, including United States citizens, apprehended in a foreign country during battle, and that the court’s power is limited under such circumstances to determining that a detention is a lawful exercise of the President’s war-making powers.

Unlike the other cases discussed in this article, the Supreme Court granted review in the *Hamdi* case.⁴² There were two issues before the Supreme Court. First, does the federal government have the authority to hold an American citizen apprehended in a foreign country as an enemy combatant? In a 5-4 ruling, the Court decided in favor of the government. Justice O’Connor wrote the plurality opinion, which was joined by Chief

³⁹ 308 F.3d 198 (3d Cir. 2002).

⁴⁰ *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002).

⁴¹ *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

⁴² *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). The Court did not review whether Hamdi had a right to consult with a lawyer. The day its opposition to certiorari was due, the government agreed to allow Hamdi to consult with an attorney, thus making that issue moot.

Justice Rehnquist and Justices Kennedy and Breyer. Hamdi contended that his detention violated the Non-Detention Act, which states that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”⁴³

But the plurality concluded that Hamdi’s detention was authorized pursuant to an act of Congress: the Authorization for Use of Military Force that was passed after September 11.⁴⁴ Justice O’Connor stated that this constituted sufficient congressional authorization to meet the requirements of the Non-Detention Act and to permit detaining an American citizen apprehended in a foreign country as an enemy combatant. Justice Thomas was the fifth vote for the government on this issue and in a separate opinion he concluded that the President has inherent authority, pursuant to Article II of the Constitution to hold Hamdi as an enemy combatant.⁴⁵

The other four Justices vehemently disagreed. Justice Souter, in an opinion joined by Justice Ginsburg, concurring in the judgment in part and dissenting in part, contended that it violates the Non-Detention Act to hold an American citizen as an enemy combatant.⁴⁶ These two Justices disagreed with the plurality’s claim that the resolution authorizing the use of military force after September 11 was sufficient to meet the requirements of the Non-Detention Act. In a powerful dissenting opinion, Justice Scalia, joined by Justice Stevens, argued that there is no authority to hold an American citizen in the United States as an enemy combatant without charges or trial, unless Congress expressly suspends the writ of habeas corpus.⁴⁷

The second issue before the Court was what, if any, process must be accorded to Hamdi? The Court ruled 8-1, with only Justice Thomas dissenting, that Hamdi must be accorded due process. Justice O’Connor explained that Hamdi is entitled to have his habeas petition heard in federal court and that imprisoning a person is obviously the most basic form of deprivation of liberty. Thus, due process is required and the procedures required are to be determined by applying the three-part balancing test under *Mathews v. Eldridge*,⁴⁸ which instructs courts to weigh the importance

⁴³ 18 U.S.C. § 4001(a) (2000).

⁴⁴ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). On September 14, 2001, Congress authorized the President “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 . . .” Authorization for Use of Military Force, § 2(a).

⁴⁵ *Hamdi*, 124 S. Ct. at 2674 (Thomas, J., dissenting).

⁴⁶ *Id.* at 2652 (Souter, J., concurring in part and dissenting in part).

⁴⁷ *Id.* at 2660 (Scalia, J., dissenting).

⁴⁸ 424 U.S. 319 (1976).

of the interest to the individual, the ability of additional procedures to reduce the risk of an erroneous deprivation, and the government's interests.

Although the Court did not specify the procedures which must be followed in Hamdi's case, the Justices were explicit that Hamdi must be given a meaningful factual hearing. At a minimum, this includes notice of the charges, the right to respond, and the right to be represented by an attorney. The Court, however, suggested that hearsay evidence might be admissible and the burden of proof could even be placed on Hamdi. Only Justice Thomas rejected this conclusion and accepted the government's argument that the President could detain enemy combatants without any form of due process.

In November 2004, the Bush administration reached a deal with Hamdi. In exchange for him renouncing his American citizenship and promising never to return to this country or take up arms against it, Hamdi was released from custody. Thus, this case will not be the vehicle for resolving the undecided questions concerning what procedures must be followed when the government detains an American citizen apprehended in a foreign country.

