

The Wall Street Journal and the case of Jose Padilla

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On November 25 the *Wall Street Journal*, following the Justice Department's announcement of a criminal indictment against Jose Padilla, published an editorial supporting the Bush administration's assertion of virtual police-state powers to seize US citizens and detain them indefinitely in military jails, stripping them of all legal recourse to contest their imprisonment.

The editorial exemplified the cynicism and dishonesty that are the stock in trade of the *Journal's* editorial page. Dripping with contempt for the bedrock issues of democratic rights involved in the Padilla case, the editorial began: "It's hard to pinpoint the precise moment when Jose Padilla became a liberal icon in the war on terror."

The summary imprisonment of Padilla is a high-water mark in the Bush administration's assault on democratic rights. One month after the arrest of Brooklyn-born Padilla by civilian authorities in Chicago's O'Hare Airport, Bush issued a one-page order declaring Padilla to be an "enemy combatant." Based on no other legal process, Padilla was transferred to a naval brig in South Carolina where he spent 42 months, the first 22 of which he was held incommunicado.

Then-Attorney General John Ashcroft went on national television to announce that the action was taken because Padilla was involved in a terrorist operation to detonate a radioactive "dirty bomb" in the United States. Two years later, however, a deputy United States attorney claimed that the plot was actually to fill New York apartments with natural gas and explode them. There has never been an evidentiary hearing in any court on either accusation.

The government's issuing of a criminal indictment last week meant that Padilla would no longer be held in military detention, but would instead be prosecuted in the civilian court system. The indictment announced by Attorney General Alberto Gonzales accused Padilla of conspiring to wage "jihad" overseas. It made no mention of the domestic terrorism allegations used to justify his being declared an "enemy combatant" and thrown into the black hole of indefinite military detention.

This glaring omission alone makes clear the contrived, if not entirely invented, character of those charges, and the fact that the case was motivated by reactionary political considerations from the outset. Ashcroft's sensational announcement of Padilla's alleged terror plot was part and parcel of a systematic effort by the Bush administration to frighten the American people in order to justify unprecedented attacks on democratic rights at home and the

buildup for war overseas, all in the name of the "global war on terrorism."

The November 21 indictment was timed to head off an impending Supreme Court battle. According to the petition for certiorari filed by Padilla's lawyers, the question presented is whether the president has "the power to seize American citizens in civilian settings on American soil and subject them to indefinite military detention without criminal charge or trial." Gonzales claims that because the administration has released Padilla from military custody to stand trial in a Florida federal court, the issue is now "moot" and, therefore, the Supreme Court should not consider it.

Padilla's lawyers intend to press forward in the Supreme Court on the basis that the Bush administration continues to deem Padilla an "enemy combatant" and may send him back to military custody at any time.

The *Journal* editorial of November 25 lashed out at "liberal reaction to Padilla's indictment," writing, "the implication—contrary to what the courts have ruled—is that he is an innocent man held illegally for three and a half years." This passage is a deliberate misrepresentation of the standpoint of those who have opposed the Bush administration's assertion of quasi-dictatorial powers in the case, as well as court rulings which have gone against the administration's position.

The editorial writers dishonestly conflate the question of whether Padilla was involved in any illegal or hostile actions with whether the Bush administration should be required to establish in a court of law the legal basis for depriving a person of his liberty. They construct this amalgam to discredit those who oppose Bush's wholesale assault on constitutional rights by painting them as terrorist sympathizers.

The editorial cites a reactionary ruling on the Padilla case handed down last September by the Fourth Circuit Court of Appeals as asserting "that the President 'unquestionably' has the right to detain a US citizen who has taken up arms against his country." The wording here is contrived to evade a central issue with vast implications for democratic rights.

How is it to be established that a US citizen took up arms against his country? (In the case of Padilla, the person imprisoned was seized not on a battlefield, but at a US airport). By a one-page presidential order, untested in court? What is implicitly denied is the basic right of a person put in prison to challenge the factual charges made by the state, and the principle that such matters of

fact are settled through a judicial process, in which the accused is presumed innocent until the state proves the contrary.

