
RICHARD L ABEL

ABSTRACT

Law proved a surprisingly powerful instrument in the last years of the struggle against apartheid. It has been a disappointingly weak shield against abuses of power by the US government in its ‘war on terror’ since 11 September 2001. This article begins a comparison of these two contrasting experiences.

I INTRODUCTION

Twenty years ago John Dugard welcomed me to the Centre of Applied Legal Studies (CALS). He and many other human rights lawyers and activists offered the hospitality and support that allowed me to write Politics by Other Means, the most rewarding research I have done in more than 40 years as an academic. As I said at the end of the Preface: ‘The dedication of South African lawyers and litigants to the struggle against apartheid redeems law’s promise by reminding us of its potential nobility’.1 I am glad to be able to repay that kindness, in small part, by participating in this celebration of John’s extraordinary career as a lawyer and legal scholar. In his gracious foreword to my book, John presciently noted that the issues it explores ‘are not confined by place or time. They are universal jurisprudential issues that must be perpetually re-examined and re-assessed if law is to be brought closer to justice’.2 Here I want to review the lessons I drew about the role of law in the struggle against apartheid and apply them to the defence of legality in the United States since 9/11.

II LAW IN THE STRUGGLE AGAINST APARTHEID

I introduced the theoretical framework of my book with a quotation from a South African writer best known to outsiders for his novel Cry, the Beloved Country, published just before the National Party began nearly a half century in power. In 1982 Alan Paton declared: ‘The Rule of Law is the greatest political achievement of humankind. The Rule of Law is a miracle; it is nothing less

2 J Dugard in Abel (ibid) Foreword ix.
than man protecting himself against his own cruelty’. From a very different geographic and political perspective, EP Thompson advanced the same opinion about 18th century England: ‘the regulation and reconciliation of conflicts through the rule of law’ is ‘a cultural achievement of universal significance’. I wrote my book to address the question of how, and to what extent, law was effective in the struggle against apartheid. 

Human rights lawyers rarely get to choose their clients. Tom Rikhoto was not the ideal worker to challenge the pass laws. The South African government constantly provoked conflict within the opposition, often successfully. Recognising their own weakness, apartheid opponents sought to negotiate, using their bodies – individually and en masse – to counter the government’s overwhelming physical power. But many issues did not allow compromise: BTR-Sarmcol’s refusal to recognise the Metal and Allied Workers Union (MAWU), the South African Defence Force’s (SADF’s) narrow definition of conscientious objection, media censorship, and forced removals. The government preferred to exercise unilateral executive power: deploying police, bulldozing homes, seizing newspapers, banning meetings, unilaterally incorporating blacks into homelands. It had the power to enact any legislation, although the miniscule opposition could use debate to embarrass the regime. Adjudication was government’s least favourite alternative. And it was fully prepared to use brute force: withholding services to drive blacks off their land, detaining tens of thousands under Emergency laws, killing hundreds and wounding thousands more, using the SADF to occupy townships, and torturing detainees. But the opposition’s very weakness could, paradoxically, become a source of strength. Deaths in detention or during raids or demonstrations provoked others to greater resistance, in a cycle of mass funerals and further government killings. Mass hunger strikes forced the government to release Emergency detainees. Even lengthy imprisonment simply increased leaders’ stature.

Apartheid opponents had to choose between proactive and reactive strategies. Government control of both executive and legislature allowed it to be proactive. In courts, by contrast, law tends to be more effective as a shield than a sword. Government often avoided defeat through strategic concessions: paying damages to torture victims or the families of those who died in detention, consenting to an interdict against further state violence, postponing removals, offering conscientious objectors non-combatant status. Forcible removal of the Magopa community from Zwartrand rendered their Appellate Division victory virtually worthless; but once they had reoccupied the land, the government found it difficult to expel them, even after the Supreme Court ordered eviction. All three 1980s treason trials ended in acquittals or dismissals. Yet reactive strategies have inherent limits, even when successful. After losing

---

3 Abel (note 1 above) quoting Paton’s 1982 speech to the King’s School, Natal Midlands, reprinted in A Paton Save the Beloved Country (1987) 283.


5 Note 1 above. Chapter 13 summarises those conclusions.
criminal prosecutions the state often charged those accused with other crimes or just detained them. The exposé of torture in Port Elizabeth terminated it temporarily but did not release its victims from prison.

For much of the nearly half century of apartheid, time seemed to be on the government’s side. It could wear down resistance by doing nothing and offering endless bureaucratic excuses. But the government’s sense of timing was far from perfect. Its announcement of forced removals let the opposition harden and the media publicise. The prospect of hanging concentrated the mind: not only of the prisoner but often of the entire world. And the opposition had inexhaustible powers of endurance because blacks had nowhere to go.

When forced into litigation, government sought to define the issues narrowly and legalistically, excluding defences in criminal trials, hiding censorship behind technicalities. But the treason trials publicised the real goals of the United Democratic Front (UDF) and the Alexandra Action Committee, as well as the substantive grievances fuelling black protest. The conscientious objector trials exposed SADF repression in the townships and aggression against frontline states. The Magopa educated the Appellate Division about their title to the land.

The opposition was surprisingly successful in appealing to the ‘court of public opinion’, both domestic and foreign. The Mpophomeni murder inquest revealed both Inkatha’s violence and the government’s indifference and possible complicity. Justice van der Walt chose to conduct the Alexandra treason trial in English for the benefit of foreign reporters and observers (although he let most state witnesses testify in camera). The watchful eyes of Black Sash, prominent clerics, international observers, and domestic and foreign media delayed removal of the Magopa. Trials offered opportunities to educate judges (and other audiences) about township life, SADF atrocities in Namibia, unemployment, long-distance commuting, obligations to ancestors, and police violence. All the magistrates and judges who heard Ivan Toms and David Bruce were convinced their objection to military service was truly conscientious. Justice van der Walt probably had never visited a black township before touring Alexandra during the treason trial (and he was appalled by what he saw, as the defence had hoped).

