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The Sham of the Padilla Trial

by Jacob G. Hornberger

Jury selection in the Jose Padilla case is now under way in federal district court in Miami, but the trial is nothing more than a sham. Why? Because no matter how the jury rules, Padilla is almost certain to remain incarcerated for a long time.

If Padilla is convicted by the jury, the judge will likely sentence him to serve much of the rest of his life in a federal penitentiary for having conspired to violate federal criminal laws against terrorism.

On the other hand, if Padilla is acquitted, the U.S. military is likely to exercise its post-9/11-acquired power to declare Americans (and foreigners) “enemy combatants” in the war on terror and throw Padilla back into a military dungeon. That is where he was before the government, as part of a clever legal maneuver that was obviously designed to avoid Supreme Court review of Padilla’s request for habeas-corpus relief, converted him from an “enemy combatant” in the war on terror to a federal-court criminal defendant charged with violating federal terrorism laws.

While the military, of course, could decline to exercise its power to retake Padilla into custody after an acquittal by the jury, that course of action is unlikely given the government’s repeated assertion that Padilla is one of the world’s most dangerous terrorists.

So either way the jury rules — guilty or not guilty — the result is almost certain to be the same — Padilla’s stay in jail is likely to be greatly prolonged.

Prior to 9/11, if a criminal defendant, including one accused of terrorism, was found not guilty by a federal jury, he would walk out of court a free man. That was the whole idea behind the right of trial by jury that was guaranteed by the Sixth Amendment. However, the government’s post-9/11 “enemy-combatant” doctrine, which was upheld by the conservative Fourth Circuit Court of Appeals in Padilla’s habeas corpus proceedings, revolutionized our judicial system by giving the military the power to take Americans (and foreigners) into custody as “enemy combatants,” including those who have been acquitted of terrorism charges by a duly selected and impaneled jury in federal district court.

Obviously, the government would prefer that Padilla be convicted by the jury because then the citizenry can simply assume that the federal system is operating normally. No alarm bells would go off, as they would if U.S. military officials carted Padilla out of federal court after a jury announced a verdict of “not guilty.”

If the military should reclaim custody of Padilla after a jury in federal district court has acquitted him, everyone will be able to easily recognize the raw military power that now hangs over the American citizenry, including the power to orchestrate sham criminal justice proceedings in federal district court, ignore federal jury verdicts, and indefinitely incarcerate Americans (and foreigners) accused of terrorism in some military hellhole.

Those who traded away our rights and freedoms for safety after 9/11 would undoubtedly respond to all this with “So what if the military now wields omnipotent power over the citizenry? Security is more important than freedom. Anyway, the military can be trusted not to abuse its powers over the citizenry, and federal officials have promised to restore our rights and freedoms as soon as the terrorist crisis is over.”

Those American ancestors of ours who crafted the Sixth Amendment and the rest of the Bill of Rights and the Constitution, who understood that the biggest threat to the freedom and well-being of the American people was the federal government, and who never would have dreamed of trading their freedom for safety, must be turning over in their graves.

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This article was originally published in April 2007.