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Donna Newman

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THE JOSE PADILLA HABEAS CASE: A MODERN DAY STRUGGLE TO PRESERVE THE GREAT WRIT

*Donna Newman**

Thank you very much for having me here today. The real fight, the heart of the fight in the *Jose Padilla* case¹ was a fight against the administration's attempt to diminish the great writ—the writ of habeas corpus. It was a fight to establish that no one, not even the President, is above the law—that not even the President can detain an American citizen indefinitely without bringing a charge.

Mr. Padilla, as many of you may know from the news, is currently standing trial in Florida.² That is a criminal trial. That case has nothing directly to do with the case in which I represented Mr. Padilla, although the prosecution was the remedy I sought. I represented Mr. Padilla in his habeas corpus petition against the government in which we asserted that Mr. Padilla was being held contrary to his constitutional rights because he was being detained without being charged with a crime. We therefore sought either his release or his being charged with a crime for which he would have the opportunity to stand trial.

In May 2002, Mr. Padilla was arrested at Chicago Airport on a material witness warrant³ issued from the Southern District of New York demanding his appearance and testimony before the grand jury sitting within that district. I was appointed by a judge sitting in the Southern District to represent Mr. Padilla.

* Opened her own practice in 1991 and maintains offices in New York and New Jersey. She predominately practices in federal court, specializing in representing criminal defendants before district courts and courts of appeals. She has represented over 500 clients in matters ranging from simple fraud to complex security fraud and racketeering cases.

¹ Jose Padilla, one of the first Americans seized on U.S. soil designated an “enemy combatant,” was accused of planning to detonate a radioactive “dirty bomb.” *Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004) (denying petition for habeas corpus based on jurisdictional grounds); see Abby Goodnough & Scott Shane, *Padilla Is Guilty on All Charges in Terror Trial*, N.Y. TIMES, Aug. 17, 2007, at A1 (commenting on how trial charges were not related to allegations that Padilla was planning to detonate a “dirty bomb”).

² *United States v. Hassoun*, No. 04-6001 (S.D. Fla Aug. 16, 2007), available at <http://fl1.findlaw.com/news.findlaw.com/cnn/docs/padilla/uspada81707juryverdict1.gif> (noting a jury conviction for criminal terrorism related charges).

³ 18 U.S.C. § 3144.

A material witness is an individual whom the government believes has information about an investigation and the government issues the warrant to compel the witness' testimony and to keep the individual in jail until he testifies before the grand jury.⁴ However, about a month after his arrest as a material witness, the government became frustrated with the process and decided to take a more radical step to assure their receipt of information from Mr. Padilla.

On June 9, 2002, President Bush declared Mr. Padilla to be an "enemy combatant." The government used that designation to circumvent the grand jury process, in fact all process, in fact the Constitution. Rather than charge Mr. Padilla with a crime which would mean certain Constitutional rights would kick-in, such as the right to have a grand jury pass on an indictment, the right to a speedy trial, etc., the government asserted that by declaring Mr. Padilla an enemy combatant, he had no rights. In short, they claimed, the military had a right to detain Padilla indefinitely, not charge him with a crime, interrogate him, deprive him of access to counsel, and to keep him in solitary confinement. And that is exactly what they did from June 2002 until April 2004.

Their legal analysis was flawed. They distorted international law, they distorted American case law from World War II and the very term "enemy combatant" was invented.⁵ In any event, the term was misapplied to the Padilla situation.

I began by saying the *Padilla* case was about the great writ because it was a case in which we questioned the President's authority to detain an American citizen seized on American soil indefinitely without a charge. History, as you know, repeats itself.

In 1627 Charles I imprisoned five knights,⁶ one of whom was Sir Thomas Darnel.⁷ The knights' offense was their refusal to pay

⁴ *Id.*

⁵ DEPUTY SEC'Y OF DEF. DEP'T OF DEF. COMBATANT STATUS REVIEW TRIBUNAL PROCESS 1 (2006), available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>. The Department of Defense defines an enemy combatant as:

[A]n individual who was part of our supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Id.

⁶ See J.S. Guy, *The Origins of the Petition of Right Reconsidered*, 25 HIST. J. 289, 291 (1982) (Hereinafter *The Origins of the Petition*); see generally J.H. Baker, 6 THE OXFORD HISTORY OF THE LAWS OF ENGLAND 94 (2003).

