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THE PERNICIOUS PUTRESCENT PADILLA PRECEDENT

by Donald E. Wilkes, Jr.



Each case of denial of rights to an individual or to a small minority may seem to be relatively unimportant, but we know now, more surely than ever before, that callousness to the rights of individuals and minorities leads to barbarism and the destruction of essential values of civilized life.—Herbert Lehman

[T]he guilty are almost always the first to suffer those hardships which are afterward used as precedents against the innocent.—Lord Macaulay

We live by precedents. So does our legal system. And so do our rights, whether they are secured under federal or state law:

constitutional rights, statutory rights, common law rights, and other legal rights. Good precedents bolster our rights; bad precedents undermine them.

Recently an anti-individual rights precedent regarding our rights was established. That precedent is pernicious because it gravely weakens and tends to destroy our rights to personal liberty and bodily integrity. It is putrescent because it gnaws those rights into rotten and smelly carcasses. It wildly and dangerously expands the power of government. This ghastly precedent arises out of what happened to the thoroughly unpleasant Jose Padilla, 41, an American citizen born in Brooklyn. There is a booking photograph of Padilla on his Wikipedia entry.

Under the Padilla precedent, the president now has power to order American citizens not charged with any crime arrested on American soil by the military, and to keep those citizens imprisoned indefinitely and without criminal charges in a high security military prison, where they may be held incommunicado, denied counsel, and continually subjected to harsh interrogation techniques. Moreover, the courts will side with the government and grant no relief to citizens so imprisoned who request release on a writ of habeas corpus or sue for damages.

Jose Padilla was, under a material witness arrest warrant, initially taken into custody by the FBI in Chicago on May 8, 2002. A month later, on Sunday, June 9, 2002, Padilla was still in custody under the material witness warrant, detained in a federal

jail in New York City. (The warrant, issued by the federal district court there pursuant to the federal material witness statute, arose out of a federal grand jury investigation of the 9/11 attacks. Ostensibly, the purpose of the warrant was to assure that Padilla would be available to testify as a witness before the grand jury.) An assistant public defender appointed to represent Padilla in connection with the warrant had the previous May 15 filed a motion requesting that the warrant be vacated, and a court hearing on the motion was set for Tuesday, June 11.

(Padilla's detention as a material witness, it should be noted, was outrageously pretextual. Material witness statutes are designed to permit, if requested by the prosecutor and approved by the court, the temporary imprisonment of innocent witnesses to crimes whenever there is good reason to believe that a witness whose testimony is important might absent himself from the upcoming trial of a criminal defendant. Officially, Padilla was detained as a material witness in connection with a grand jury investigation of the 9/11 attacks. In reality, the government did not regard him as an innocent witness, but strongly suspected him of involvement in criminal terrorist activities. Thus, the government actually was claiming that Jose Padilla was a material witness to crimes allegedly committed by Jose Padilla. The government had decided to postpone arresting him on criminal charges, probably to deny him the rights criminal defendants are entitled to. So it was pretending that he was only a material witness. This is not surprising. For many years, federal prosecutors have perverted material witness laws by using them not just against innocent witnesses but against the suspects under investigation. This permits prosecutors to lock up, interrogate, vex, and compile evidence against suspects who have not yet been charged while simultaneously denying the suspects the legal protections available to criminal defendants.)

On that Sunday, while Padilla and his lawyer awaited the hearing scheduled for the following Tuesday, President Bush signed a secret order directing Defense Secretary Donald Rumsfeld to detain Padilla as an "enemy combatant." In the order Bush "determine[d]" that Padilla (1) was "closely associated" with the international terrorist organization al Qaeda, (2) "engaged . . . in hostile and war-like acts, including . . . preparation for acts of international terrorism," (3) "possessed intelligence" about al Qaeda,

and (4) "represents a continuing, present and grave danger to the national security of the United States."

Later that same Sunday, without notifying Padilla's attorney, prosecutors unusually had a private meeting with the district court judge at which they announced they were withdrawing a grand jury subpoena against Padilla, disclosed the existence of the presidential order, and asked for the material witness warrant to be vacated. If the judge did so, prosecutors announced, Padilla would immediately be taken into military custody and transported to a military prison in South Carolina. It was improper, unethical, unprofessional, and unfair for the judge and the prosecutors to hold this ex parte hearing from which Padilla's attorney was deliberately excluded. Nonetheless, that same day (and again without notice to Padilla's lawyer) the judge vacated the warrant, whereupon military police sent by Rumsfeld promptly seized Padilla and briskly conveyed him in handcuffs, chains, and fetters to the Consolidated Naval Brig in South Carolina, where in accordance with calculated preparations prison officials immediately began treating him as if he was a canine-type creature drooling rabies-induced saliva.

Two days later, on June 11, the date the hearing on vacating the warrant was supposed to be held, Padilla's attorney still had not been officially informed of the whereabouts of her client. She learned of her client's location from the media, not the government. She was soon officially informed that she could not visit or communicate with her client.

Padilla remained a military prisoner for nearly 4 years—until Jan. 5, 2006. For most of the first two years—until March 2004—he was held incommunicado from counsel, friends, and family and subjected to harsh, continuing interrogation. In accordance with the "enhanced interrogation" protocols used to question Gitmo prisoners, the cruel interrogation tactics would have included sleep deprivation, forced stress positions, extreme isolation, nudity, liquid diet, extreme environmental stresses, noise and temperature variations, dousing, cramped confinement, and deprivation of sensory stimuli. Distinguishing these barbaric questioning tactics from torture requires the cleverness of a medieval scholastic logician—or a right-wing mentality. Tellingly, the videos of Padilla's interrogations have, the government says, been "lost."

On June 11, the day Padilla's

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