The opposition sought to transform legal issues into moral outrage. The pass laws divided husband from wife and parent from child, just as American slave owners had sold slaves ‘down the river’. The death penalty, always difficult to justify, was even more suspect when applied to alleged conspiracies. Hunger strikes dramatised the hardship of detention without trial. Bible-reading South Africans could scarcely overlook parallels between the homeless Magopa and the Israelites’ flight from Egypt (or the Afrikaners’ great trek).

Most of the time, however, publicity and education are secondary goals of litigation, whose purpose is to win. In this, the opposition was surprisingly successful. Most judges followed clear statutory language, even when this thwarted the government that had appointed them and violated their own preferences. Although Arthur Chaskalson repeatedly clashed with Justice van Dijkhorst during the Delmas treason trial (the most momentous of the
three), and eventually won a reversal of the convictions because of judicial misconduct, Van Dijkhorst subsequently agreed with Chaskalson’s contention that the Prevention of Illegal Squatting Act did not authorise the government to declare Oukasie an ‘Emergency Camp’. Sometimes judges went well beyond what the law required. The Appellate Division could have found that Mrs Komani did not ‘ordinarily reside’ in Guguletu because she lacked legal accommodation and that Parliament had adopted the ‘call-in’ card system to prevent annual contract workers like Mr Rikhoto from qualifying for urban residence. Instead it ruled for both plaintiffs. Judges sometimes disregarded a statute’s plain meaning. Although two magistrates and two Supreme Court benches read the 1983 Defence Act to mandate a prison sentence on draft resisters one and a half times the outstanding military obligation, the Appellate Division interpreted that as a maximum. Unambiguous facts also could induce politically unpopular decisions. Wendy Orr’s evidence made it impossible for Port Elizabeth police to deny torture. Judges credited even contested evidence by the regime’s opponents. Magistrate SM Nieuwoudt, a young Afrikaner woman subordinate to executive authority, found that the Mpophomeni deaths had been criminal and named some of the Inkatha members responsible. The Natal Supreme Court dismissed the treason charges when the defence discredited the state’s expert witness and unmasked errors in the transcription and translation of videotaped meetings. Some courts refused to tolerate procedural irregularities. The Appellate Division overturned the Delmas convictions because Justice van Dijkhorst had dismissed an assessor without sufficient grounds. Justice Didcott threw out an Industrial Court decision against MAWU because the presiding judge had been the keynote speaker at a seminar organised by BTR-Sarmcol’s labour consultant.

Despite its many surprising, and often striking, victories, however, the opposition predictably lost many cases. Even Justice Laurie Ackermann felt compelled to reject the Seleke challenge to incorporation into Lebowa because the statute did not require their consent, only the government’s. Courts rejected Lebowa’s objection to the excision of Moutse (which turned on the significance of parentheses and commas) and Magopa’s defence to its eviction from the cemetery (based on the contention that the government had used the wrong statute to expropriate the land). Courts construed ambiguous facts against the opposition: convicting some Delmas treason trialists, disregarding extensive documentation of BTR-Sarmcol’s determination to crush MAWU. Upholding censorship of the New Nation, Justice Curlewis acknowledged that ‘opinion … will be dependent in the first place, [on] where the person stands in the political spectrum, and whether he is black or white’.6 Government was at least as effective as the opposition in manipulating procedural niceties. Parliament refused to hear Moutse’s petition against its incorporation into KwaNdebele because Lebowa’s Supreme Court action rendered the matter sub judice. Justice van der Merwe rejected Magopa’s defence to its eviction

6 Abel (note 1 above) 286.
from the Zwartrand cemetery because it had failed to join the Minister of Community Development as a party. Government abused technicalities in order to resist enforcement of Komani and Rikhoto. No sooner was one Emergency regulation invalidated than government promulgated another achieving much the same goal. A court conceded that the New Nation ‘was dealing with the opinion of a politician and not a judgement of a court of law’. ‘The Minister does not have to give “reasons” why he formed an opinion’, nor was it the Court’s ‘function to pass an opinion upon the Minister’s opinion’.

Law was far more effective in defending negative freedom than in conferring positive liberty. The Legal Resources Centre (LRC) might persuade courts to extend s 10 rights to migrant workers and their families, but it could not assure them jobs, housing, schools, transportation, or safety. Courts might find that the Industrial Court had committed procedural error, but they were unlikely to order reinstatement of a thousand workers. Respect for legality was directly proportioned to the visibility of government action. The procedural regularity of highly publicised prosecutions co-existed with violent covert attacks on End Conscription Campaign (ECC) activists and SADF involvement in the dirty tricks campaign. Despite Magistrate Nieuwoudt’s exposure of Inkatha’s culpability for the Mpophomeni murders, the Natal Attorney General took no action. Extrajudicial violence and threats intimidated witnesses. The security forces constantly referred brutality complaints to their internal review procedures, which did nothing. Magistrates bowed to executive pressure rather than fulfilling their legal obligations. Superiors claimed ignorance of subordinate misconduct. High-level white security police relied on black subordinates to conduct torture; kitkonstabels repressed the townships. Government incited black-on-black violence, turned a blind eye to ‘third force’ military action, and tolerated or even invited right-wing civilian assassins and provocateurs. Unconstrained by a constitution or effective parliamentary opposition, government could overturn any adverse judicial decision. What requires explanation, therefore, are its decisions not to do so: withdrawing bills to impose the Magopa removal and the Moutse incorporation, choosing not to nullify Komani and Rikhoto.

