

# The Bush administration and the Padilla case: White House caught in its own lies

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An extraordinary dispute has erupted between the Bush administration and a three-judge panel of the Fourth Circuit Court of Appeals over the status of Jose Padilla, the US citizen who has spent 42 months in a Navy brig after being arrested in Chicago and placed in military detention as an “enemy combatant.”

Late last November, the Justice Department reversed itself and requested that the court agree to remove Padilla from military control so that he could be tried on criminal charges in Florida. The Bush administration was stunned when the Fourth Circuit panel first demanded that it furnish an explanation for its about-face on Padilla’s military detention, and then ruled against the Justice Department’s request.

The Fourth Circuit’s action was all the more unexpected since the same three-judge panel, headed by right-wing Republican J. Michael Luttig, had handed Bush a legal victory the previous September, upholding his right to arrest and indefinitely detain Padilla as an enemy combatant. (See “Court upholds power of White House to jail citizens as ‘enemy combatants’”)

The panel rebuked the Bush administration for dropping all of the allegations it had made in placing Padilla in military confinement in the first place, and lodging entirely new charges in its criminal indictment. In his rejection of the government’s request last month, Luttig made no bones about his belief that the Justice Department’s decision to issue a criminal indictment and remove Padilla from military custody was a maneuver to block Padilla’s case from going before the US Supreme Court, where a petition for review had been filed by Padilla’s lawyers against Luttig’s September ruling.

When Attorney General Alberto Gonzales had announced the criminal indictment, he said it rendered Padilla’s appeal to the US Supreme Court “moot.”

In the latest twist in this public conflict between the Bush administration and the Fourth Circuit, the Justice Department has filed a brief with the US Supreme Court asking it to overturn the court’s ruling against its request to have Padilla handed over to civilian authorities for trial in a Florida court.

However the dispute is ultimately resolved, it has already demonstrated that the case against Padilla was trumped up, if not entirely fabricated, to further the Bush administration’s reactionary political agenda.

When the US-born convert to Islamic fundamentalism was declared by Bush to be an “enemy combatant” in June of 2002—one month after his arrest in Chicago’s O’Hare Airport on a subpoena to appear as a grand jury witness—then-Attorney General John Ashcroft went on national television with a lurid tale of Padilla’s plans to explode a radioactive “dirty bomb” in a US city. Two years later, government prosecutors shelved that allegation and came up with another—planning to fill apartments with natural gas and explode them—but the clear intention from the outset was to use Padilla to give new impetus to White House efforts to whip up fear and panic in the aftermath of 9/11, so as to justify police-state measures at home and build support for the planned war against Iraq.

Padilla was to be the precedent for the administration’s assertion of the power to unilaterally arrest and imprison, indefinitely and without any legal recourse, any individual, including a US citizen in US territory, proclaimed by the president to be an “enemy combatant.” In seizing Padilla and throwing him into the Navy brig, Bush simply issued a one-paragraph presidential order.

The White House has maintained throughout that the president cannot be compelled to go before any court to substantiate his decision to seize a US citizen and place him in a military prison, potentially for life. It has further maintained that any such “enemy combatant” has no legal rights. Accordingly, the Justice Department denied Padilla access to his attorney for 22 months.

This unprecedented use of executive detention flies in the face of the bedrock principle of habeas corpus—first laid down in the Magna Carta of 1215 in opposition to arbitrary arrest and detention by the English monarchy.

The current dispute between the Bush administration and the Fourth Circuit arose from late November’s announcement that Bush had ordered Padilla released from military custody to stand trial on a newly filed indictment charging that in the 1990s he joined a conspiracy to wage “violent jihad” against foreign governments. The criminal indictment was announced two business days before the Justice Department was due to file its opposition to Padilla’s petition in the Supreme Court for certiorari (review) of Luttig’s September opinion upholding the Bush administration.

Having filed the criminal indictment, the Justice Department asserted that the issue of Padilla’s military detention had become moot and should not be subjected to Supreme Court review. Evidently, administration officials were concerned that the high court’s current membership might deliver an unfavorable ruling, especially with the court still transitioning under a new chief justice, and Sandra Day O’Connor not yet replaced by Samuel Alito.

