



Detention Case Forced Government About-Face

NEW HAVEN LAWYER IN MIDDLE OF HISTORY-ALTERING DRAMA

By MARIE P. GRADY

Long before he strode onto the international stage as a respected human rights lawyer, Jonathan Freiman was a professional Shakespearean actor. One of his favorite characters was a villain named Angelo, a duke's deputy who dispensed justice without mercy before receiving a dose of it himself.

In those salad days of his youth, Freiman could not have imagined that he would one day end up representing one of the most vilified men in recent U.S. history: American terrorism suspect José Padilla. In the fear and fury that followed the Sept. 11 terrorist attacks, Freiman would become somewhat of a villain himself to those who equated any challenge to the Bush administration as unpatriotic.

But Freiman and other attorneys like him are not alone in the annals of legal history. After all, John Adams was vilified for defending the British soldiers accused in the Boston massacre before he became president. And Kenneth Royall would be criticized for representing Nazi saboteurs before he was named this nation's last secretary of war by President Harry Truman.

"I think people in power, whoever they are, will always be tempted to act outside of the law," said Freiman, recalling the tortuous history of the Padilla litigation. "That's why now, and in the future, just like John Adams, lawyers need to stand up and hold our leaders accountable."

In the aftermath of 9/11, the government greatly expanded the 50-year-old "state secrets doctrine," under which courts decline to take cases which may reveal state secrets vital to national security. It also implemented "extraordinary rendition," or the forced removal of suspected enemy combatants

to facilities outside the United States, where the detainees are not subject to the same constitutional due process guarantees.

Of all of the legal battles waged after the attacks, those fought on behalf of so-called "enemy combatants" who were rounded up and locked in military briggs are viewed by scholars as among the most important in the history of constitutional jurisprudence. Freiman has also filed a civil lawsuit against former Bush legal adviser John Yoo, charging that his memos authorizing harsh interrogation techniques resulted in permanent injury to Padilla in the three years and eight months he was held in a military brig.

In four separate cases concerning the detention of enemy combatants, the U.S. Supreme Court would ultimately decide that the president, even in times of war, does not have absolute power to detain suspects indefinitely without charging them or allowing them some means to refute the charges against them. It would also decide that the military detention facility the United States leases in Guantanamo Bay in Cuba was not immune from constitutional guarantees of due process and that detainees there had to be held and tried in accordance with international law.

By the time the first decisions were handed down, Padilla had been held for almost two years in a 9-by-7-foot cell outfitted with a steel slab for a bed. His body, according to Freiman's suit against Yoo, was contorted into a stress position for hours. His room was kept unnaturally cold or hot with noxious fumes occasionally pumped in. He was deprived of daylight and sleep, his only exercise taking place in a metal cage.



Marie Grady

'I think people in power, whoever they are, will always be tempted to act outside of the law,' said Jonathan Freiman, who represented terror suspect José Padilla.

Like hundreds of other such detainees, he was cut off from contact with family or counsel.

High-Profile Arrest

Padilla's case began in May 2002 when a New York grand jury investigating the 2001 terrorist attacks approved of the federal government's request for a warrant to pick him up as a material witness to a terror plot. Federal agents arrested Padilla as he got off a plane at Chicago's O'Hare International Airport and whisked him to a detention facility in New York.

A court-appointed attorney filed motions to vacate the material witness warrant on the grounds that his detention was unlawful and unconstitutional, but the government

declared him an enemy combatant before a hearing could be held and transferred him to a military brig in South Carolina. At the time, then-Attorney General John Ashcroft described the detention as an important victory in the War on Terror, alleging that Padilla was part of a plot to set off a radioactive dirty bomb.

Freiman, a partner at Wiggin and Dana, set about to help court-appointed attorney Donna Newman, who filed a habeas petition in New York to free Padilla. His brief filed in support of Padilla drew backing from unlikely allies, both conservative and liberal groups alarmed that a core civil liberty was under attack. The lawyers won a ruling from the 2nd Circuit Court of Appeals that would have released Padilla, but the U.S. Supreme Court decided that the court lacked jurisdiction because Padilla was now under the custodianship of the South Carolina military brig commander.