Even more surprising were opposition victories based not on law but on the regime’s own ideology. Moutse successfully used apartheid’s grundnorm – ethnic homogeneity and self-determination – to resist incorporation into KwaNdebele. KwaNdebele women improbably convinced the highest court that the only country in the world whose official policy was racial discrimination could not engage in sex discrimination without explicit legal authority. The opposition’s ideological leverage was enhanced by the government’s desire to appear reformist. In February 1985, it proclaimed the end of ‘forced removals’ and subsequently repealed the Black Administration Act. President Botha declared that apartheid was dead. The opposition transformed the Alexandra treason trial into a public debate over who was more democratic.

7 Ibid 286-7.
— the minority white regime or the Alexandra Action Committee, which constantly consulted lawyers, obsessively redrafted a constitution, held proceedings in public, was accountable to its supporters, and repudiated fiscal irregularities and adventurist criminal conduct. The defence unambiguously won this contest when Justice van der Walt acquitted the accused, declaring: ‘While white South African citizens may have a democracy, Black South African citizens certainly have no share in it’.8

III  THE DEFENCE OF LEGALITY IN THE US AFTER 9/11

After completing Politics by Other Means I turned my attention to other subjects. Many better-qualified lawyers and scholars were addressing how to realise the promises of the new democratic government and Constitution. Then, on the first Sunday of May 2004, at the top of every hour during a ten-hour drive back to Los Angeles from the Grand Canyon, I heard Seymour Hersh expose the Abu Ghraib abuses on National Public Radio and knew I had to write about this.9 As I looked back over the three-and-a-half years since the 9/11 attacks and have continued tracking the story for the last six years, I gradually refined the question I wanted to answer: why was the rule of law, which seemed surprisingly effective in the struggle against apartheid (at least during what turned out to be its final 15 years), apparently so ineffective in resisting state power in the US since 9/11?

I ended my South African book by enumerating some of the distinctive features of that extraordinary struggle. By the 1980s, the rest of the world had repudiated de jure racism, making South Africa an international pariah. Mass resistance built on more than 40 years of experience. Black workers played an increasingly prominent role as global competition forced domestic capital to recognise black trade unions in order to increase productivity. South Africa was heavily dependent on foreign capital and trade. The sports-mad white electorate chafed under the cultural boycott. With the end of the Cold War, the government could no longer tie the ‘swaart gevaar’ to the ‘rooie gevaar’. The costs of military reversals in Angola and of repressing the South West African People’s Organisation (SWAPO) in Namibia — in both body bags and taxes — pushed the front line back into South Africa. But though all of these specifics caution against drawing lessons for other times and places, a superficial comparison of the two countries led me to hope that law would be more effective in curbing political power in the contemporary US.

I began my South African book with a WH Auden poem about the impotence of raw power:10

8 Ibid 367.
9 Hersh was talking about ‘Torture at Abu Ghraib’ New Yorker (10 May 2004), which had already been published electronically and became part of his book Chain of Command The Road from 9/11 to Abu Ghraib (2004). I may have found Hersh’s revelations especially compelling because he exposed My Lai (and happens to be my brother-in-law).
The Ogre does what ogres can,  
Deeds quite impossible for Man,  
But one prize is beyond his reach,  
The Ogre cannot master Speech.  
About a subjugated plain,  
Among its desperate and slain  
The Ogre stalks with Hands on hips,  
While Drivel gushes from his lips.

Although Auden was writing in response to Soviet tanks crushing the 1968 Prague spring, his poem could well have been describing Bush and Cheney justifying the American hegemon’s invasion of Iraq in April 2003 by invoking fictitious weapons of mass destruction (WMDs) and ludicrous claims about Al Qaeda collaboration with Saddam Hussein, as well as the military’s triumphant boasts about ‘shock and awe’. Auden gave poetic expression to Weber’s distinction between power and authority. In liberal democracies, the state can exercise authority only through laws, which embody government’s reasons for its actions. The question, therefore, is whether law, by compelling the Ogre to speak, constrains state power (hence the title of my first chapter: ‘Speaking with the Ogre’).

Auden wrote another, much more famous, poem eerily anticipating the 9/11 attack by more than six decades. Apostrophising New York’s ‘blind skyscrapers’ asserting ‘their full height to proclaim the strength of collective man’, ‘September 1, 1939’ looked back:

As the clever hopes expire  
Of a low dishonest decade:  
Waves of anger and fear  
Circulate over the bright  
And darkened lands of the earth,  
Obsessing our private lives;  
The unmentionable odour of death  
Offends the September night.

Mocking ‘The windiest militant trash/Important persons shout’, Auden concluded:

Defenseless under the night  
Our world in stupor lies;  
Yet, dotted everywhere,  
Ironic points of light  
Flash out wherever the Just  
Exchange their messages:  
May I, composed like them  
Of Eros and dust  
Beleaguered by the same  
Negation and despair  
Show an affirming flame.

