

Justices Won't Review Padilla Case

'Enemy Combatant' Ruling Left Intact as Court Averts Showdown on War Powers

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Tuesday, April 4, 2006; A06

A potential showdown between the Supreme Court and the Bush administration over the president's war powers was averted yesterday when the court declined to hear the appeal of a U.S. citizen who was held in military custody for more than three years.

By a 6 to 3 vote, the court granted the administration's request not to review the case of Jose Padilla, an alleged member of al-Qaeda arrested in Chicago in 2002, because the administration last November met Padilla's demand to be indicted in a civilian court and transferred from a Navy brig to a civilian jail.

That made consideration of his rights "hypothetical," according to an opinion signed by three of the justices in the majority.

The decision is a victory for the administration because it leaves intact an appeals court ruling that upheld the president's authority to detain Padilla as an "enemy combatant." But the win was possible only because the administration had already made its tactical retreat in the face of negative public reaction and uncertain prospects at the high court, legal analysts said. Until a definitive Supreme Court ruling, they said, it remains an open question whether President Bush could legally detain a U.S. citizen in the United States as an enemy combatant in the future.

The vote in past Supreme Court cases, including a previous version of Padilla's case, suggested it would be hard for the administration to muster a five-vote majority.

"It's a victory for the government in a narrow sense because their strategy was to keep the Supreme Court out," said Joseph N. Onek, senior counsel of the Constitution Project, which backed Padilla. "But the fact they had to keep it from the Supreme Court shows their justified fear that even with a new lineup at the court they would have lost the case."

"If you had to pick winners and losers, you'd say the government won and Padilla lost," said Richard Samp, chief counsel of the [Washington Legal Foundation](#), which supported the administration. "But it's not black and white."

Padilla's case represented one of the most aggressive assertions of presidential authority by the Bush administration since Sept. 11, 2001. Arrested at Chicago's O'Hare International Airport on May 8, 2002, Padilla was first held as a material witness, then designated an enemy combatant and sent to a South Carolina brig.

Announcing Padilla's detention, then-Attorney General John D. Ashcroft said that Padilla, a former Chicago gang member who converted to Islam in prison and had been to al-Qaeda camps in Afghanistan, was plotting to detonate a radioactive "dirty bomb" in the United States

Attorneys for Padilla, who could not contact him directly for most of the time he was in the brig, argued that the Constitution prohibits the arrest and detention of a citizen on U.S. soil without charges or access to a lawyer. The idea that a citizen could be placed incommunicado in military custody at the order of the president triggered a broad outcry from civil libertarians.

But the Bush administration argued that such measures were consistent with cases from past wars and that it needed the authority to designate U.S. citizens enemy combatants in order to interrogate them and prevent terrorist attacks.

Under the circumstances, Justice Anthony M. Kennedy wrote yesterday, it would be better to avoid "fundamental issues respecting the separation of powers, including consideration of the role and function of the courts," and let the pending civilian trial against Padilla run its course.

Still, Kennedy warned that Padilla has a "continuing concern" that the president might designate him an enemy combatant if he is acquitted, and "that concern . . . can be addressed if the necessity arises."

Kennedy's opinion was joined by Chief Justice John G. Roberts Jr. and Justice John Paul Stevens. It takes four votes for the court to agree to hear an appeal, known as a petition for certiorari. But Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr. voted against granting Padilla's petition, while only Justices David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer voted in favor.

Ginsburg wrote a solo opinion explaining that she would have agreed to hear the case because "[n]othing the Government has yet done purports to retract the assertion of Executive power Padilla protests."

The justices' unusual step of making public the vote count on a petition for certiorari, accompanied by opinions outlining their internal debate, showed the importance they attached to the case. One sign of that debate's intensity is that Padilla's petition was discussed at eight closed conferences since Jan. 13.

The court had faced Padilla's case in 2004, while he was still in military custody. But at that time, it voted 5 to 4 to dismiss the case, saying that Padilla's lawyers should have brought it in South Carolina rather than New York.

Scalia was in the majority in 2004. But his vote against the government in the case of another U.S.-citizen enemy combatant suggested that he might provide a fifth vote for Padilla on the merits of his case.

A South Carolina district judge ruled in Padilla's favor, but the U.S. Court of Appeals for the 4th Circuit, based in Richmond, upheld his detention in September, citing the president's power under a Sept. 14, 2001, congressional resolution authorizing the use of force against al-Qaeda.

In addition to the dirty-bomb plot, the government said that Padilla had planned to blow up apartment houses using their own supplies of natural gas. But during interrogation, Padilla denied both plots, saying he had outlined them to al-Qaeda leaders so that they would let him quit the war in Afghanistan and return to the United States, according to a summary of his interrogation released by the government in 2004.

The government's Nov. 23, 2005, indictment does not refer to either the gas-explosion or dirty-bomb charges but instead alleges that Padilla conspired to commit terrorist acts abroad and offered material support to al-Qaeda.

The decision to switch tactics against Padilla earned the administration a tongue-lashing from Judge J. Michael Luttig of the 4th Circuit, who wrote in December that it created an appearance that the Justice Department was trying to duck the Supreme Court or had lost confidence in its case.

Padilla was one of only two U.S. citizens held as enemy combatants; the other, Yaser Esam Hamdi, held dual citizenship in the United States and Saudi Arabia and was captured in Afghanistan. His case resulted in a Supreme Court ruling granting him access to a lawyer and other rights. He was returned to Saudi Arabia without facing trial here but was not incarcerated there.

The only remaining enemy combatant in military custody is a non-citizen, Ali Saleh Kahlab al-Marri, a Qatari. His case is still pending in lower courts.

Despite yesterday's decision, the Supreme Court could intervene in any future enemy combatant case involving a U.S. citizen -- if there is one.

"Civil libertarians were able to set a line and back the government off from using this technique," Onk said. "But we'll see if the line holds if there are any more untoward [terrorism] incidents."

The case is *Padilla v. Hanft*, No. 05-533.