After refiled the habeas petition in South Carolina, the lawyers won their case before a federal district court. But the 4th Circuit overturned that ruling. Just two days before the government was to file briefs supporting its case before the Supreme Court, it finally filed criminal charges against Padilla unrelated to the dirty bomb allegation and transferred him to a civilian prison in Florida. The court decided the military detention issue was moot, but in a rare move, indicated it would hear the case should Padilla ever be removed to military custody again as an enemy combatant.

Although the case never resulted in a Supreme Court decision on the merits, it is widely viewed as forcing the government to reverse course on its plan to change the law as it applies to U.S. citizens classified as enemy combatants.

"The Padilla case was absolutely critical," said William Dunlap, a professor of constitutional law at Quinnipiac University School of Law. "There have been hundreds of lawyers like Jonathan who have gone out, and in many cases given their time, not because they're sympathetic to the terrorist movement, but because they realize what we've got here is a legal system that requires lawyers on both sides."

In 2002, however, there were just a few willing to take on representation of those linked by authorities to the carnage of 9/11.

Jenny Martinez, a law professor at Stanford University, was one of a handful of lawyers who took on the Padilla case with Frei-

man in 2002. Then a lecturer at Yale University School of Law, Freiman had co-founded the National Litigation Project of the Allard K. Lowenstein Clinic with Harold Hongju Koh, then dean of the law school and now a legal adviser to the State Department.

"[Freiman] continues to show a lot of courage in working on these cases," said Martinez, who argued the first Padilla case before the Supreme Court. "Jon has taken a lot of heat. He's a lawyer who's not afraid to do what he thinks is right."

Martinez, then on a fellowship at Yale, also remembers taking heat herself. Whenever she spoke publicly on the litigation during that time, there was always someone in the audience loudly challenging her.

The issue of indefinitely detaining a U.S. citizen without charge revealed a schism on the Supreme Court that crossed ideological lines. When the court decided on June 28, 2004, that the 2nd Circuit lacked jurisdiction to order Padilla released pending criminal charges, Justice John Paul Stevens, considered to be one of the most liberal justices, wrote in his dissent that what was at stake was "nothing less than the essence of a free society."

When a majority of the court decided on the same day that another American citizen captured with the Taliban in Afghanistan could be held for the duration of the War on Terror, Justice Antonin Scalia wrote in dissent, "The very core liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."

Echoing a decision authored by Stevens in 2004, the court in 2008 would ultimately decide in a 5-4 decision that terror suspects held at Guantanamo Bay in Cuba had a constitutional right to challenge their detention in civilian courts. At the time, more than 200 detainees were still in the lock-up; at one point, over 600 had been detained without being charged.

But even those rulings did not lead to immediate release for some of those imprisoned. In another case, New Haven solo Elizabeth Gilson and other attorneys represented 17 ethnic Chinese Uighur Muslims who were held for more than eight years, even after the government conceded they were not enemy combatants. At issue was the court's authority to release non-nationals onto U.S. soil.

The Supreme Court was set to hear the case last year when offers to resettle the pris-

oners in other countries led it to remand to the lower courts without opinion in light of new developments.

Although President Barack Obama promised during his campaign to shut down Guantanamo Bay within a year, he has backtracked on that goal amid congressional concerns about trying terror suspects in civilian courts or releasing them on U.S. soil.

His administration also has disappointed some Bush critics for failing to back away from some policies. In one case targeting an airline company for transporting a terror suspect out of the country, Obama's Justice Department maintained the court lacked jurisdiction under the "state secrets doctrine."

Tightrope Walk

Jeffrey Meyer, a professor at Quinnipiac and Yale schools of law and a former federal prosecutor, said that the detention litigation speaks to the tightrope walk between maintaining national security without trampling on civil rights.

"That's been really the key balance," he said. "The battle over time since Sept. 11 has been trying to assess the importance of pursuing terrorists and preventing the next terrorist attack against the invaluable civil liberties we have. To date, the [Supreme Court] has been unwilling to accept all of the government's arguments."

Freiman believes government officials who act outside the boundaries of the Constitution need to be held accountable. In 2009, in California, U.S. District Judge Jeffrey S. White refused to dismiss most of Padilla's claims against John Yoo, a former deputy attorney general who is now a law professor at the University of California-Berkeley School of Law. In his decision, the judge cited a controversial memo from Yoo that concluded, among other things, that "for an act to constitute torture, ... it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."

