TomPaine.common sense
Progressive insight and action. Every day.
A Project of the Institute for America's Future

Padilla Can't Wait
Aziz Huq
April 11, 2006

Aziz Z. Huq is associate counsel at the Brennan Center for Justice at NYU School of Law. He is co-author of Unchecked and Unbalanced: Presidential Power in a Time of Terror, to be published in 2007 by the New Press.

Can a U.S. citizen be locked up for three-plus years without access to a court or opportunity to challenge the government's reasons for detention? Today, the answer in America is a provisional "yes." And last week the government took one important step toward cementing this "yes" into a permanent power.

In legal briefs and internal Justice Department memoranda, the administration has argued since 9/11 that the president has authority to detain anyone—U.S. citizen or non-citizen—without charge, without a hearing before a neutral magistrate and without access to the evidence lodged against them. First invoked against members of the Taliban and Al Qaeda in the ebb of Operation Enduring Freedom, this presidential detention power soon cast a shadow over the United States. In June 2002, President George W. Bush designated Jose Padilla, a U.S. citizen then behind bars in a Manhattan jail, an "enemy combatant." Per the government, Padilla was entitled to no opportunity to learn the evidence against him or present a meaningful defense.

Padilla remained in presidential lock-up for 42 months. His challenge to indefinite detention came to a head last year, when the generally conservative Fourth Circuit Court of Appeals signed off on the government's legal argument that the whole of the United States is a battlefield, and the president can lock up anyone, anytime by designating them an "enemy combatant."

Padilla was then "released" from executive detention into the custody of the regular criminal justice system mere days after his lawyers asked the Supreme Court to take the case (Padilla had once previously been before the Supreme Court in 2004, only to be sent back to trial court on a technicality). Even the Fourth Circuit issued a sputtering indictment of what seemed cynical maneuvering on the Justice Department's part to avoid disfavorable Supreme Court review.

The court, however, has now denied review. In an elucidatory opinion issued on April 3, Justice Kennedy pointed out that Padilla is no longer subject to indefinite detention. Civil libertarians rightly stress that at least seven justices, however,

signaled concern last week about the “fundamental issues respecting the separation of powers, including considerations of the role and function of the courts,” suggesting the government would get no easy ride from the Court should the issue reappear.

But in constitutional law, as in real estate, there are three factors that make all the difference in the world: Timing, timing and timing. The administration’s win—and we fool only ourselves by refusing it see its true character—lies in its successful postponement of Supreme Court reckoning. And delaying a decision allows time for changes in the Court’s approach and views.

Consider what can shift in the interval between now and the time the Court may next be called on to sketch the limits of presidential detention power. Bear in mind that this may be not months, but years, away.

No less than any other political institution, the Supreme Court stands in the cross-winds of the political moment. The former chief justice, William Hubbs Rehnquist, knew this. Like his old boss, Justice Robert Jackson, Rehnquist was too canny to endorse wholeheartedly the self-serving nostrums of self-proclaimed “originalists” like his colleague Antonin Scalia: He knew that today’s politics make a difference to judges.

In a 1986 article, Rehnquist described what he saw in 1952 as a young law clerk for Justice Jackson during the Court’s consideration of the “Steel Seizure” case, a landmark decision limiting presidential power. The justices, Rehnquist observed, could not help but notice that the Korean war was deadlocked, no victory in sight, the draft was increasingly unpopular and President Truman’s popularity had fallen to “its nadir” (The Jon Stewarts of the day joked that “To err is Truman”). The justices read the morning papers, Rehnquist explained. And so, a case the government looked poised to win easily turned into a major defeat for presidential power advocates.

The similarities today are striking: A president pummeled in the rating. A foreign war that does not look winnable (at least until the administration changes the definition of “victory” in some Orwellian fashion). And an array of domestic policies that are increasingly bones of domestic contention. Most significant here, the different imbroglios of NSA warrantless wiretapping and port management cast into doubt the administration’s credibility and competence on national security.

This is hardly an ideal time, from the government’s perspective, to test bounds of presidential power. Moreover, while we all hope or pray that nothing further happens in the American mainland, it seems likely that further atrocities, not least in Europe or elsewhere, may well take place. There will be moments, the government must know, when the tang of fear in the air will be sharper than today.

And there is another morbid and deeply regretful factor. The Court's membership has recently changed after a long period of stasis. Doubtless, government lawyers are well aware of the possibility of further changes sometime in the future. Doubtless, they reckon such changes are unlikely to hurt their cause.

In a fascinating aside to his 1986 article, Rehnquist implicitly suggests one final reason why the government today wins by delaying reckoning. Rehnquist explained that one of the government's pivotal mistakes was to make an aggressive case for unchecked presidential power in a lawsuit in the public eye, inciting judicial opposition and public ire.

The same is true now. Indefinite detention is also at issue in a set of less noticed cases. Several legislative proposals for comprehensive immigration reform include provisions that permit indefinite detention of certain non-citizens. To be sure, there is limited judicial review, but often so curtailed as to be functionally meaningless. As David Cole persuasively argues, this is a wedge's thin end, opening up the possibility that unlimited detention for a broader category of residents and citizens may be permissible under statutory and constitutional law. The next time the government argues for indefinite detention power, no one may be paying attention. And no one may even notice when the Court approves that power.

The administration succeeded last week in drawing the question of presidential detention out of the public limelight. This question, however, will not go away. At a time when the threat from terrorism shows no sign of abating, government will always seek the power to respond in ways that bypass normal judicial protections. Now, whether the administration will gain by stealth the power of indefinite detention at issue in the Padilla case depends on more than just the Supreme Court: It depends as much on the vigilance of a lively press, a bar dedicated to the rule of law, and an informed, engaged public.