

Bush Game on Padilla May Backfire

Contributed by MWC News
Monday, 28 November 2005

Bush Game on Padilla May Backfire

Once again, at the 11th hour, the Bush administration has pulled its punches in the case of Jose Padilla. Using an approach that more closely resembles a game of chess than a system of justice, Team Bush has altered its strategy, while seeking to keep all options open. Its fancy footwork, however, may ultimately backfire.

Op/Ed,

Bush Game on Padilla May Backfire By Marjorie Cohn

Once again, at the 11th hour, the Bush administration has pulled its punches in the case of Jose Padilla. Using an approach that more closely resembles a game of chess than a system of justice, Team Bush has altered its strategy, while seeking to keep all options open. Its fancy footwork, however, may ultimately backfire.

Last Tuesday, just before today's due date for the government's reply to Padilla's petition to the Supreme Court, Attorney General Alberto Gonzales announced the criminal indictment of Padilla. With this move, Bush hopes to prevent the high court from placing limits on his power to hold anyone he designates an "enemy combatant."

I remember the day in May of 2002 that Jose Padilla, a US citizen, was arrested at O'Hare Airport in Chicago. Former Attorney General John Ashcroft interrupted his trip to Moscow to ceremoniously announce on television that the government had foiled Padilla's effort to detonate a radioactive "dirty" bomb on the streets of America. Coming just 8 months after the September 11 attacks, those were fighting words to the American people.

The day of Padilla's arrest, I appeared on MSNBC's Abrams Report. Dan Abrams was foaming at the mouth about "the dirty bomber." When I reminded Abrams, a lawyer himself, about the presumption of innocence, he became furious, slamming his papers on the table.

Bush & Co. were banking on a similar reaction from the American people and the US courts. Team Bush hoped we would just salute and march when they rounded up hundreds of "terrorists," locked them up, and then threw away the key. They hoped we would look the other way when they tortured their prisoners. They hoped that the Imperial President could designate anyone an "enemy combatant" and no questions would be asked.

The government has changed its designation for Jose Padilla 3 times. When Padilla was arrested, he was called a "material witness," being held to testify against the terrorists. A month later, Bush labeled Padilla an "enemy combatant." Padilla was transferred to a military brig in South Carolina and denied any contact with counsel. Even though a federal judge ruled in December 2002 that Padilla was entitled to have a lawyer to challenge his detention, he was not permitted to consult with counsel until March 2004.

Bush finally allowed Padilla to meet with a lawyer in order to pre-empt an unfavorable ruling in his upcoming Supreme Court case in 2004. And while the Court was considering Padilla's case, the Justice Department announced that he had planned to use natural gas to blow up apartment buildings in the US. These 2 moves by the administration were designed to save face and undercut Padilla's case in the Supreme Court.

In June 2004, the Supreme Court ruled in the case of Yaser Hamdi that a US citizen held in the United States as an enemy combatant has a due process right to contest his detention before a neutral decision maker, and that includes the right to counsel. Justice Sandra Day O'Connor wrote for the Court: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

The same day, however, the high court declined to rule on Padilla's case because his habeas corpus petition had been filed in New York, where he was originally held, rather than South Carolina, where he was currently incarcerated. Five of the 9 justices said that Padilla must re-file his petition in South Carolina and name the commander of the military brig, rather than Donald Rumsfeld, as a defendant. Padilla filed a new petition.

In the Hamdi case, Justice Sandra Day O'Connor and 4 other justices limited the definition of "enemy combatant" to someone "carrying a weapon against American troops on a foreign battlefield." But Padilla was arrested in the United States. Padilla's lawyers are asking a question that the Bush administration is afraid the Court to answer: "Does the President have the power to seize American citizens in civilian settings on American soil and subject them to indefinite

military detention without criminal charge or trial?"

Bush will argue that this issue is now moot, since he filed criminal charges against Padilla. But, talking out of both sides of its collective mouth, the Bush administration also maintains that even if Padilla is ultimately acquitted of the criminal charges, it can re-arrest him and hold him as an enemy combatant. Thus, Padilla's lawyers are arguing that the issue is not moot and the Supreme Court should decide it.

Ironically, the charges the government brought against Padilla have nothing to do with dirty bombs or natural gas explosions. The indictment portrays Padilla as a bit player in a conspiracy to murder and kidnap, but not in the United States. And it accuses him of providing material aid to terrorists. It does not even allege he is a member of al Qaeda.

If the government had charged Padilla with dirty bomb or explosion charges, the testimony of the prosecution's only "witnesses" would be inadmissible or unbelievable since they were tortured to implicate Padilla. One of them, Khalid Sheikh Mohammed, suffered excessive use of "waterboarding," a torture technique that simulates drowning. This was confirmed last year in a report by the CIA inspector general. Another review released by US intelligence agencies in April 2003 assessed the quality of Mohammed's information as "Precious Truths, Surrounded by a Bodyguard of Lies."

A second government "witness" against Padilla, Binyan Mohammed, was taken to Morocco to be tortured, according to his lawyer Clive A. Stafford Smith. "He signed a confession saying whatever they wanted to hear, which is that he worked with Jose Padilla to do the dirty bomb plot. He says that's absolute nonsense, and he doesn't know Jose Padilla."

Padilla has been held by the Bush administration in solitary confinement for more than 3 years without criminal charges. Now, in the government's haste to avoid an unfavorable ruling in the Supreme Court, it has charged Padilla with crimes that may be trumped up. For the first time, Padilla will have an opportunity to tell his side of the story in court; it may be a story of harsh interrogation that the government would prefer to keep quiet. Padilla will undoubtedly be offered a plea bargain to prevent his telling the truth about what happened to him while he languished in military custody for so long. The government may offer Padilla a deal like the one it offered John Walker Lindh, who was also facing life in prison. Lindh was allowed to plead guilty to lesser charges on the condition that he not mention the mistreatment he suffered while in custody.

The legal maneuvering by the Bush administration is "a remarkable game of musical courtrooms," said Eugene Fidell, president of the National Institute for Military Justice. "The Justice Department cannot continue changing course each time action from the courts is imminent," according to Rep. Adam B. Schiff (D-Calif.), a member of the Judiciary Committee.

Bill Goodman, Legal Director of the Center for Constitutional Rights, characterizes the charges against Padilla as a "stale conspiracy" and predicts the government will try to have Padilla's petition to the Supreme Court dismissed as moot. "In my judgment," Goodman said on Democracy Now!, "that borders on abuse of process by the Justice Department. What they are doing is manipulating the process in order to sustain an opinion that says the President can virtually shred the Constitution ... and saying someone who had been held in violation of constitutional principles because he was such a danger to the United States because of these allegations, now they're irrelevant. It's shocking. It's an outrage."

Jose Padilla's case may end up being a lose-lose situation for the Bush administration if the Supreme Court decides to go ahead and hear Padilla's petition anyway. Depending on the composition of the high court after Samuel Alito's confirmation hearing, the Court could place some limits on the President's power to indefinitely detain a US citizen arrested on American soil and held as an "enemy combatant." Padilla could refuse a plea bargain and testify about how he was treated - or mistreated - while in custody. And the defense may have a meritorious motion to dismiss the criminal charges because the government denied Padilla due process by its delay in filing the charges against him.

Marjorie Cohn, a contributing editor to MWC News Magazine & t r u t h o u t, is a professor at Thomas Jefferson School of Law, president-elect of the National Lawyers Guild, and the US representative to the executive committee of the American Association of Jurists.

Read Other Columns By Marjorie Cohn