E. *Ninth Circuit: United States v. Afshari*

A recent Ninth Circuit decision, *United States v. Afshari*,⁴⁹ is very disturbing because it allows the government to punish people for activities protected by the First Amendment and denies the individuals the chance even to argue that their conduct is constitutionally protected. The case arises from the criminal indictment of Roya Rahmani and six other individuals for providing material support to a group that the Secretary of State has designated as a "foreign terrorist organization." They were indicted under 18 U.S.C. § 2339B for raising and giving money to MEK (Mujahedin-e Khalq), the main opposition to the fundamentalist regime in Iran.

The defendants claimed that MEK is not a terrorist organization and sought to prove this as their defense to the charges against them. If MEK is not a terrorist organization, then contributions to it are protected by the First Amendment. Federal law, however, precludes the defendants from challenging the designation of MEK. The federal statute provides that when a group is designated by the Secretary of State as a terrorist organization, review of the designation is possible only in a challenge brought by the organization in the United States Court of Appeals for the

⁴⁹ 392 F.3d 1031 (9th Cir. 2004). A petition for *en banc* review is now pending.

District of Columbia Circuit. Thus, those prosecuted under the statute for aiding a “terrorist organization” cannot bring a challenge to the designation, even though the designation is the basis for the prosecution. The defendants claimed that their donation was protected by the First Amendment’s guarantees of freedom of speech and association.

The United States District Court for the Central District of California declared it unconstitutional to punish individuals for contributing to a terrorist organization without giving them the opportunity to challenge the organization’s designation.⁵⁰ Although there is no First Amendment right to contribute money to a terrorist organization,⁵¹ there is a First Amendment right to donate and solicit for an organization that is not a terrorist organization. Whether an entity meets the requirements for being deemed a terrorist organization is a factual question and should not be deemed true simply because an executive official says so.

Unfortunately, the United States Court of Appeals for the Ninth Circuit reversed the district court in an opinion by Judge Kleinfeld. The effect of the Ninth Circuit’s decision is that individuals can be prosecuted for activities that are protected by the First Amendment without having an opportunity to litigate their First Amendment claims. That just cannot be right.

This is particularly troubling in the context of the statute and the facts of the case decided by the Ninth Circuit. The statute, which was the basis for the prosecution, is enormously broad in its definition of terrorist activity. The statute requires a threat to national security, which includes the “economic interests of the United States”⁵² and includes any threat to use a firearm against any person or property, anywhere in the world, except for personal monetary gain. There is no limit to what groups might be deemed terrorist organizations under this statute and contributors to these groups would face up to fifteen years in prison. The Secretary of State thus has broad latitude in deciding which groups are to be deemed “terrorist organizations.”

In the *Afshari* case, it is understandable why the defendants would want the chance to prove that MEK is not a terrorist organization. MEK is the only major Muslim organization in the Middle East that supports the Middle East peace process. It has aided the United States in terrorism investigations. In 1998 and again in 2002, hundreds of members of the

⁵⁰ United States v. Rahmani, 209 F. Supp. 2d 1045 (C.D. Cal. 2002).

⁵¹ Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000).

⁵² 8 U.S.C. § 1189(c)(2) (2000).

United States House of Representatives issued statements calling the MEK a legitimate opposition to the repressive Iranian regime.

The defendants who are indicted with aiding a terrorist organization simply want the chance to refute the charge by showing that the entity is not involved with terrorism and thus that their contributions and fund raising activities are protected by the First Amendment. In fact, there is Supreme Court precedent on point which clearly indicates that it is unconstitutional to preclude the defendants from challenging the basis for the prosecution against them. In *McKinney v. Alabama*,⁵³ the Supreme Court declared unconstitutional an Alabama statute that allowed an Alabama prosecutor to establish a work to be obscene in one case and then in subsequent prosecutions against different defendants, to preclude relitigation of the earlier judicial designation of obscenity. In other words, under the Alabama law, the defendant had no right to challenge the underlying judicial determination of obscenity or to argue that the material was not obscene.

The Supreme Court declared this unconstitutional and stressed that those prosecuted have a First Amendment right to challenge the basis for their prosecution. The Court explained that “the procedures utilized by the State of Alabama, insofar as they precluded [the proprietor] from litigating the obscenity [of the particular works] violated the First and Fourteenth Amendments.”⁵⁴

There is an obvious parallel between the law in *McKinney* and the statute at issue in the recent Ninth Circuit case. Both decisions involved statutes that precluded litigants from challenging the predicate for their criminal prosecutions. In *McKinney*, this was declared unconstitutional, but in *Afshari* it was upheld. *McKinney* makes it clear that the First Amendment rights of a criminal defendant are not adequately protected just because there are other individuals who have an incentive to litigate the matter. The point of *McKinney* is that a criminal defendant has the right, particularly in a First Amendment case, to challenge the legal basis for his prosecution and to disprove any of the elements of the government’s case.