It is likewise dishonest for the *Journal* to claim that critics of the administration are arguing “contrary to what the courts have ruled.” The editorial asserts that in summarily imprisoning Padilla, Bush was “exercising the authority that other wartime Presidents have used,” and implies that Bush has prevailed on every legal challenge, starting with “a federal judge in Manhattan” who “ruled that the President has the constitutional authority to detain enemy combatants.”

In fact, that federal judge, Michael Mukasey, ruled on December 4, 2002 against the Bush administration’s claims that it could hold Padilla without access to legal counsel or an evidentiary hearing. The Bush administration appealed and lost, with the Second Circuit Court of Appeals ordering that Padilla either be released or charged with a crime. At the oral argument, Judge Barrington Parker, Jr., himself appointed by Bush, said that if the administration’s argument became law, “we would be effecting a sea change in the constitutional life of this country by making changes that would be unprecedented in civilized society.”

By a 5-4 vote, the Supreme Court avoided, on narrow procedural grounds, a review of the Second Circuit decision, claiming that Padilla had filed for habeas corpus in the wrong court. In dissent, Associate Justice John Paul Stevens wrote, “At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people’s rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process.”

The next judge to consider the legality of Padilla’s detention, Bush appointee Henry Floyd of South Carolina, also ruled that Padilla had to be charged with a crime or released. Floyd wrote that if the administration’s position “were ever adopted by the courts, it would totally eviscerate the limits placed on Presidential authority to protect the citizenry’s individual liberties.”

Only the Fourth Circuit, the most reactionary in the nation, in an opinion by right-wing Judge Michael Luttig—a prominent candidate for Bush’s next Supreme Court appointment—upheld the administration’s position. The *Journal* claimed that Luttig was merely applying “the precedent set by the Supreme Court last year in the *Hamdi* case, which concerned another American citizen being detained as an enemy combatant.”

While the position of the Bush administration in the *Hamdi* case was no less anti-democratic and, from a constitutional standpoint, indefensible than in the Padilla case, the circumstances in the two cases were very different. Yaser Hamdi was captured on an Afghanistan battlefield with a detachment of Taliban soldiers. Padilla was picked up by the FBI while walking, unarmed, through an American airport.

What the *Journal* would prefer is a Supreme Court ruling resoundingly upholding the administration’s assertion of police-state powers. “Now that Padilla has been indicted, the appeal is probably moot—which is too bad,” the editorial states, “missing a

chance at a larger victory for executive war-fighting authority.” It continues: “Largely absent from the public debate over one man’s rights has been any discussion of the rights of the rest of us—namely, the right to be protected against enemy attack.”

In other words, “one man’s rights,” including the right to liberty itself, can be abolished at the whim of a president on the basis of an unsubstantiated claim to be protecting “against enemy attack.” And if this can be done to “one man,” it can be done to all men. Under this logic, there is nothing to stop warrantless entries and searches, as well as summary imprisonment, torture and execution, so long as the president claims to be acting in the national defense.

This is how the *Wall Street Journal* treats fundamental rights dating back at least to the Magna Carta of 1215. Article 29 of that document, enacted specifically to prevent the sovereign from arbitrarily arresting and imprisoning perceived enemies of the Crown, states that “no Freeman shall be taken, or imprisoned... but by lawful judgment of his Peers or by the law of the land.” The identical principle is enshrined in the Fifth Amendment of the US Bill of Rights, which provides that “no person shall be... deprived of life, liberty, or property, without due process of law.” This basic concept, that no one can be imprisoned without legal recourse, is embodied in the “great writ” of habeas corpus.

The appearance of such an editorial in a major US newspaper—and the flagrant abuse of presidential power which it defends—must be taken as a warning by the working class. The *Journal* speaks for dominant sections of the ruling elite which have abandoned any genuine commitment to democratic processes. The fact that there has been no serious opposition to Bush’s authoritarian measures from the so-called liberal media or the Democratic Party shows that there is no section of the US financial and political establishment that seriously defends democratic rights.



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