

## Dodging Justice

The last-minute indictment of Padilla continues a pattern of evading judicial review.

BY JOSEPH MARGULIES

**O**n Nov. 22, President George W. Bush's administration charged Jose Padilla in federal court with supporting terrorism.

Two weeks before, the Senate endorsed language that, if it becomes law, would strip the federal courts of the power to review future detentions at Guantánamo Bay, Cuba.

These events, undertaken by separate branches of government, may seem unconnected. In fact, they are closely related. The relationship involves the constitutional balance among the three parts of the federal government—particularly, executive and legislative branch efforts to restrict judicial oversight of prisoners held in connection with the war on terror. Thus far, this connection has largely escaped comment.

Padilla, a U.S. citizen, was arrested at O'Hare International Airport in Chicago. He then was designated an "enemy combatant" by the president and placed in a South Carolina brig for more than three years.

His was one of a trio of cases the Supreme Court decided last year. The other two cases were *Hamdi v. Rumsfeld* (2004), involving Yaser Hamdi, another U.S. citizen held in the same South Carolina jail, and *Rasul v. Bush* (2004), which involved Shafiq Rasul, a British citizen and the first-named petitioner in a suit brought by 16 prisoners held at Guantánamo Bay. These three cases were the Court's first attempt to wrestle with the role of the judiciary in policing the bounds of executive power in the war on terror.

At the Supreme Court, Padilla argued that a U.S. citizen captured in the United States could not be deprived of his liberty unless he was charged with a crime. The Court ruled in *Rumsfeld v. Padilla* (2004) that his lawyers had filed in the wrong place (New York, instead of South Carolina), and ordered them to start again with another habeas petition in South Carolina, the location of the detention facility.

Padilla won in the federal district court in Charleston, S.C., and then lost in the U.S. Court of Appeals for the 4th Circuit. Seventeen months later, he was back in the Supreme Court.

The government's response was due Monday, Nov. 28, the day after the Thanksgiving weekend. Instead of addressing Padilla's arguments, however, the administration indicted him in federal court in Miami while seeking an extension at the Supreme Court. The indictment, unsealed Nov. 22, gave Padilla what he had sought all along—the chance to defend himself in federal court.

### AT THE LAST MINUTE

The Bush administration and its defenders (such as Berkeley law professor John Yoo, who formerly worked at the Office of Legal Counsel at the Department of Justice) find nothing untoward in this course of events. To their thinking, Padilla is essentially a cow, and having milked him for all the information he had, the president was finally free to release him from purgatory and bring him into the established legal system.

The administration points to the Supreme Court decision in *Hamdi* to justify its behavior. But *Hamdi* specifically rejected the prisoner-as-farm-animal approach to the war on terror: "Certainly we agree," Justice Sandra Day O'Connor wrote, "that indefinite detention for the purpose of interrogation is not authorized."

This statement required no elaboration because it is so self-evident: At least so long as we call ourselves a constitutional democracy, we cannot accept the notion that the executive branch may imprison someone for as long as it deems proper

without making a prompt accounting of its actions before a neutral tribunal.

And this requirement of judicial involvement helps explain why the administration suddenly decided to indict Padilla. No one should be taken in by the lame suggestion that Padilla was indicted when the cow ran dry.

On the contrary, Padilla's indictment fits within a pattern of events. Over and over again, the Bush administration has taken steps to sand down the roughest edges of its post-9/11 detention policy only when it faces the prospect of what it believes will be hostile judicial oversight. Consider the following:

Throughout the litigation in Hamdi's case, the Department of Defense insisted he was such a threat to national security that he could not be allowed to meet with counsel. The day before his attorneys filed a brief in the Supreme Court protesting his indefinite detention without legal process, the department relented. National security suddenly did not require that Hamdi be held incommunicado.

After the Supreme Court ordered the administration to defend Hamdi's detention in open court, and days before a hearing was scheduled to begin in a Virginia courtroom, the government let him go. No evidence was ever presented to justify Hamdi's nearly three-year imprisonment.

The same pattern occurred with Padilla. After his arrest in Chicago, Padilla was originally held as a material witness in the Southern District of New York. Chief U.S. District Judge Michael Mukasey appointed Donna Newman, an experienced criminal defense attorney, to represent him. She and her colleague Andy Patel filed a number of motions on Padilla's behalf, including one that sought his release.

The day before these motions were scheduled to be heard, the government decided that Padilla was an "enemy combatant" and whisked him to South Carolina, where, despite his previous contact with counsel, the urgent demands of national security suddenly required that he be held incommunicado.

