Supreme Court shirks Padilla appeal against "enemy combatant" detention

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In a thoroughly cowardly and unprincipled decision, the United States Supreme Court denied the latest petition by José Padilla, the US citizen who was held without charges or a hearing for 42 months—the first 22 of which were incommunicado, without access to family or lawyers—in a Navy brig.

Padilla was accused by former Attorney General John Ashcroft in June 2002 of plotting with Al Qaeda to detonate radioactive "dirty bombs" in the United States. President George Bush declared him an "enemy combatant"—a category his administration invented to deny people the protection of both US and international law. Subsequently, the government has dropped its allegations about a "dirty bomb" plot.

The immediate effect of Monday's ruling is to uphold the reactionary opinion by the Fourth Circuit Court of Appeals—the most conservative court in the United States—which concurred with the Bush administration's assertion of extraordinary executive power to apprehend American citizens on US soil and imprison them as "enemy combatants" for the duration of the "war on terror" (See "Court upholds power of White House to jail citizens as 'enemy combatants'"). The action has been viewed as a tactical victory for Bush, who appears to have avoided an adverse decision in the high court after almost four years of playing legal dodge ball.

The denial of Padilla's appeal for the court to review his case—in legal language a petition for a writ of certiorari—represents the second time the case has been in the Supreme Court since the FBI apprehended the Brooklyn-born convert to Islam in Chicago on May 8, 2002. At that time, federal authorities claimed that they were holding him as a witness to testify before a Manhattan grand jury investigating the September 11 attacks.

Days before a hearing seeking Padilla's release pending what supposedly was to be his appearance before the grand jury, Bush issued the "enemy combatant" declaration, resulting in his transfer from a New York jail to a military prison in South Carolina. Two years later, his habeas corpus petition worked its way up from a New York trial court to the Supreme Court, which ruled 5-4 that the petition should have been filed in South Carolina, where any appeal would be decided by the Fourth Circuit, rather than in New York, which is within the more liberal Second Circuit Court of Appeals.

The habeas corpus petition took nearly two more years to work its way back to the Supreme Court. Last November, less than a week before the Bush administration was due to file its opposition to Padilla's petition challenging the Fourth Circuit's ruling, Attorney General Alberto Gonzales announced that Padilla would be released from military custody to stand trial in Florida on criminal charges of having once supported "jihad" outside the US. The indictment makes no mention of the purported "dirty bomb" plot or the subsequent charge of a conspiracy to blow up apartment buildings that were used to justify his military detention.

The sudden shift in Bush administration tactics was widely seen as a ploy to head off a review of Padilla's case by the US Supreme Court, where there was a strong possibility of a ruling unfavorable to the administration's unprecedented assertion of executive power. The Supreme Court has jurisdiction only over actual "cases or controversies," however, and the Bush administration argued that its release of Padilla from military custody made the dispute "moot," and therefore stripped the high court of jurisdiction.

The Supreme Court's unusual response to the Bush administration's machinations exposes how it sits not as a detached arbiter of legal principles, but rather as a forum where highly conscious representatives of the ruling elite work through its most fundamental disputes.

The briefing in the case was finalized late last year, and

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Padilla's petition was distributed for the justices' regular weekly conference on January 17. It takes only four votes out of nine to agree to hear a case (although after a case is accepted it takes a majority to reverse a lower court ruling) and decisions on whether or not they will be heard are usually resolved during the first weekly conference, or the second, at most. Padilla's petition, however, was considered at eight separate weekly conferences before the decision to deny certiorari.

Associate Justices Ruth Bader Ginsburg, David H. Souter and Stephen G. Breyer voted in favor of reviewing the Fourth Circuit opinion. Chief Justice John G. Roberts, Jr., and Associate Justices Antonin Scalia, Clarence Thomas, Anthony M. Kennedy, Samuel A. Alito, Jr., and John Paul Stevens voted against Padilla. Stevens's vote raised eyebrows among high court observers because he has sided with Ginsburg, Souter and Breyer in the other cases considering the expansion of executive power by the Bush administration and is considered the leader of the four-vote "liberal" bloc.

The two written opinions explaining the action underscore the degree of political maneuvering on the Supreme Court in response to the Bush administration's assertion of near-dictatorial powers by invoking the constitutional provision declaring the president "commander in chief of the Army and Navy."

The decision not to review the case was accompanied by a written dissent from Ginsberg, which begins with a reference to Stevens's own dissent from the earlier Supreme Court ruling that sent the case to South Carolina. Writing that the case "raises a question 'of profound importance to the Nation,'" Ginsburg defined the question as whether "the President ha[s] authority to imprison indefinitely a United States citizen arrested on United States soil distant from a zone of combat, based on an Executive declaration that the citizen was, at the time of his arrest an 'enemy combatant.'"

What such a question poses is nothing less than the survival of the fundamental human right to be free from arbitrary arrest and imprisonment, first established in Anglo-American jurisprudence by the Magna Carta of 1215, and protected throughout the ensuing centuries by the "Great Writ" of habeas corpus.

Moreover—as Ginsburg correctly noted—the case is not "moot" because "nothing prevents the Executive from returning to the road it earlier constructed and defended."

Kennedy wrote separately, joined by Roberts and Stevens, detailing the reasons why these three justices voted to deny review. A written opinion to explain concurring in the denial of certiorari is virtually unprecedented in Supreme Court annals.

Kennedy said that their votes did not turn on whether the case was moot, but rather on "strong prudential considerations disfavoring the exercise of the Court's certiorari power." Rather than using the case to curtail the Bush administration's assault on the most fundamental democratic right, Kennedy asserted: "That Padilla's claims raise fundamental issues respecting the separation of powers, including consideration of the role and function of the courts, also counsels against addressing those claims when the course of legal proceedings has made them, at least for now, hypothetical."

There was nothing "hypothetical" about the three-and-a-half years—most of it incommunicado—Padilla spent in the Charleston Brig. Nor is there any reason to believe that the Bush administration will not employ the same dictatorial methods against Padilla or someone else in the future.

Kennedy recognized this threat, declaring, "Padilla, it must be acknowledged, has a continuing concern that his status might be altered again." But rather than hear the case and prevent that from happening, he asserted that, were the Bush administration to throw him back into the legal black hole of "enemy combatant" status, Padilla "retains the option of seeking a writ of habeas corpus," including before the Supreme Court.

This empty threat is aimed more at preserving the threadbare credibility of the Supreme Court than at warding off new dictatorial measures by the Bush White House.

Among the voices denouncing the decision was that of Amnesty International, which issued a statement expressing disappointment with the "Supreme Court decision not to review Mr. Padilla's appeal. It is very important to challenge the notion the president can at whim place individuals outside the protection of the law. The dangerous presidentially designated category of enemy combatants is both unconstitutional and contrary to the international legal obligations of the United States."

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