To insure that the case would be ruled moot, administration lawyers filed in the Fourth Circuit what then appeared to be a routine request to vacate Luttig’s September decision and transfer Padilla from military custody to civilian authorities to stand trial.

Although arguing strenuously that the case should not be mooted and should be heard by the Supreme Court because the Bush administration still claimed to have authority to designate Padilla an enemy combatant and jail him militarily, Padilla’s lawyers did not oppose the government’s request that he be removed from military custody and tried in a civilian court. They had been contending all along that Padilla should be released from military custody and either charged with a crime or allowed to go free.

On December 21, the Fourth Circuit panel denied the request to transfer Padilla to civilian authorities for the criminal proceedings. The judges also refused to withdraw their decision that upheld Padilla’s military imprisonment.

On December 28, the Bush administration applied directly to the Supreme Court to overturn the Fourth Circuit's recent order, which it labeled "an unwarranted attack on the exercise of Executive discretion" that "defies both law and logic." It is not known what, if any, action the Supreme Court might take on the emergency request. The high court justices received papers from Padilla's lawyers on December 30, who urged them to take no action until they discuss the case as a whole at their January 13 private conference.

The Supreme Court might accept the case and issue a ruling of its own, most likely shortly before its present term concludes next June, make some other order affecting Padilla's status, or deny review altogether and allow the Fourth Circuit ruling to stand as precedent.

These recent developments are all the more remarkable because the Fourth Circuit, which covers the states of Maryland, Virginia, North and South Carolina, and West Virginia, is widely considered the most reactionary federal appeals court in the United States. For years, the Bush administration has deliberately housed certain prisoners and brought prosecutions within its jurisdiction because it could count on the circuit's ideologically right-wing judges to establish precedents attacking democratic rights in the name of the "war on terror." Moreover, both the original Fourth Circuit opinion and the recent ruling were drafted for the three-judge panel by Luttig, who appeared on the short lists of the Bush administration for its recent Supreme Court nominations.

Even before these recent twists, the government's manipulation of Padilla's case has been without precedent. The original declaration of his status as an "enemy combatant" and his transfer to the South Carolina brig were timed to head off a New York court hearing to quash his grand jury subpoena. His court-appointed lawyer, Donna Newman, immediately filed for a writ of habeas corpus in New York, where she last had contact with her client.

The New York trial judge ruled that the government could hold Padilla as an enemy combatant, but only if it could prove the claim in court, and that it had to allow Padilla access to his attorneys in the meantime. The Bush administration appealed that ruling to the Second Circuit Court of Appeals, which ordered the government either to charge Padilla with a crime or release him.

On the day that its petition for certiorari from the Second Circuit ruling was due in the US Supreme Court, the Bush administration abruptly dropped its claim that it could hold Padilla incommunicado and, after 22 months, allowed him to meet once again with his attorneys.

In June 2004, the Supreme Court evaded substantive review of the Second Circuit ruling on the technical grounds that Padilla's habeas corpus petition should have been filed in South Carolina rather than New York, forcing the case into the Fourth Circuit. At the same time, the Supreme Court decided in another case that the Bush administration could hold Yaser Hamdi, a dual US-Saudi citizen captured among Taliban fighters in Afghanistan, as an enemy combatant, but that Hamdi was entitled to a due process hearing to challenge his classification. There never was such a hearing, because the US military released Hamdi to return to Saudi Arabia.

Padilla filed a new habeas corpus petition in South Carolina, where the government lawyers shifted their allegations again. To shoehorn Padilla's case within the *Hamdi* precedent, they claimed that Padilla had actually carried weapons in Afghanistan against US forces before returning to the United States at the behest of Al Qaeda to carry out acts of sabotage. Padilla's lawyers have steadfastly denied in their court papers that their client intended to carry out any belligerent acts against the United States or its military forces.