Whereas the Bush administration’s many critics have performed the indispensable task of documenting the illegality of its actions, I want to ‘show an affirming flame’ by identifying the potential of the rule of law, rightly praised by Paton and Thompson, to restrain state power.
The past eight years have been particularly disheartening because, along every dimension, the US should have been far more protective of legality than South Africa in the 1980s. Whereas the South African Parliament was supreme, the US has had a written constitution with a bill of rights and a strong tradition of judicial review for two centuries. Whereas the National Party had dominated South African politics for 40 years – disregarding an opposition that was always powerless and, for 13 years, was reduced to Helen Suzman’s lone voice – America’s two parties are relatively equally matched. The National Party had appointed every sitting judge, whereas both American parties had made appointments to the federal bench (if the Republicans’ were more numerous and ideologically extreme). Whereas there were few black South African lawyers in the 1980s, the American legal profession was increasingly diverse; it was also large, wealthy, and well-organised. The US had invented public interest law nearly a century earlier, and large American firms now devote substantial resources to pro bono legal services. Whereas South Africa had outlawed the African National Congress (ANC), the South African Communist Party (SACP) and many other opposition organisations and had jailed, exiled, banned or restricted thousands of individual activists, the US had a rich civil society, including many non-governmental organisations (NGOs) dedicated to legality. Whereas the government owned or censored the domestic media and excluded many international journalists, American media were free.

Despite all this, the rule of law has suffered terribly since 9/11. I want to understand why this has happened and which efforts to defend legality were most successful. At this point all I can offer is an analytic outline.

(a) The legal construction of lawlessness

At the direction of the White House, lawyers in the Office of Legal Counsel (OLC) of the Department of Justice (DOJ) (including Yoo, Bybee, Bradbury and Flanigan)\(^\text{11}\) drafted a series of memoranda, some still secret, authorising extraordinary rendition, detention without trial, and harsh interrogation. What resistance did these provoke, within the OLC and DOJ and outside, and how were the secrets exposed?

(b) Congress

Post-9/11 hysteria allowed the administration to secure virtually unanimous Congressional support for the Authorization for the Use of Military Force (AUMF) and the catch-all USA Patriot Act 2001. Who opposed these and with what effect? The Republican-controlled Congress later passed the Detainee Treatment Act 2005 (sponsored by Senators McCain, Graham and Warner), but President Bush limited its effect by his signing statement (as he did with more legislation than any previous president). Democrats capitulated to the

\(^{11}\) The authors of the notorious ‘torture memos’.
Military Commissions Act 2006, fearing an electoral backlash if they showed ‘weakness’ toward ‘terrorists’. Given Republican control from 2001 to 2007, Democrats were limited to mandatory confirmation hearings, which failed to prevent Alberto Gonzales from becoming Attorney General or to subject Supreme Court nominees John Roberts or Samuel Alito to serious scrutiny. During Bush’s last two years Democratic committee chairs were able to conduct oversight hearings; but administration claims of executive privilege and state secrets significantly limited these.

(c) Abu Ghraib
This story emerged because one soldier complained to superiors, CBS later obtained some of the photos, and Seymour Hersh got a copy of General Taguba’s report. The administration responded with numerous inquiries, almost all of them whitewashes. Foot soldiers took the fall, while the chain of command escaped punishment. The administration used this outcome to argue that the problem was a few bad apples and could be solved by getting rid of them.

(d) Renditions and secret prisons
Virtually all opposition came from investigative reporters, European governments, regional bodies, and NGOs. (European resistance also forced changes in the use of SWIFT banking records.) But whereas Canada apologised to Maher Arar and paid him $10-million, the US continues to deny any legal responsibility. Although the Bush administration claimed to have closed all secret prisons after transferring 14 high value detainees to Guantanamo in August 2006, neither it nor its successor disavowed their future use.

(e) Courts martial and criminal prosecutions
American military have been court martialed for and convicted of abuses. But almost none of the accused was an officer, trials were conducted out of the spotlight, and subsequent sentence reductions received little publicity. The Department of Justice has been very reluctant to prosecute civilians (CIA, private contractors, or ex-military).

(f) Guantanamo
Despite the fact that detentions have been litigated since early 2002, and the Supreme Court has repeatedly rebuked the administration, virtually no prisoner has been released as the result of a court order. Combatant Status Review Tribunals and Annual Review Boards document the weakness of evidence against detainees. Military Commissions have repeatedly been exposed for violating due process, but even the Obama administration seems determined to use them. Non-cooperation, resistance, hunger strikes, and suicides have been the detainees’ only effective weapons.
(g) **Criminal prosecutions for terrorism**

The administration has pursued two kinds: show trials and pretextual prosecutions of minor players and misfits, often directed by agents provocateurs. John Walker Lindh pleaded to avoid the death penalty. Zacarias Moussaoui pleaded guilty and then defended himself in the penalty phase. The Obama administration seems committed to prosecuting some high value detainees.

(h) **Civil liberties violations and remedies**

Investigative reporters exposed National Security Agency (NSA) wiretapping, but Congressional action amending The Foreign Intelligence Surveillance Act (FISA) effectively eliminated lawsuits against the telecommunications companies, and sovereign immunity and state secrets doctrines have blocked suits against the government. The administration has strenuously fought lawsuits brought by immigrants and Muslims rounded up and mistreated in the immediate aftermath of 9/11. Damage actions are pending against military contractors. Even this sketchy summary suggests the weakness of law in restraining state power. My goal, nevertheless, is to identify effective strategies, especially Auden’s ‘ironic points of light’. To that end, I want to present a case where legality, counter-intuitively, played a valuable role, as it did in South Africa.