For his part, Yoo recently told the *National Law Journal*, "I do not think that the rule of law suffered because of 9/11, though the phrase means different things to different people. We were confronted by a wholly new kind of enemy, and our legal system over time responded by adapting wartime principles to it."

Freiman argued the case before the 9th

Circuit Court of Appeals 14 months ago and is awaiting a decision. In 2008, Padilla, a 40-year-old former gang member who converted to Islam, was sentenced to 17 years after a Florida jury convicted him of conspiring with Islamic extremists in the 1990s to kill or injure others in Chechnya, Afghanistan, Somalia and elsewhere.

The judge, citing his harsh treatment while detained as an enemy combatant, rejected the government's request for a life sentence. Prosecutors presented evidence that he had trained at an al-Qaeda camp in Afghanistan but provided no evidence he had harmed anyone overseas or plotted to detonate a bomb or commit another terrorist act here.

The fact Padilla finally got his day in court was a victory for the lawyers who had fought so many years to ensure that the government could not lock up someone on mere suspicion and throw away the key.

Reflecting on his role in the post 9/11 litigation recently, Freiman acknowledges that it came against a backdrop of personal pain. In the play within the play that was his life, the attorney was losing his beloved wife, Amy, to breast cancer even as he waged a legal fight on behalf of suspects who were reviled by many.

The two met when both were acting in a Des Moines, Iowa, Shakespeare festival in 1993. Before she died in January, leaving their three small children behind, Amy supported her husband's efforts every step of the way, despite the anonymous e-mails he received wishing him a fate worse than Padilla's.

In "Measure for Measure," the Shakespeare play featuring the villain Freiman once so loved to play, the character utters a line that may seem apropos to lawyers who have challenged the government's post 9/11 policies.

"The law hath not been dead, though it hath slept."

If the rule of law survives, Freiman says, it is because lawyers will always take on difficult cases.

"Lawyers play an essential role in times of national crisis," he said. "That includes in times of extraordinary national security concerns. Whether ultimately we're right in any argument we make is less important than that the courts have a chance to make sure the government is acting in accord with the law and the Constitution, even in times of crisis." ■

VIEWS FROM THE BENCH

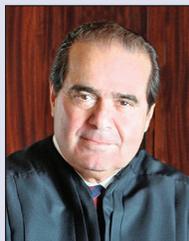
Justice Sandra Day O'Connor



Writing for the U.S. Supreme Court majority in *Hamdi v. Rumsfeld* (2004) (Deciding that an American citizen caught in Afghanistan with the Taliban could be held for the duration of the war but should be given a meaningful opportunity to contest the basis for the detention.)

"There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the [Authorization to Use Military Force]. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use ... Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized."

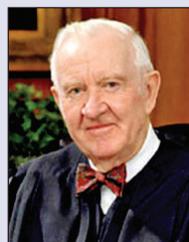
Justice Antonin Scalia



Writing in dissent in *Hamdi v. Rumsfeld* (2004)

"Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime ... The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."

Justice John Paul Stevens



Writing in dissent in *Rumsfeld v. Padilla* (2004) (in which the Supreme Court found that a habeas petition to free accused enemy combatant Jose Padilla should not have been filed in New York because he had been moved to a military brig in South Carolina.)

"At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process."

Judge Jeffrey S. White



Writing in *Padilla and Lebron v. Yoo* (2009) (U.S. District Court, Northern California, decision allowing case against former Bush legal adviser John Yoo to proceed for authoring memos leading to alleged cruel and unusual treatment of detainees in the War on Terror)

"The complaint alleges that military agents entered a civilian jail, seized a citizen from the civilian justice system, transported him to a military brig, detained him there indefinitely without criminal charge or conviction, deprived him of contact with anyone, including attorneys or family, removed the basic ability to practice his religion, and subjected him to a program of extreme interrogations, sensory deprivation and punishment over a period of three years and eight months. The specific designation as an enemy combatant does not automatically eviscerate all of the constitutional protections afforded to a citizen of the United States."