

Judge orders end to indefinite detention of Jose Padilla

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In a ruling that systematically rejects White House claims of unbridled executive power to seize and detain American citizens, a federal judge in South Carolina on Monday ordered the Bush administration to release alleged terrorist Jose Padilla within 45 days or bring charges against him in a state or federal court.

The Justice Department immediately announced it would appeal the decision by Judge Henry F. Floyd to the Fourth US Circuit Court of Appeals, in Richmond, Virginia.

The decision in *Padilla v. Hanft* was all the more remarkable because it was issued by a judge who was appointed in 2003 by Bush himself. This underscores the fact that the Bush administration's trampling on US constitutional norms is so flagrant that it has aroused concerns even among some elements of the Republican Party.

Judge Floyd upheld essentially all the contentions of Padilla's lawyers, who charged that his indefinite detention violated the Second, Third, Fourth, Fifth and Sixth Amendments of the Constitution, as well as the Non-Detention Act, an act of Congress which explicitly prohibits arbitrary detention of any US citizen on the basis of executive fiat.

Padilla, a US citizen, now 34, was arrested May 8, 2002 when he stepped off an airplane at Chicago's O'Hare Airport. He was held in federal custody for a month, until June 9, when President Bush ordered his transfer to a military brig in order to forestall a *habeas corpus* petition filed on Padilla's behalf by a public defender.

At the time, the Bush administration sought to justify the action with lurid claims that a major terrorist attack had been nipped in the bud. Attorney General John Ashcroft said that the arrest had prevented an atrocity comparable to the attacks on New York and Washington on September 11, 2001. The administration provided the media with sensational and uncorroborated details of Padilla's alleged role in a plan to detonate a "dirty bomb"—a conventional explosive wrapped in radioactive material—inside a major US city. Deputy Defense Secretary Paul Wolfowitz subsequently admitted that even if Padilla had intended such an attack, he had made no plans nor taken any actions toward it.

The Padilla case became the occasion for an unprecedented assertion of executive power. Bush issued an executive order

declaring Padilla an "enemy combatant," cutting off his ongoing contact with his lawyer, and instructing the Justice Department to move him from a federal cell in New York City to the Navy brig in Charleston, South Carolina, where he has remained ever since.

Padilla has now been in military custody for nearly 33 months without any charges being brought or any opportunity to confront his accusers or assert his constitutional rights. This is the longest that any US citizen has ever been held without any judicial proceeding, simply on the say-so of the president.

A legal case brought by Padilla's attorneys reached the Supreme Court last June, along with a similar appeal by attorneys for Yasser Hamdi, an American-born Saudi youth who was captured in Afghanistan, turned over to the US military and taken to the Guantanamo Bay detention camp. When Hamdi's American birth and citizenship were discovered, he was transferred to the same South Carolina brig as Padilla, and held under the same conditions: without a lawyer or any access to the courts.

In the *Hamdi* case, the Supreme Court ruled by 8-1 that while Bush had the power to hold a US citizen captured on a foreign battlefield, the government could not hold him indefinitely and had to accord him access to a legal procedure to challenge his detention. Rather than present any evidence that Hamdi was a terrorist—there is no reason to believe that such evidence existed—the Bush administration simply released him from military custody and returned him to Saudi Arabia, in return for a promise to stay in that country.

The Supreme Court's ruling on Padilla's appeal evaded the central issue of executive power, focusing instead on a technicality. The justices required Padilla to refile his case in a federal court in South Carolina, where he was being held, rather than in New York, where he was initially held and where his public defenders brought their suit for *habeas corpus*. The refiled case came before Judge Floyd, but produced a decision far more unfavorable to claims of executive power than the *Hamdi* decision eight months before.

Floyd flatly rejected the claim that Bush has the authority to order the indefinite detention of a US citizen arrested on American soil. "The court finds that the president has no power, neither express nor implied, neither constitutional nor

statutory, to hold petitioner as an enemy combatant,” he wrote.

