



Photo by AP Images/Wilfredo Lee

QUESTION

of

Authority

**Andrew Patel defended Jose Padilla,
suspected of plotting a “dirty bomb” attack in the United States**

By May Mon Post and Dr. Mark Franek

Andrew Patel may be the only lawyer in the United States who stood at Ground Zero in Lower Manhattan moments before the Earth shook and then, in the tragedy's terrible wake, went on the defend suspected terrorists - just as he did before the World Trade Center towers fell. His clients often have uncommon names like El Sayyid Nosair - the convicted murderer suspected of masterminding the 1993 World Trade Center bombing from prison - and Jose Padilla - the man whose case is the basis of this story. His opponents often have unlimited resources. His job is not an easy one.

The federal government arrested José Padilla, an American citizen, in Chicago on May 8, 2002, and detained him as a material witness until June 9, 2002, when President Bush designated him an “enemy combatant.” Padilla was subsequently transferred to a military prison in South Carolina where he was held, without trial and in extreme solitary confinement, for more than three-and-a-half years on suspicion of plotting a radioactive “dirty bomb” attack inside the United States. For more than two years he was denied counsel. After pressure from civil liberties groups and lawyers, including Patel, the Padilla case was eventually moved to a civilian court.

In a dramatic turn of events, the federal government's November 2005 indictment did not mention the alleged crimes that had lead to Padilla's “enemy combatant” status and his 43 months of solitary confinement. No mention of a “dirty bomb”, no mention of planned attacks – or of “planning to plan” attacks – on U.S. soil, and no direct references to Al-Qaeda. Instead, the indictment accused Padilla of conspiring to murder, kidnap and maim people overseas. Furthermore, the indictment was handed down several days before a pending U.S. Supreme Court hearing on the Padilla case, which would have lead to a showdown between the Supreme Court and the president, and would have likely clarified the limits

of the president's power during wartime.

The change in strategy ultimately worked in favor of the government. After only three days of deliberation on Aug. 16, 2007, a federal jury in Miami, Fla., found Padilla guilty of charges that he conspired to kill people in an overseas jihad and to fund and support overseas terrorism. He was sentenced to 17 years and 4 months in prison. In one of his first public statements after the conviction, Patel observed: “You have to excuse me. It's hard to summarize what, to me, is a human tragedy in a sentence or two. We were very sad, very disappointed, and had been hoping for a different verdict. We had been hoping that José would be home with his family today.”

Recently, Patel spoke to *Philadelphia Lawyer* editorial board member May Mon Post about the Padilla case. Post and writer Mark Franek took the transcript from the telephone interview and, where it seemed appropriate, re-ordered Patel's answers and added boldface type. The goal was to tell a story in the manner of *Esquire*'s magazine's “What I've Learned” column.



On the morning of 9/11, I was right here. I was in Lower Manhattan. I will never forget.

I was so close from where I was standing. We could not see the building fall. According to *The New York Times*, if you look at the photographs of the South Tower, which was the first one to fall, and there's an amazing photograph of it just starting to collapse. And if you look at the bottom of the photograph, you'll see this brown cloud. According to *The Times*, that cloud was moving at 140 mph. I can tell you that from where I was standing, which was two blocks away, when something's coming at you at 140 mph, you get two steps and then the lights go out. I actually put my hand in front of my face and could not see it. You couldn't see, you couldn't breathe. I had been standing shoulder-to-shoulder with two people from my office, and they just disappeared. I eventually – if you've seen people covered with white ash – looking like ghost people. I was one of those people. I had chemical burns in my eyes from the material. As I explained to a friend of mine, for some of us, 9/11 was not a television experience. When you say I will never forget it, that much is beyond the shadow of doubt.

The Padilla case is about Mr. Padilla and the constitutional principles that came out of this case, but it wasn't really about the Constitution [itself]. That sounds like a trite answer, but it's really not. This case concerned, as the Supreme Court eventually put it, the authority of the most powerful office on the planet. Can the president order someone to be held by the military as a matter of executive whim? I don't use the word "whim" lightly. But when you're a judge, jury and sentencer, then whim becomes the appropriate word.

The notion that the law applies equally to one and all broke down in this case. Here we had the president himself say: "I order that this person be detained by the United States military," and essentially argue that no court would have the authority to overrule, limit, or interfere with the president's power to order

someone's detention. And that was really an extraordinary claim of authority by the president of the United States.

In the Southern District of New York and in almost all of the federal courts, there is a panel of private attorneys who have sufficient experience in federal criminal investigations where the court will ask us to represent individuals who can't afford to hire an attorney. I am a member of what is called the Criminal Justice Act Panel in Manhattan. It was Chief Judge McCavey who asked me to get involved with the Padilla case. There's a very clear rule of federal litigation; when a judge asks you to do something, the answer is always "yes." That's how I got involved in this case and these cases.

The public basis for initially declaring Padilla to be an enemy combatant was a declaration by an employee of the Department of Defense – a lawyer – containing certain factual allegations of which that individual had no personal knowledge. In other words, it was entirely hearsay.