IV **Jose Padilla**

(a) **Enemy combatant**

Jose Padilla, an American citizen, was apprehended at O’Hare Airport, after arriving from Pakistan on 8 May 2002, on a material witness warrant issued by Chief Judge Mukasey of the US District Court for the Southern District of New York. He was carrying over $10,000 and had cellphone and e-mail addresses of Al Qaeda operatives. After Padilla was moved to New York, Mukasey scheduled a hearing for Monday, 10 June on a defence motion to vacate the warrant. But the preceding Sunday the court did so at the government’s request without notifying Padilla’s lawyer. Bush designated Padilla an enemy combatant, and Secretary of Defense Rumsfeld secretly spirited him away to the Navy brig in Charleston, South Carolina. Although Attorney General Ashcroft was in Moscow at the time, the President’s staff insisted he make the announcement. Ashcroft declared on television: ‘We have disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive “dirty bomb”. We have acted with legal authority both under the laws of war and clear Supreme Court precedent’. Even then, however, Deputy Defense Secretary Wolfowitz conceded Padilla was ‘in the very early stages of his planning. I don’t think there was actually a plot beyond some fairly loose talk’.

Donna Newman, appointed by the court to represent Padilla, only learned about all this the next day and immediately petitioned Mukasey for habeas corpus, complaining that the Department of Defense refused to let her consult with Padilla. Two days later Rumsfeld reiterated that Padilla was being detained ‘to gather as much … intelligence information as possible’.13

The government moved to dismiss the habeas petition. Judge Mukasey had been a Wall Street lawyer and federal prosecutor before being appointed by President Reagan. He had tried an earlier terrorist conspiracy, sentencing the defendants to terms ranging from 25 years to life and observing presciently that they had sought to murder ‘hundreds if not thousands of people’. He made three important rulings on Padilla’s petition. First, ‘the convenience of counsel is served by keeping the case here’, even though Padilla was in South Carolina. Second, Padilla had a constitutional right to consult a lawyer, whose help he ‘obviously’ needed to seek habeas. The government argument that this would ‘jeopardize’ intelligence gathering was based on ‘gossamer speculation’ in the special agent’s declaration.14 (Padilla had been conferring with lawyers for a month, although Mukasey did not mention this.) But third, although Congress had passed the Non-Detention Act of 197115 in response to the Japanese-American internment,16 the post-9/11 AUMF satisfied the 1971 law’s requirement of an ‘Act of Congress’ authorising Padilla’s detention as an enemy combatant.

A defiant government sought to present additional evidence, stalling until the Fourth Circuit decided a similar petition by Yasser Hamdi (the other citizen held incommunicado in the brig). When that court rejected Hamdi’s petition, the government moved for reconsideration in Padilla, hoping Mukasey would defer to the Fourth Circuit. The government submitted a declaration by Admiral Jacoby, Director of the Defense Intelligence Agency, that access to counsel would ‘break – probably irrevocably – the sense of dependency and trust that the interrogators are attempting to create’. Mukasey was unimpressed: ‘Although I would not be so bold as to substitute my judgment for Admiral Jacoby’s on any of the numerous intelligence-related topics in his declaration’, there were ‘no true experts’ on ‘human nature’. Padilla was an ex-con, ‘and criminals are people with whom this court has at least as much experience as does Admiral Jacoby, and perhaps more’.17 On appeal, the Second Circuit went much further. Judges Pooler (appointed by Clinton) and Parker (appointed to the District Court by Clinton but elevated to the Court of Appeals by Bush) found that the Non-Detention Act’s ‘plain language’ prohibited ‘all detentions of citizens’, and the AUMF did not authorise detention of an American citizen outside the battlefield (thereby distinguishing Hamdi, who had been seized in Afghanistan).

14 Padilla v Bush 233 F Supp 2d 564 (S D N Y 2002).
15 18 U S C s 4001.
17 Padilla v Rumsfeld 352 F 2d 695 (2nd Cir 2003).
In February 2004, White House Counsel Alberto Gonzales told the American Bar Association’s mid-year meeting that citizens who betray their country do not deserve legal counsel. Such rights ‘must give way to the national security needs of this country to gather intelligence from captured enemy combatants’:

The stream of intelligence would quickly dry up if the enemy combatants were allowed contact with outsiders during the course of an ongoing debriefing. The result would be the failure to uncover information that could prevent attacks. This is an intolerable cost, and we do not believe it is one required by the Constitution.18

When Padilla’s case was argued before the Supreme Court in April, Justice Ginsburg asked: ‘Suppose the executive says, “Mild torture, we think, will help get this information”. Some systems do that to get information’. Deputy Solicitor General Clement replied: ‘Well, our executive doesn’t’. (Of course, it did.) Justice Scalia added: ‘It doesn’t say you can do whatever it takes to win the war’. That evening CBS broke the Abu Ghraib story. In May the Justice Department held a press conference to announce that Padilla had confessed to the dirty bomb plot and other al Qaeda activities. Deputy Attorney General Comey claimed: ‘We now know much of what Jose Padilla knows. And what we have learned confirms that the president of the United States made the right call’.19

In June the Supreme Court decided this (as well as the two other detention cases, 

*Hamdi* and *Rasul*). The conservative majority summarily ruled that Padilla had to seek habeas in South Carolina. Justice Stevens (a Ford appointee) dissented, joined by Justices Souter (appointed by Bush’s father) and Ginsburg and Breyer (Clinton appointees). The venue rule was ‘riddled with exceptions’ intended to protect the ‘Great Writ’ and did not preclude consideration of an ‘exceptional’, ‘singular’ case presenting ‘questions of profound importance to the Nation’. Twice criticising the ‘secret’ actions, Stevens said: ‘we should not permit the Government to obtain a tactical advantage as a consequence of an ex parte proceeding’. By holding Padilla for two years ‘pursuant to a warrantless arrest’ and granting him access to counsel only ‘as a matter of the Government’s grace’, Rumsfeld had ‘created a unique and unprecedented threat to the freedom of every American citizen’. ‘At stake is nothing less than the essence of a free society’. ‘Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber’. ‘[I]f this nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny’.20

