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## **The Enemy-Combatant Attack on Freedom, Part 1**

**by Jacob G. Hornberger**

Since an attack on Iran could result in heightened “war-on-terrorism” emergencies here in the United States, this would be a good time to review the issue of “enemy combatants,” especially as the concept applies to American citizens. To analyze the critical importance of the “enemy-combatant” doctrine, we will examine the cases of two people who were incarcerated as “enemy combatants” — Jose Padilla, an American citizen, and Ali al-Marri, a citizen of Qatar. Both were taken into custody on American soil, labeled “enemy combatants,” and incarcerated by the U.S. military.

Padilla was initially arrested in May 2002 at Chicago’s O’Hare International Airport after returning from a trip to Egypt, Saudi Arabia, Afghanistan, Pakistan, and Iraq. At first he was moved to New York and held in custody by U.S. civilian authorities as a “material witness.” The following month, however, he was labeled an “enemy combatant” by President Bush as part of the president’s “war on terror.” Padilla was then transferred to the custody of the U.S. military, which removed him to a military brig in South Carolina.

Padilla’s attorney filed a petition for writ of habeas corpus in New York federal district court. The origins of this particular writ stretch back to medieval England, where the king would oftentimes take citizens into custody and punish them for political reasons. Habeas corpus, which the Framers expressly guaranteed in the Constitution, provides the means by which a person in custody can test the legal validity of his detention.

Here is the way that habeas corpus works: The detainee files his petition for a writ of habeas corpus with a court. The judge issues the writ, commanding the person who is holding the petitioner in custody to appear in his court with the petitioner and show cause for holding the person. There is an evidentiary hearing.

If the judge concludes that there is just cause for holding the detainee, he will deny the petition. On the other hand, if he concludes that there is not just cause, he will order the release of the petitioner. Each side can appeal the judge’s decision to the higher courts. In the federal

system, this would mean an appeal to the federal court of appeals in which the district court is situated. Each side can then appeal that decision to the U.S. Supreme Court.

There are two important factors to keep in mind about the habeas corpus proceeding. First, the judge must decide whether the reason for the detention is valid, and, second, assuming the reason is valid, he must decide whether there is sufficient evidence to support the detention.

For example, suppose the president ordered the arrest and incarceration of a person who gave a speech critical of the president's foreign policy. At the habeas corpus hearing, the government might submit a videotape of the petitioner that actually does show him giving a speech criticizing, say, the invasion of Iraq.

In this case, the judge would order the release of the petitioner because the government would have failed to meet both prongs of the test. Even though the government produced evidence showing that the petitioner delivered the speech, it failed to show that giving a speech critical of foreign policy is against the law. And even if Congress had made such speech illegal, the court could still order the release of the petitioner on the ground that such a law was in violation of the Constitution.

Suppose the president orders the arrest of a person who has shot a federal officer performing his duties. At the habeas corpus proceeding, the government fails to produce any evidence that the petitioner has committed the offense. Even though the reason for the detention is valid (i.e., there is a federal law against shooting federal officers doing their duty), the judge would nonetheless order the release of the prisoner because the government failed to provide any evidence that the petitioner was, in fact, the one who did the shooting.

Thus, in a habeas corpus proceeding involving a suspected terrorist who has been labeled an "enemy combatant," a court must resolve two issues. The first issue is: Is the "enemy-combatant" doctrine valid? Second, if it is valid, is there any evidence that the petitioner is, in fact, an "enemy combatant"? And actually, there is a third issue: How much evidence and what type of evidence must the government produce at the habeas corpus hearing?

### **The proceedings in New York and South Carolina**

At Padilla's habeas corpus hearing, the district court upheld the enemy-combatant doctrine and ruled that there was sufficient evidence to conclude that he was, in fact, an enemy combatant. His petition for writ of habeas corpus was denied.

Padilla appealed to the Second Circuit Court of Appeals in New York, which overturned the district court's ruling. The court rejected the enemy-combatant doctrine for Americans arrested on American soil, effectively holding that if the government had evidence that Padilla had committed some act of terrorism, it would have to secure a criminal indictment against him and prosecute him in federal district court. Since the U.S. military was holding Padilla under no valid justification, the fact that the government was able to produce incriminating evidence was

irrelevant because, again, both prongs of the test must be met. What the court was effectively telling the government was: Charge Padilla in federal district court with a criminal offense or release him.