⁷ *Id.*

the taxes the King imposed to finance his war. Sir Darnel and his cohorts refused to pay the tax to voice opposition to the King's war against France and Spain.⁸ The King, clearly unhappy with this demonstration of opposition, claimed a right by "my special command," "as a matter of state," to imprison the knights without charging them with an offense.⁹ The Attorney General provided the legal basis (sound familiar?) and emphasized that the Crown had an overriding interest in protecting the people from a conspiracy that threatened the common good.¹⁰ Therefore, he claimed he was within his right to imprison these knights. No judge, not even Parliament, he claimed, could intervene with the Crown's actions.¹¹ Eventually, the King released the knights. Parliament, however, did not let things rest (I guess Parliament was more outraged at the treatment of their citizens than Congress today). They passed the Petition of Rights, which prohibited the arrest and detention of somebody without a charge because such an action violated the very essential right of due process that was guaranteed by the Magna Carta.¹² The essentials of the Petition of Rights were codified a half a century later in the Habeas Corpus Act of 1679, which guaranteed the right to contest detention by a sovereign.¹³

The Founding Fathers were keenly aware of the dangers inherent in sovereign/executive power and sought to guard against it. Alexander Hamilton wrote in the Federalist Papers No. 84, that the most "dangerous engine of arbitrary government" is "confinement of the person by secretly hurrying him to jail where his sufferings are unknown or forgotten."¹⁴ Therefore, the Founding Fathers specifically limited the Executive's power and in particular included in the Constitution itself in Article I, Section 9, Clause 2, "the privilege of the writ of habeas corpus shall not be suspended, unless when in . . . Cases of . . . Invasion the public safety may

⁸ *Id.*

⁹ *Darnel's Case*, 3 HOW. ST. TR. 1, 37 (K.B. 1627) (argument of Attorney General Robert Heath).

¹⁰ *Id.* at 45; King Charles I argued that detention without filing charges was legal "by his majesty's special commandment." See *The Origins of the Petition*, at 291-93; see also, Robert S. Walker, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY 67 (1960); Mark Kishlansky, *Tyranny Denied: Charles I, Attorney General Heath, and the Five Knights Case*, 42 HIST. J. 53, 60 (1999).

¹¹ *Id.*

¹² See The Constitution Society, Records Concerning Parliament, http://www.constitution.org/sech/sech_092.htm (last visited Nov. 1, 2007).

¹³ See *Id.* Habeas Corpus Act, <http://www.constitution.org/eng/habcorpa.htm> (last visited Nov. 1, 2007).

¹⁴ The Federalist No. 84, at 438 (Alexander Hamilton) (Beloff ed. 1987) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *136).

require it.”¹⁵ This occurs only when martial law has been declared. Congress, under a plain reading of the Constitution, I suggest, is the only body which can suspend the great writ.

In the *Padilla* case, the government never admitted to suspending the writ, but their actions speak louder than their denials. What they did was tantamount to suspending the writ as to him. They held Padilla without a charge and said they could hold him at their discretion without a charge. They said he could contest the detention—i.e. file a writ—but of course he was being held incommunicado which made it for all practical purposes impossible for him to file his writ. On top of that, they said his attorney could prosecute his habeas writ but denied him access to the attorney who was representing him. As a final effort to effectively deny him the power to prosecute the writ, they argued that I could not bring the writ on his behalf and insisted this man being held incommunicado, whom I could not see, must sign the writ himself. In short, they attempted to diminish, dilute and effectively eliminate Padilla’s right to habeas corpus. At the bottom of their argument, similar to King Charles I, the government claimed they need not answer to anyone.

The Supreme Court disagreed. As then-Justice Sandra Day O’Connor in *Hamdi v. Rumsfeld* stated:

As critical as the government’s interests may be in detaining those who actually pose an imminent threat to national security, history and common sense teach us that an unchecked system of detention carries the potential to become a means of oppression and abuse We reaffirm today the fundamental nature of an [American] citizen’s right to be free from involuntary confinement by his own government without due process of law.¹⁶

The government, as I stated before, finally had to relent. They charged Mr. Padilla with a crime and, as I mentioned before, Mr. Padilla is now on trial in Florida on the charges they brought to trial.¹⁷ It is important to recognize that before this occurred, Padilla had to fight for a right which was long established: his right to habeas corpus. It is indeed a chilling thought to envision what would have happened to Padilla had he not been first arrested as a material witness and counsel assigned. Would he have been taken by the military, held incommunicado, and subject to horrific inter-

¹⁵ U.S. CONST. art. 1 §9, cl.2.

¹⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507, 350–51 (2004).

¹⁷ Abby Goodnough & Scott Shane, *Padilla Is Guilty on All Charges in Terror Trial*, N.Y. TIMES, Aug. 17, 2007, at A1.

rogation without the ability to assert his right to habeas relief? In short, we have no guarantee that this chilling vision cannot be reality. I leave you with that vision to spur vigilance of this most important writ, which was established to safeguard against executives who act outside the law.