At that time there was no redefined definition of an enemy combatant. It basically comes out of a Supreme Court decision from World War II, and at that point what it really meant was an "enemy

combatant" has no such definition. If it sounds bizarre, that's because it was.

The general allegations were that they had information – there was what was called the Mobbs Declaration, which was the basis for the president's order, and there was an affidavit from an FBI agent that was the basis for the warrant for Padilla's arrest. Michael H. Mobbs, Special Advisor to the Undersecretary Defense for Policy, declares that he is a government employee in the Department of Defense, government reports in records about Padilla, relevant to the president's June 9 determination that he is an enemy combatant – I'm sort of paraphrasing this. The information is derived from multiple intelligence sources regarding Abu Zubaydah and Binyama Mohammed. The term "intelligence source" is a broad term. It can be anything from a newspaper report to anyone who talks to someone who then talks to an intelligence officer. As to these two intelligence sources, the government has admitted that Zubaydah was waterboarded. There has been a great deal of litigation and media coverage concerning Benjamin Mohammed. He experienced a rendition to Morocco where he was treated in a manner that would make waterboarding seem like a day in the park. It is distressing that the warrant [in Padilla's case] was supported only by

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soldier." But it's been somewhat more defined as the litigation went along. But this is not a term that prior to this round of activity by the United States government was generally used in the discussions of the law of war. For example, if the term "negligence" is a legal term that lawyers and jurors understand, and the court can define, and has defined, there will be a dispute about whether a specific act is or is not negligent. The term "enemy

information obtained by torture.

When the source of information is obtained by torture, and the person providing information has no personal knowledge of the source, then you have unreliable information being reported as hearsay. So you have unreliability on top of unreliability, and based on that unreliability, which the government has now to a certain extent admitted, wouldn't

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stand up in court. You have someone being thrown into a military brig and held in complete isolation for more than three years. In other words, just because someone wants to say something bad about somebody, doesn't mean it's true.

For example: If the government obtained an affidavit that said [a person named] Muhammad had met with you, and you had planned to perform a terrorist act in the United States, but there's no statement from Muhammad, the person who gives the statement never met Muhammad, there's no information about how the statement was obtained from Muhammad. And yet, you're thrown in jail, not even a jail that a judge has sent you to, but a jail the president has sent you to. That's essentially what happened to Padilla.

When you say "allowed to happen" you assume there must have been a rational basis for it. But this happened because the president said, "I have the authority to do this." This is exactly what the Constitution was designed to prevent: that level of assertion of power by any branch of government.

The important thing was not what Padilla said [during interrogation that resulted in a "confession"], but the fact that he was held under military detention by order of the president, and not by order of a judge. He was taken outside the Constitutional system. So what he said is really irrelevant, and has never been and probably never will be used in a court of law.

A conspiracy is an agreement between two or more people to do something unlawful. That's a classic definition of a criminal conspiracy. The question is, can you have an agreement to agree to commit some crime that hasn't happened? And the crime that Padilla was charged with was a conspiracy to commit murder overseas. So it was a conspiracy on top of a conspiracy. And it really kind of stretches the very logic of conspiracy law.

There was no dirty bomb. And the government brought an entirely different set of accusations against Padilla [in Miami]. The dirty bomb rumors, to be polite, were irrelevant to the charges in Miami. He just was not charged with anything to do with the dirty bomb – because there was none.

Well, it's because the Attorney General of the United States went on television and said, "We stopped this guy from setting off a dirty bomb."

This case was about some very fundamental basic issues. Does the president have the authority to hold someone on his own authority? Does a court have a right to say, "I'm sorry, Mr. President, you can't do that." And a number of courts did say, "Mr. President, you don't have the right to do that." You don't have the authority. The Constitution does not give your office the power to do that. It is an office of enormous but not unlimited power.

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You don't have to wait for terrorists' acts to be completed before you begin an investigation or a prosecution. That's certainly true.

Because, when guys are clearly involved in attempting to build a bomb [or planning a terrorist attack], that's one thing. But you also have people who are involved in more advocacy kinds of things. And then the question becomes, where do you draw the line?

I'm a solo practitioner, but there was a team of us working on the Padilla case. One of the things that really pleased me and made me very proud of our profession was the way lawyers from medium firms, big firms, and small firms rose to the occasion and didn't say, "Oh, no, this is too controversial for me." But they wrote magnificent *amicus* briefs at every level. At the District Court level, at the Circuit Court level, and then the Supreme Court. They made themselves available to discuss some of the very arcane issues involved. So it was really the support that we got from the legal community. I think it's something that all of us can be very proud of. I thought it was extraordinary. It was not, "what's in it for us, or for our firm?" Instead, it was "we think this is important. What can we do to help?"

May Mon Post, the owner of the Post Law Firm and president of the Asian American Bar Association of Pennsylvania, is a member of the Editorial Board of The Philadelphia Lawyer magazine. Dr. Mark Franek is a freelance writer and a member of the Cabrini College English department.

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