The government appealed that decision to the U.S. Supreme Court. The Supreme Court refused to rule on the merits of the case and instead dismissed it on a procedural ground. The Court ruled that the original petition should have been brought in a South Carolina federal district court rather than a New York federal district court because that was where Padilla was in military custody. In their dissent to this ruling, however, some of the justices were clearly sympathetic to Padilla's arguments.

Padilla then started all over, filing a new petition for writ of habeas corpus in a South Carolina federal district court. The South Carolina district court rejected the enemy-combatant doctrine, effectively holding the same thing that the Second Circuit Court of Appeals had held. The South Carolina court also effectively told the government: Charge Padilla in federal district court or release him.

The government then appealed to the Fourth Circuit Court of Appeals in Richmond, which is reputed to be the most conservative federal appeals court in the nation. Upholding the enemy-combatant doctrine, in June 2005 a three-judge panel of that court overturned the South Carolina district court's ruling.

While Padilla was appealing that decision to the U.S. Supreme Court, the government pulled a very clever legal maneuver. In November 2005 — three years after he had been taken into custody — the government secured a criminal indictment against Padilla and transferred him from military custody to civilian custody for criminal prosecution for terrorism in a Florida federal district court. That meant that Padilla's habeas corpus appeal to the U.S. Supreme Court was now moot, because he was no longer in military custody. With the government's clever legal maneuvering, the nation was left with the Fourth Circuit's decision upholding the enemy-combatant doctrine and without much of a chance that the Supreme Court would have the opportunity to consider and possibly overturn that decision any time soon.

On August 7, 2007, a federal jury convicted Padilla of criminal offenses relating to terrorism.

### **The importance of the Padilla case**

It is impossible to overstate the importance of the principles involved in the Padilla case for the American people. Ordinary Americans might ask, "Why get all upset about some guy named Jose Padilla? He's just a terrorist."

What such Americans fail to realize, however, is that Padilla was just the test case whose legal principles would then apply to all Americans. That's why groups dedicated to civil liberties and especially the Bill of Rights (including The Future of Freedom Foundation) have focused

such an inordinate amount of attention on the Padilla case. They understood that if the enemy-combatant doctrine would be upheld with respect to Padilla, the government would then be able to apply it against all Americans, including dissidents, protesters, and critics of the government.

The enemy-combatant doctrine constitutes the most direct and dangerous threat to the freedom of the American people in the history of our country. Prior to 9/11, terrorism was considered by almost everyone a federal criminal offense. If anyone, including an American, was accused of terrorism, the government had to secure a grand-jury indictment against him and prosecute him in U.S. district court. In that proceeding, the accused would be entitled to all the rights and guarantees enumerated in the Bill of Rights, such as the right to counsel, right to due process of law, right to trial by jury, right to be free from unreasonable searches and seizures, right to confront witnesses, and right against self-incrimination.

The fact that terrorism has historically been considered a criminal offense was reflected, for example, in the federal criminal prosecutions of convicted terrorists Ramzi Yousef, one of the architects of the 1993 bombing of the World Trade Center, and Timothy McVeigh, the man who bombed the Oklahoma City federal building. Indeed, even in the post-9/11 era, the government has prosecuted one of the 9/11 co-conspirators, Zacarias Moussaoui, in federal district court, as well as other terrorist suspects in Michigan, Florida, and elsewhere.

What was revolutionary about President Bush's treatment of Jose Padilla was that for the first time in U.S. history, the government was claiming the power to treat suspected terrorists in two alternative ways: (1) through the normal federal-court route; and (2) through the enemy-combatant route. It would be difficult to find a more perfect violation of the age-old principle of the "rule of law," the principle that holds that all people should have to answer to a well-defined law for their conduct rather than to the discretionary decisions of government officials. With the post-9/11 option to treat suspected terrorists in two completely different ways, each with markedly different consequences, the president and the Pentagon converted the United States from a "nation of laws" to a "nation of men."

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