In a remarkably scathing passage, Floyd challenged the claim that presidential authority in wartime is absolute and unquestionable. He wrote:

“Certainly Respondent does not intend to argue here that, just because the President states that Petitioner’s detention is ‘consistent with the laws of the United States, including the Authorization for Use of Military Force’ that makes it so. Not only is such a statement in direct contravention to the well settled separation of powers doctrine, it is simply not the law. Moreover, such a statement is deeply troubling. If such position were ever adopted by the courts, it would totally eviscerate the limits placed on Presidential authority to protect the citizenry’s individual liberties.”

The 23-page opinion systematically takes up and demolishes the various claims of the Bush administration, in a manner that suggests not only rejection of the anti-democratic and authoritarian position of the White House, but genuine anger on the part of the judge at the cynical, bad faith legal arguments employed.

The Bush administration claimed its actions were based, in part, on the Supreme Court’s 1942 decision *Ex Parte Quirin*, which involved German agents arrested on American soil during World War II after they were landed by U-boats to carry out sabotage. One of the spies claimed American citizenship and sought to challenge his arrest on that basis. The Supreme Court turned him down. Floyd pointed out that these German spies were tried before a military tribunal under a procedure established by Congress. They were not held arbitrarily or indefinitely on an order by the president.

The Bush administration further claimed as a legal basis for its detention of Padilla the Congressional Joint Resolution of September 18, 2001, passed in the wake of the terrorist attacks on New York and Washington, which authorizes “all necessary and appropriate force” against those engaged in preparing or supporting such attacks. Floyd ruled that while the detention of Hamdi, taken on a battlefield in Afghanistan, might have been legal, he did not believe “the same is true when a United States citizen is arrested in a civilian setting such as a United States airport.”

Perhaps the most absurd legal argument was the government’s claim that Padilla was not “in” the United States because he was arrested at an airport as he arrived on an international flight from Europe. Floyd rejected his claim—an attempt to equate Padilla’s arrest with Hamdi’s in Afghanistan—as fatally flawed, noting that the Bush administration had been unable to find a single court precedent supporting this position.

Judge Floyd also rejected the claims of authority inherent in Bush’s powers as commander-in-chief—the main staple of Bush’s lawyers in both the White House and the Justice Department who argued that international treaties against torture could not tie the president’s hands in the interrogation

of suspected Taliban and Al Qaeda prisoners. He cited the famous argument by Justice Robert Jackson, in the 1952 Supreme Court decision overturning President Truman’s seizure of the steel industry during the Korean War: “The Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute also Commander-in-Chief of the country, its industries and its inhabitants.”

The judge wrote: “The Court is of the firm opinion that it must reject the position posited by Respondent. To do otherwise would not only offend the rule of law and violate this country’s constitutional tradition, but it would also be a betrayal of this Nation’s commitment to the separation of powers that safeguards our democratic values and individual liberties.”

He concluded: “Simply stated, this is a law enforcement matter, not a military matter. The civilian authorities captured Petitioner just as they should have. At the time that Petitioner was arrested pursuant to the material arrest warrant, any alleged terrorist plans that he harbored were thwarted. From then on, he was available to be questioned—and was indeed questioned—just as any other citizen accused of criminal conduct. This is as it should be. There can be no debate that this country’s laws amply provide for the investigation, detention and prosecution of citizen and non-citizen terrorists alike.”

This analysis attacks the entire premise of the Bush administration’s self-proclaimed “war on terror.” It rejects the notion that democratic rights and constitutional norms must be suspended as unnecessary obstacles to the defense of the American people against terrorism. Both the tone of the decision and its legal implications confirm that the ceaseless expansion of unchecked presidential power, not the supposed threat of terrorism, represents the greatest danger to the rights of the American people. It also exposes the glaring hypocrisy of a government that claims to be conducting a crusade for “democracy” around the world while it claims for itself virtually dictatorial powers and lays siege to democratic rights within the US.



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