Moreover, the Ninth Circuit erred in not recognizing the serious due process problems with the designation process. Although designating an organization a terrorist has profound consequences, including criminal penalties for those who aid the organization, there is no process where

⁵³ 424 U.S. 669 (1976).

⁵⁴ *Id.* at 673.

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individuals can challenge the basis for their prosecutions. This complete absence of any form of process is a violation of the Constitution.

The Ninth Circuit's ruling in *Afshari* has troubling implications. There would be nothing to stop the government from establishing any fact in one proceeding and then using that fact as a basis for a criminal prosecution of a different individual. This flies in the face of due process, which prohibits a person from being bound if he or she was not a party to a prior action.

Afshari is another example of liberties being lost as part of the war on terrorism and of a district court protecting rights more than the court of appeals, but the last chapter in this story is not yet written. The defendants are seeking *en banc* review in the Ninth Circuit. The court should grant it and make clear that defendants must be accorded the right to show that their speech is protected by the First Amendment. Failing that, the Supreme Court should grant review and make clear that those prosecuted for their speech and political activities must be allowed to demonstrate that their speech is constitutionally protected.

F. *The Future*

There are a number of other cases where federal district courts have ruled in favor of civil liberties and where it will be interesting to see if this trend of court of appeals reversals continues. In *Doe v. Ashcroft*, the United States District Court for the Southern District of New York, declared unconstitutional the practice of the government obtaining confidential information by issuing "national security letters."⁵⁵ In *Hamdan v. Rumsfeld*, the United States District Court for the District of Columbia held that the military tribunals created by the Bush Administration violated American and international law.⁵⁶ In *In re Guantanamo Detainees Cases*, a federal district court judge ruled that those detained in Guantanamo have stated a claim upon which relief can be granted and thus denied the government's motion to dismiss.⁵⁷

III. WHY?

The cases described above all involve situations in which the district courts ruled in favor of civil liberties and were reversed by the courts of appeals. Perhaps five cases are not enough to constitute a trend worth

⁵⁵ 334 F. Supp. 2d 471 (S.D.N.Y. 2004).

⁵⁶ 344 F. Supp. 2d 152 (D.D.C. 2004).

⁵⁷ 355 F. Supp. 2d 443 (D.D.C. 2005). Another district court in the District of Columbia came to an opposite conclusion see *In re Guantanamo Detainees Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004). Both cases are now on appeal to the D.C. Circuit.

discussing. Maybe it is just the luck of the draw in these five cases that the district court judges happened to be sensitive towards civil liberties and the court of appeals judges in the cases were more inclined towards protecting national security.

However, I intentionally chose cases from five different circuits to make it harder to dismiss the cases as anecdotal. Might there be other explanations besides coincidence? One possibility is that it says something about the method of judicial selection. The White House generally chooses federal court of appeals judges, whereas Senators play a key role in selecting district court judges. Thus, it is to be expected that ideology generally plays a much larger role in picking court of appeals judges than in selecting district court judges. At this point, sixty percent of the federal court of appeals judges – 94 of 162 – are Republican appointees.

Another possible explanation, not at all mutually exclusive, is based on the role orientation of the judges. District judges perceive their roles as, and are much more accustomed to, evaluating the credibility of the evidence before them. The courts of appeals, which are less in the business of evaluating the credibility of witnesses, have been much more willing to defer to the government. This, too, could explain why district courts, more than courts of appeals, have rejected the government's claim of the need to take away civil liberties for the sake of national security.

IV. CONCLUSION

There is much to say about civil liberties and the war on terrorism. In this article I have made a limited point, but one that seems to have been overlooked: federal district courts have generally done a better job in protecting civil liberties in the war on terrorism than the courts of appeals.

The late Justice Louis Brandeis wrote:

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.⁵⁸

Louis Brandeis, of course, never knew John Ashcroft or Donald Rumsfeld, but if he had, he could not have chosen a more apt description.

⁵⁸ *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).