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COURT DECLINES TO REVIEW DETENTION OF "ENEMY COMBATANT" JOSE PADILLA (Padilla v. Hanft)

The U.S. Supreme Court today issued an order declining to review a lower court's decision upholding the federal government's detention of Jose Padilla, the "dirty bomber" accused of being an al Qaeda operative. The decision was a victory for the Washington Legal Foundation (WLF), which filed a brief urging the Court not to hear the case.

The Supreme Court neither declared the case moot nor vacated the lower court decision on mootness grounds. As a result, the appeals court decision in the government's favor remains standing and can serve as a precedent in future enemy combatant cases. On the other hand, Padilla is not foreclosed from pursuing his claim that the military lacked a factual basis for declaring him an enemy combatant; that claim is before the U.S. District Court for the District of South Carolina.

In a brief filed in *Padilla v. Hanft*, WLF argued that granting review would be particularly inappropriate now that Padilla has been indicted on terrorism charges and has been transferred from military custody to the regular criminal justice system. WLF also argued that the lower court was correct: the government is entitled to detain Padilla without trial just as it is entitled to detain any enemy soldier captured in time of war. WLF argued that the government's right to detain Padilla is not diminished simply because he is a U.S. citizen and was captured in Chicago rather than on an overseas battlefield. WLF noted that Padilla fought with al Qaeda/Taliban forces in Afghanistan against the United States; WLF argued that he should not be exempt from detention simply because he managed to elude capture and make his way out of the country.

The order denying review was unusual in that it was accompanied by two opinions explaining the Justices' actions. Justice Kennedy (in an opinion joined by Chief Justice Roberts and Justice Stevens) said that review was unwarranted because Padilla's military detention is "hypothetical" now that he has been transferred to the custody of the civilian courts. He wrote that Padilla will be able to obtain rapid judicial review if and when he is again subjected to military custody. Justice Ginsburg dissented, stating that review is warranted because the issue -- detention of American citizens -- is highly important and that the military's voluntary cessation of its alleged misconduct cannot serve to render the case moot.

"When American military leaders determine that individuals should be detained as enemy combatants, the courts should be highly deferential to such decisions," WLF Chief Counsel Richard Samp said after reviewing the Supreme Court's order. "The courts are ill-equipped to second-guess the President when, acting in his capacity as Commander in Chief, he makes decisions implicating sensitive matters of foreign policy, national security, or military affairs," Samp said. "Now that the President has determined that Padilla should be removed from military custody, the Supreme Court correctly concluded that there is no reason for the courts to set themselves up for a confrontation with the elected branches of government," Samp said.

Padilla was arrested at Chicago's O'Hare Airport in May 2002 while returning from an extended trip to Afghanistan and Pakistan and has been detained ever since. Until his indictment on criminal charges last fall, Padilla was being detained without criminal charges as an "enemy combatant." He is now incarcerated in Miami as he awaits trial.

In its brief opposing Supreme Court review, WLF argued that the centuries-old laws of war and Supreme Court precedent both support the government's decision to hold enemy combatants such as Padilla, regardless of their citizenship. WLF argued that the courts should grant extreme deference to the government's decision to hold Padilla; the decision should be overturned only if Padilla can demonstrate that the government has been acting in bad faith. WLF argued that the courts need to be vigilant to guard against government abuse of power but that there is no evidence of such abuse here. WLF also argued that judicial deference to the Executive Branch in military matters counsels against granting review, particularly now that Padilla's military detention has ended.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a significant portion of its resources to promoting America's national security and to ensuring that the United States government is not deprived of the tools necessary to protect the country from those who would seek to destroy it and/or harm its citizens. WLF filed its brief on behalf of itself and the Allied Educational Foundation.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its website, www.wlf.org.