In Padilla's first trip to the Supreme Court, after the government had lost in the lower courts, the demands of national security just happened to relax enough to allow Padilla to meet with his lawyers on the same day the administration filed a brief asking the Supreme Court to review the case.

#### QUICKLY RELEASED

Earlier this year the U.S. military arrested Cyrus Kar in Iraq. Kar, a filmmaker and U.S. citizen, had allegedly been captured in a taxi that contained timers that could be used in homemade explosive devices. But days after the American Civil Liberties Union filed a lawsuit on Kar's behalf, the administration announced that he was innocent. He was quickly released, and no evidence was ever presented to justify his detention.

In December 2003, days after the Supreme Court agreed to hear *Rasul* and amid a growing outcry that prisoners at the Guantánamo Bay base should not be kept in a legal black hole, the administration announced that 140 inmates would be released within the next two months. This was more than double the number that had been released up to that point.

In October 2001 the United States rendered Mamdouh Habib from Pakistan to Egypt, where he was tortured for six

months. In January 2005 the details of his rendition and torture became public. Three weeks later, Habib was home with his family in Australia.

According to CIA officials, who spoke to Australian officials only on the condition of anonymity, he was released to prevent a U.S. court from delving into these details. No evidence was ever presented in open court to justify Habib's detention or rendition.

These uncanny coincidences—popping up just when a court is poised to put the administration to its proof—suggest that it is only the prospect of meaningful judicial review that keeps the executive branch in line. Without the prospect of a judicial intervention, the Bush administration seems quite willing to keep possibly innocent individuals locked up indefinitely.

#### PRESERVING THE WRIT

And that is why the Graham-Levin amendment, adopted by the Senate on Nov. 15, is so misguided. Passed with barely an hour's debate and no hearings at all, the amendment, sponsored by Sens. Lindsey Graham (R-S.C.) and Carl Levin (D-Mich.), strips the federal courts of the power to review future detentions at Guantánamo Bay.

Instead future prisoners, all of whom are aliens unfamiliar with the American legal system, will be held as "enemy combatants." Their only chance at freedom requires that they somehow manage to disprove allegations they cannot see, and whose reliability they cannot test, before a military panel whose superiors have already made public pronouncements that they are not only enemy combatants but are "among the worst of the worst." And they must shoulder this burden without counsel.

After this proceeding—which cannot fairly be called a hearing—prisoners may challenge any departure from the panel's procedural rules in the D.C. Circuit, but they will not be allowed to challenge the government's substantive allegations before a neutral court. And hanging in the balance is imprisonment that may last the rest of these prisoners' lives.

As one would expect of such hastily drafted legislation, the Graham-Levin amendment is thoroughly flawed, but its biggest problem is simply this: It threatens to plunge Guantánamo Bay back into darkness.

In *Rasul* the Supreme Court held that prisoners at the base could force the government to explain to a judge why they were being held.

This is a matter of no small import. The administration stubbornly insists the prisoners at the base are all terrorists.

But intelligence officials now admit that expectations about the culpability of the prisoners have proved inaccurate. In the spring of 2002, Michael Dunlavey, the former head of interrogations at Guantánamo Bay, traveled to Afghanistan to complain that too many "Mickey Mouse" prisoners were being sent to the base. Dozens were consigned to Guantánamo even though intelligence officers, after conducting repeated interrogations at Bagram and Kandahar air bases in Afghanistan, had recommended that they be released.

Nor have matters improved with time. Last fall, Brig. Gen. Martin Lucenti, the deputy commander at the base, told the *Financial Times* that "most of these guys weren't fighting,

they were running.” Lucenti later said he was misquoted, but he has not retracted the statement he made to the German daily *Der Spiegel*, in which he described most of the prisoners as “little fish.”

As one official put it: “We thought the detainees were all masterminds. It wasn’t the case. Most of them were just dirt farmers in Afghanistan.” Lt. Col. Anthony Christino, a 20-year veteran Pentagon intelligence officer who spent more than a year reviewing the information gathered from Guantánamo Bay, says the administration’s claims about the prisoners and their intelligence value are “wildly exaggerated.”

That’s why it’s so important that Congress preserve the Great Writ. Isolated from election pressures or the perceived

need to justify earlier mistakes, courts are free to identify where America has erred in its war on terror and to release the wrongly imprisoned.

Courts at times may be imperfect at dispensing justice, but they remain the bulwark that protects citizens and aliens alike from unwarranted detention. In these turbulent times, Congress must not diminish the precious safeguard of judicial review.

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