

Bush Appointee Rules for Enemy Combatant

If the law in its current state is found by the President to be insufficient to protect this country from terrorist plots, such as the one alleged here, then the President should prevail upon Congress to remedy the problem. -- Judge Henry Floyd

Jose Padilla may someday see either his freedom or at least the inside of a courtroom, where a jury might hear evidence of his guilt or innocence. That is the upshot of a [23-page ruling](#) by U.S. District Judge Floyd, who was appointed by President Bush in 2003, the year after Padilla was taken into custody as an “enemy combatant.”

But let's not celebrate just yet. Padilla, an American citizen who has been charged with no crime, has had victories in court before. And yet May 8 will mark the third anniversary of his detainment, one month in the Metropolitan Correctional Center in New York City, and the rest in the Consolidated Naval Brig in Charleston, South Carolina.

The Story So Far

The first six pages of Judge Floyd's ruling review how Padilla got to this point. On May 8, 2002, Padilla flew from Pakistan to O'Hare Airport in Chicago. He went through customs like an ordinary U.S. citizen, was carrying no weapons or explosives, and was arrested on a material witness warrant from the grand jury investigating the September 11 bombings.

Material witness warrants allow the government to hold someone who is believed to have evidence to give a court. Since September 11, the government has stretched them to hold anyone it finds suspicious, whether they actually are called to testify or not. However, such warrants are limited and are under the authority of a judge. In practice, the government gets to hold people until the judge starts paying attention. In Padilla's case, that took about a month. His court-appointed attorney, Donna Newman filed a petition of habeas corpus in New York on June 11, only to discover that the government had declared Padilla an enemy combatant on June 9 and taken him to South Carolina.

The government justified its action by claiming that Padilla is a terrorist. In particular, it accused him of plotting to explode a “dirty bomb” -- a conventional explosion that scatters radioactive material -- in an American city.

Perhaps fearing that the government might keep her chasing Jose forever, Newman stayed with the New York petition. She lost at the district court level, won at the appeals court, and then had the petition thrown out on technical grounds by the Supreme Court last June. The Court didn't rule on the merits of the case, but refused to let the jurisdiction rules stretch this far. The habeas corpus petition had to be re-filed in South Carolina against the commander of the brig.

So Newman was back in district court, this time in South Carolina, in front of a judge appointed by the same president who signed the declaration that Jose was an enemy combatant. But she did have one advantage this time around: at the same time that the Supreme Court was throwing out her petition, it ruled on the case of the only other American citizen to be declared an enemy combatant -- Yaser Hamdi. (See my account [The Supreme Court Confronts the 9/11 World](#).) Hamdi was captured on a battlefield in Afghanistan rather than unarmed in the United States, so it had been generally assumed that the government had a better chance in his case. But the Court gave a mixed ruling in *Hamdi*. It admitted that the President had the right to detain Hamdi, but ruled that Hamdi had to be provided a chance to dispute the government's charges in front of a neutral judge. It left open the possibility of a military tribunal, if Hamdi's due process rights were sufficiently guarded. (Rather than defend its claims in such a setting, the government released Hamdi, who is now free in Saudi Arabia.)

The Ruling

The judge's ruling came in response to Newman's motion for a summary judgment. Essentially, such a motion claims that the facts already conceded by the other side are already sufficient for a favorable ruling, so there is no need to hold a trial. Judge Floyd agreed.

The government based its case on the following claims:

- The Authorization for the Use of Military Force (AUMF) that Congress passed after 9/11 grants the President the authority to detain enemy combatants, and thus nullifies Non-Detention Act of 1971.
- Even without Congressional authorization, the power to detain enemy combatants is part of the President's constitutional power as commander-in-chief.

Congressional Authorization

The AUMF authorizes the President to use "all necessary and appropriate force" against the 9/11 terrorists and their allies. The Supreme Court ruled in *Hamdi* that it is necessary and appropriate to detain someone captured on a battlefield so that they do not return to battle. Judge Floyd, like the appellate judges who ruled in Padilla's favor in November, 2003, considered his situation to be quite different.

Petitioner in this action was captured in the United States. His alleged terrorist plans were thwarted at the time of his arrest. There were no impediments whatsoever to the Government bringing charges against him for any one or all of the array of heinous crimes that he has been effectively accused of committing. ... Therefore, since Petitioner's alleged terrorist plans were thwarted when he was arrested on the material witness warrant, the Court finds that the President's subsequent decision to detain Petitioner as an enemy combatant was neither necessary nor appropriate.

He quotes the appellate court that ruled in Padilla's favor:

While it may be possible to infer a power of detention from the Joint Resolution in the battlefield context where detentions are necessary to carry out the war, there is no reason to suspect from the language of the Joint Resolution that Congress believed it would be authorizing the detention of an American citizen already held in a federal correctional institution and not arrayed against our troops in the field of battle.

In considering the claim that this makes no difference, Floyd begins to get testy in that Miss-Manners way that judges have.

Nevertheless, Respondent would have the Court find that the place of capture is of no consequence in determining whether the President can properly hold Petitioner as an enemy combatant. According to that view, it would be illogical to find that Petitioner could evade his detention as an enemy combatant status just because he returned to the United States before he could be captured. The cogency of this argument eludes the Court.

Finally, he dismisses a rather bizarre claim:

Respondent next argues that,

Even if there were any doubt about whether the AUMF encompasses combatants seized within the United States, such doubt would be resolved in favor of the President's determination that Congress did in fact authorize petitioner's detention. President's Order, Preamble (declaring that petitioner's detention is "consistent with the laws of the United States, including the Authorization for Use of Military Force").

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 a 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 Limits of Commander-in-Chief Powers

Floyd shows considerable disrespect for the government's second claim. He begins by quoting from a landmark case from the Civil War era, *Ex parte Milligan*:

“The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence.”

The Court held in *Milligan* that the military commission lacked any jurisdiction to try Milligan when the civilian “courts are open and their process unobstructed.” The President may not unilaterally establish military commissions in wartime “because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws.”

He quotes Justice Jackson’s opinion in the 1952 *Youngstown* case:

“Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy. There are indications that the Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute [the President] also Commander-in-Chief of the country, its industries and its inhabitants.”

Judge Floyd concludes with a shot across the bow -- a reminder to President Bush that maybe all this conservative rhetoric ought to mean something. To find for the government in this case, Floyd ruled, would be “to engage in judicial activism.”

What Happens Next?

Judge Floyd gave the government 45 days to either charge Padilla with something or let him go. The government, naturally, will do neither. It has already announced that it will appeal.