Padilla’s re-filed petition in South Carolina was heard by Judge Floyd, who had served in the Army Reserve, practised in small South Carolina firms for

20 years, and been a state trial judge for ten before being appointed by Bush in 2003. He also distinguished *Hamdi*, noting that Chief Judge Wilkinson of his own Fourth Circuit had called the two cases ‘apples and oranges’, and Justice O’Connor had limited her *Hamdi* opinion to its facts at least nine times. The ‘clear and unambiguous language’ of the Non-Detention Act ‘forbids any kind of detention of a United States citizen, except that which is specifically allowed by Congress’. Congress had not done that in the AUMF:

Certainly [the government] does not intend to argue here that, just because the President states that Petitioner’s detention is ‘consistent with the laws of the United States …’ that makes it so … If such a position were ever adopted by the courts, it would totally eviscerate the limits placed on Presidential authority to protect the citizenry’s individual liberties.\(^{21}\)

Quoting Justice Jackson’s famous statement (in the Youngstown steel seizure case) that ‘the Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute [the President] also Commander-in-Chief of the country’, Floyd added:

[T]he Court is of the firm opinion that it must reject the [government’s] position … To do otherwise would not only offend the rule of law and violate this country’s constitutional tradition, but it would also be a betrayal of this Nation’s commitment to the separation of powers that safeguards our democratic values and individual liberties.

For the Court to find for Respondent would also be to engage in judicial activism. This Court sits to interpret the law as it is and not as the Court might wish it to be.

Simply stated, this is a law enforcement matter, not a military matter … The difference between invocation of the criminal process and the power claimed by the President here … is one of accountability. The criminal justice system requires that defendants and witnesses be afforded access to counsel, imposes judicial supervision over government action, and places congressionally imposed limits on incarceration.\(^{22}\)

A week later Gonzales (now Attorney General) warned (accurately) that the government might charge Padilla if forced to release him, disregarding Deputy Attorney General Comey’s admission the previous June that ‘We obviously can’t use any of the statements he’s made in military custody, which will make that option challenging.’\(^{23}\) The government appealed Floyd’s decision to a Fourth Circuit panel of Judges Luttig, Michael, and Traxler.

Justice O’Connor announced her retirement from the Supreme Court on 1 July 2005. On 17 July, as suspense about her replacement heightened, television crews descended on Luttig’s house. He was an obvious candidate, having worked in the Reagan White House, clerked for (then) Judge Scalia and Chief Justice Burger, helped prepare Souter and Thomas for their Supreme Court confirmation hearings, and argued for expanded presidential power in the Justice Department of the first President Bush, who appointed him to the bench in 1991. During oral argument in *Padilla* two days later, Luttig admonished the petitioner’s lawyer: ‘We might as well not have a president of the United States if his hands are tied behind his back to protect the citizens…’\(^{24}\) The same day,

\(^{21}\) *Padilla v Hanft* 389 F Supp 2nd 678 (D S C 2005).

\(^{22}\) Ibid.

\(^{23}\) Ibid.

however, Bush nominated Roberts, Luttig’s colleague in the Reagan administration. Then Chief Justice Rehnquist died on 3 September; three days later Bush re-nominated Roberts as Chief Justice. Three days after that the Fourth Circuit upheld Padilla’s military detention, in an opinion by Luttig supported by the other two judges, both Clinton appointees. Judge Michael had been a federal prosecutor and practised privately, briefly on Wall Street but mostly in West Virginia, before serving as counsel to that state’s Democratic Governor Rockefeller (who later, as Senator was an outspoken critic of the Bush administration). Michael had written opinions favouring freedom of the press and federal protections for abortion providers, the environment and the disabled. Judge Traxler had been a South Carolina prosecutor and judge.

Despite the urgings of both their own Chief Judge Wilkinson and Justice O’Connor, these three judges found ‘no difference’ between Hamdi and Padilla. Criminal prosecution ‘may well not achieve the very purpose for which detention is authorized in the first place – the prevention of return to the field of battle’ – and often ‘would impede the Executive in its efforts to gather intelligence from the detainee … ’. Judge Floyd had failed ‘to accord the President the deference that is his when he acts pursuant to a broad delegation of authority, such as the AUMF’, which gave him ‘a power without which, Congress understood, the President could well be unable to protect American citizens from the very kind of savage attack that occurred four years ago almost to the day’. 25

Attorney General Gonzales exulted that the ruling reaffirmed ‘the president’s critical authority to detain enemy combatants who take up arms on behalf of al Qaeda’ (although no court had found that Padilla – or any detainee – had done so). Less than a month later Bush nominated White House Counsel Harriet Miers to succeed O’Connor. Luttig was disappointed for the third time but may have recognised the pressure on Bush to replace O’Connor with another woman. But on 31 October, four days after Miers withdrew, Bush nominated Alito, finally dashing Luttig’s Supreme Court hopes.

(b) Criminal accused

On 21 November, just days before it had to respond to Padilla’s petition for Supreme Court review, the government surprised everyone by charging him, not with the sensational plots it had previously alleged but in an existing indictment in Florida against Adham Amin Hassoun and Kifah Wael Jayyousi for the relatively minor charges of training and transferring money to fighters in Chechnya and Kosovo. The government disingenuously called its decision ‘a classic example of why the criminal justice system is one of those important tools’ in the prevention of terrorism. ‘[M]uch thought goes into how and why various tools are used in these complicated cases. The important thing is for

someone not to come away thinking this whole process is arbitrary, which it is not’.  