United States District Judge Henry Floyd, a Bush appointee, ruled that even on the new facts alleged by administration lawyers, Padilla had to be charged with a crime or released, writing that if the administration's position on holding him as an enemy combatant "were ever adopted by

the courts, it would totally eviscerate the limits placed on Presidential authority to protect the citizenry's individual liberties."

It was Judge Floyd's ruling that the Fourth Circuit reversed last September, falsely equating Padilla's arrest by the FBI in Chicago's O'Hare Airport with Hamdi's battlefield capture in Afghanistan and ordering Judge Floyd to hold a hearing on whether Padilla met *Hamdi*'s criteria for an enemy combatant.

In explaining the Fourth Circuit's order of December 21 denying the government's request to transfer Padilla, Luttig accused the Bush administration of reversing course "to avoid consideration of our decision by the Supreme Court." He also complained that the administration's criminal indictment against Padilla entirely omitted the charges that had been used to place him under military confinement.

The Padilla indictment makes no mention of "dirty bombs," exploding buildings with natural gas, battling US forces in Afghanistan, or any other violent acts directed against the United States, its population, or its armed forces. It does not even allege a link between Padilla and Al Qaeda.

The only conclusion to be drawn from such a dramatic turnabout in the accusations against Padilla is that the government never had serious evidence to support its previous sensational charges. As long as the Bush administration attorneys were proceeding outside of any judicial process, they could make up whatever charges served their political needs. But in a court of law, they are obliged to meet certain standards of evidence to support their charges. Obviously, they could not meet these standards, and therefore were obliged to come up with new charges.

In his ruling of last September upholding the Bush administration's position, Luttig uncritically accepted as true the administration's now-abandoned allegations about Padilla, including the battlefield and domestic sabotage claims. These supposed facts were central to Luttig's argument upholding Bush, because they allowed him to base his ruling on the previous Supreme Court decision in *Hamdi*. One can only imagine Luttig's anger over the administration filing a criminal indictment that drops all of the supposed facts that he personally vouched for in his ruling. The administration's maneuver was, as a result, highly discrediting and damaging for him personally.

There are, however, broader concerns at stake. Obviously alarmed over how the Bush administration was discrediting itself with its crude maneuvering, Luttig pointed to "the consequences of the actions that the government has taken in this important case over the past several weeks, not only for the public perception of the war on terror but also for the government's credibility before the courts in litigation ancillary to that war."

The government's "actions have left not only the impression that Padilla may have been held for these years, even if justifiably, by mistake—an impression we would have thought the government could ill afford to leave extant," Luttig continued, "they have left the impression that the government may even have come to the belief that the principle in reliance upon which it has detained Padilla for this time, that the President possesses the authority to detain enemy combatants who enter into this country for the purpose of attacking America and its citizens from within, can, in the end, yield to expediency with little or no cost to its conduct of the war against terror—an impression we would have thought the government likewise could ill afford to leave extant. And these impressions have been left, we fear, at what may ultimately prove to be substantial cost to the government's credibility before the courts, to whom it will one day need to argue again in support of a principle of assertedly like importance and necessity to the one that it seems to abandon today. While there could be an objective that could command such a price as all of this, it is difficult to imagine what that objective would be."

Thus Luttig, a hard-line advocate of virtually unlimited presidential powers that eviscerate constitutional and democratic safeguards, argues that the administration's machinations over Padilla undermine the

credibility of its legal offensive to expand executive powers in the name of the “war on terror.”

His warning that “a principle of assertedly like importance and necessity to the one that it seems to abandon today” may be jeopardized by the administration’s conduct is particularly significant and ominous. What unidentified “principle” is he suggesting? A declaration of martial law? Suspension of an election? Dismissal of Congress and rule by presidential decree? Mass roundups of political dissidents?

Regardless of Luttig’s profoundly anti-democratic motives in opposing the Bush administration’s tactical shift in the Padilla case, the open conflict that has emerged between his panel and the White House has further discredited the case as a whole, exposing the weak and dubious character of all the charges against Padilla and underscoring the deeply reactionary political motivations that underlay the case from the beginning.



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