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COURT URGED TO UPHOLD DETENTION OF "ENEMY COMBATANT" JOSE PADILLA *(Padilla v. Rumsfeld)*

The Washington Legal Foundation (WLF) this week urged the U.S Court of Appeals for the Second Circuit in New York to uphold the federal government's detention of Jose Padilla, the "dirty bomber" accused of being an al Qaeda operative.

In a brief filed in *Padilla v. Rumsfeld*, WLF argued that 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 some overseas battlefield.

WLF filed its brief on behalf of itself, the Allied Educational Foundation, and three members of Congress: Walter Jones (N.C.), Lamar Smith (Tex.), and John Sweeney (N.Y.).

"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 filing WLF's brief. "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.

Padilla was arrested at Chicago's O'Hare Airport in May 2002 while returning from an extended trip to Afghanistan and Pakistan. The government alleges, based on statements by captured al Qaeda leaders, that Padilla plotted to build and detonate a "radiological dispersal device" (a "dirty bomb") in a major American city. Padilla has not been charged with any crime. Rather, he is being held incommunicado in a military facility and is being interrogated by military investigators.

A lawyer who had previously represented Padilla filed a habeas corpus petition on his

behalf in June 2002 in New York City. The district judge has issued several preliminary rulings, including that: (1) the government has the authority to hold enemy combatants without charges, even when they are Americans captured in the United States; (2) Americans may file habeas corpus petitions challenging their designation as enemy combatants, but the designation should be upheld if the government can produce "some evidence" in support of its decision; and (3) Padilla should be granted access to his attorney to allow her to assist in pursuing the habeas corpus petition. Padilla appealed from the first two determinations; the government appealed from the third determination.

In its brief, WLF supported the federal government on all three issues. 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 argued that there is nothing to suggest that Padilla is being held because of his racial background or in retaliation for any anti-government speech; rather, the evidence suggests that the only reason that Padilla is being held is that the government really believes that he is an al Qaeda operative.

WLF also argued that the government should be permitted to continue to interrogate Padilla without granting him access to a lawyer. WLF argued that courts are ill-equipped to judge whether a captured al Qaeda operative possesses valuable intelligence (as the government claims here) and how best to persuade him to tell what he knows.

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.

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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.