The government moved to transfer Padilla from military to civilian custody, expecting this to be pro forma since the defendant supported it. But the Fourth Circuit took the unusual step of requesting briefs on whether to vacate its opinion, given the difference between the indictment and Bush’s original allegations justifying detention. A month later that court denied the motion. Luttig (who had learned of the indictment only when his clerk suggested he listen to Gonzales’s speech on the chambers television) wrote that the case presented ‘an issue of such especial national importance as to warrant final consideration’ by the Supreme Court. The government’s actions created ‘at least an appearance’ that it is ‘attempting to avoid’ such consideration. For three-and-a-half years the government had been ‘steadfastly maintaining that it was imperative in the interest of national security’ that Padilla be held militarily. While calling its motion an ‘emergency application’, the government ‘provided no explanation as to what comprised the asserted exigency’. The ‘rule of law is best served by maintaining on appeal the status quo’. The government’s actions have left not only the impression that Padilla may have been held for these years … by mistake … [but also] that the government may even have come to the belief that the principle in reliance upon which it has detained Padilla for this time … can, in the end, yield to expediency … these impressions have been left … at what may ultimately prove to be substantial cost to the government’s credibility before the courts …”

Appealing to the Supreme Court, the government said this decision ‘defies both law and logic’. It was ‘based on a mischaracterization of events and an unwarranted attack on the exercise of executive discretion, and … would raise profound separation-of-powers concerns’. Prosecutors had narrowed the charges against Padilla because the original allegations would have compromised intelligence ‘sources or methods’ (i.e. his years of mistreatment in the brig). The Supreme Court summarily approved the transfer and on 3 April denied review of the habeas petition. Justice Kennedy took the unusual step of giving his reasons (in which Roberts and Stevens concurred). Padilla’s custody would be unaffected by review; the possibility of his return to military custody was merely ‘hypothetical’. The Court should avoid ‘fundamental issues respecting the separation of powers’. But acknowledging Padilla’s ‘continuing concern that his status might be altered again’, Kennedy assured him the District Court ‘would be in a position to rule quickly’. It and ‘other courts of competent jurisdiction should act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised’. And Padilla could apply directly to the Supreme Court. Ginsburg explained

27 Padilla v Hanft 432 F 3rd 582, 585 (4th Cir 2005).
28 Solicitor General, Paul D Clement, quoted by E Lichtbau ‘Supreme Court Is Asked to Rule on Terror Trial’ New York Times (29 December 2005).
29 Padilla v Hanft 2006 WL 845383 (US).
her vote for review by quoting Stevens’s 2004 dissent declaring that the case raised a question ‘of profound importance to the Nation’ – implicitly rebuking him for withholding the necessary fourth vote (with Souter and Breyer). ‘It is a question the Court heard, and should have decided, two years ago’. The government had done ‘nothing’ to ‘retract the assertion of Executive power’, and ‘nothing’ prevented it from returning Padilla to military detention.30

Five weeks later Luttig abruptly resigned from the bench to become general counsel of Boeing. The company was facing serious problems: a fine of up to $500-million for improperly acquiring documents from Lockheed Martin Corporation, illegal recruitment of a senior Air Force official who oversaw billions of dollars in other Boeing contracts, and an investigation for the (aborted) $20-billion contract to lease air refuelling planes. Luttig insisted that ‘my decision has nothing whatever to do with the Supreme Court process’. ‘No one can or should plan their life around the possibility of a Supreme Court appointment’. Boeing offered a ‘singular opportunity’ to remain in public service by working for an ‘American icon’ (thereby confirming Eisenhower’s 1961 warning about the military-industrial complex). Furthermore, he could not afford to send his two teenage children to college on his $172,000 judge’s salary. He had rejected the government’s motion to transfer Padilla only because ‘I thought that it was appropriate that the Supreme Court would have the final review of the case’. Pointedly overlooking President Bush, standing next to him, Luttig expressed ‘heartfelt thanks to your father, because of whom my professional dreams in life came true’.31 Four months after Luttig’s move, an employee of a Boeing subsidiary – Jeppesen International Trip Planning – disclosed that Jeppesen’s managing director had boasted that ‘we do all of the extraordinary rendition flights – you know, the torture flights’.32 In May 2007 the American Civil Liberties Union (ACLU) sued Jeppesen and Boeing on behalf of Khaled el-Masri and two other rendition victims (and named 76 others). (In 2010 the Ninth Circuit dismissed the case, citing state secrets.)

Padilla, Hassoun and Jayyousi were tried by Judge Cooke, a 1977 Wayne State law graduate, who had spent one year in legal aid, another as a public defender, and a third as a law firm associate before working exclusively for government: three years as an Assistant US Attorney and another seven in administrative positions in that office, three for the Governor of Florida, and two as a Dade County Assistant Attorney, before being appointed by Bush in 2004. As the case approached trial, she dismissed one of the three conspiracy counts as duplicative (though the 11th Circuit reversed). The federal magistrate denied a motion to suppress Padilla’s pre-arrest statements to the FBI at O’Hare. ‘Defendant was not restrained at any time, by handcuffs or otherwise. Every effort was made for defendant to be made comfortable, in a

30 Ibid.
32 J Mayer ‘Outsourcing: The CIA’s Travel Agent’ New Yorker (30 October 2006).
non-threatening setting. He was never told that he was not free to go'. The magistrate also denied a motion to suppress the evidence seized after Padilla’s arrest, which was grounded on the argument that the warrant was based on evidence extracted from detainees tortured (Binyam Muhamad) or medicated (Abu Zubadayh) in secret prisons.

The defence moved to dismiss because of outrageous government conduct. It alleged that Padilla had been kept in total isolation for nearly 21 months, without a window or a watch. He slept on a cold steel bunk and was constantly deprived of sleep, especially before lengthy interrogations. Most of the time he had no reading matter. He was allowed to exercise only at night. He was subjected to bright light or complete darkness for more than 24 consecutive hours and placed in stress positions, hooded and shackled and manacled with a belly chain for hours in his cell. Noxious fumes made his eyes and nose run. He suffered extreme cold. He was denied showers for weeks and then subjected to forced grooming. He was threatened with being cut with a knife and having alcohol poured on his wounds and with rendition and imminent execution. He was fed false information by multiple interrogators who shook and screamed at him. He was given drugs he believed to be LSD or PCP. The defence filed a video showing him extracted from his cell for root canal surgery with his hands and feet shackled and wearing noise blocking headphones and blacked out goggles. Cooke denied the motion.

The defence moved to have Padilla declared mentally incompetent to stand trial. The Navy brig’s daily log showed he had endured stretches of 34, 17 and 15 days without any contact other than visual checks (through the door slit) and up to six days without even that. Defence experts found him suffering from post-traumatic stress syndrome and Stockholm syndrome: Padilla suggested, for instance, that his mother ask President Bush to cut through red tape for her next visit. One psychologist said he threatened to commit suicide if returned to the brig. He refused to discuss his interrogation with counsel, believing they might be conspiring with the government. He displayed facial tics and contortions. The brig psychologist, who had spoken to Padilla only twice, found ‘no remarkable changes the second time’ (when they conversed through the cell door slit) and claimed ‘he smiled’. ‘I saw this individual happy … joking … the full, broad range of emotions.’ Based on the expert testimony, Padilla’s courtroom demeanour, and his affidavit on torture, Cooke found him competent. She also denied his motion to dismiss for the (four-year) pre-indictment delay and failure to provide a speedy trial and denied the other two defendants’ motion to sever their cases on the ground that all the potential jurors had a negative opinion of Padilla.

---

Cooke allowed the defence 36 peremptory challenges and the prosecution 30 (compared with the customary ten and six). She dismissed about a third of the 550 potential jurors whose questionnaire responses suggested possible bias. She allowed the prosecution to refer to 9/11 in voir dire but not to suggest that Padilla had been involved. She excused more than half of the first 26 panellists for bias and took four weeks to seat a jury of five blacks, four whites, and three Hispanics. It included a young black woman who had relatives on the police force but said ‘there are a lot of people who are incarcerated who shouldn’t be there because they didn’t commit the crimes they are accused of’, a 40-year-old male internet company chief financial officer who thought Middle Eastern madrassas contributed to violence but also believed Islam was ‘one of the more temperate religions for hundreds of years’, and a young Latino college student who felt ‘the war in Iraq is for profit and oil, not because of weapons of mass destruction’. Two black men were later excused and replaced by Latinos.

In opening argument, the prosecution said Padilla had provided ‘the ultimate support’ to al Qaeda – himself. Hassoun, a computer programmer for a Broward County firm, ‘indoctrinated people and converted them to become al Qaeda fighters’. Jayyousi, a naturalised US citizen from Jordan, Navy veteran, engineer, and former Detroit school administrator, was the ‘money man’. The lead public defender warned that ‘throughout history there have been times of crisis, times when fear runs high, when political convenience causes parts of our government to overreach … Now is one of those times … and this is one of those cases’. One of Hassoun’s lawyers said ‘the government is really trying to put al Qaeda on trial in this case and it doesn’t belong in this courtroom because it has nothing to do with this case’.

The government’s strongest evidence against Padilla was his July 2000 al Qaeda ‘pledge form’, delivered by an Afghan to a CIA agent (who was allowed to testify in disguise). Although it used Padilla’s alias – Abu Abdallah Al Mujahir (the immigrant) – it bore his fingerprints and birth date (18 October 1970) and accurately described him as a native speaker of English and Spanish with carpentry skills, who had studied Arabic and the Koran, made the Hajj, and travelled to Yemen ‘as a way to go through for Jihad’. Testifying in exchange for sentence reduction, Yahya Goba, a US citizen of Yemeni descent serving ten years as one of the Lackawanna 6, described the al Qaeda camp where Padilla allegedly trained. But Goba never met him and said he himself had gone there to help Muslims in Palestine, Bosnia, Chechnya and Kosovo. Cooke instructed the jury not to draw any inference from Goba’s testimony that Padilla had attended the same camp and barred the government from showing a video of Goba meeting bin Laden.

After seeing Padilla on television at his 2002 arrest, Herbert Atwell, who attended the same South Florida mosque as Padilla, contacted the FBI from a Georgia prison (where he was serving time for his fifth serious crime). He initially identified an ‘Ibrahim’ at the mosque who urged members to fight for Muslims; and he did not mention Hassoun until the FBI showed him a photograph in January 2007. But for his (then) wife’s pregnancy, Atwell himself would have gone abroad to train for jihad, which he characterised as altruistic support for Muslims under siege in foreign countries. He jeopardised his credibility by insisting he had seen Hassoun on the same television news as Padilla (although Hassoun had not been charged at the time and had no connection with Padilla’s arrest). Cooke remarked that ‘these two things cannot be allowed to exist together in a truthful universe’ and wondered how the prosecution would ‘deal with his credibility’. 38 Jeremy Collins a Muslim convert who volunteered for Jayyousi’s American Worldwide Relief, testified about helping to buy satellite phones from Glocom, which cut off service when Russia complained the phones were being used by rebels. This fact and the account of another volunteer who returned from Chechnya to report ‘more fighting than relief work’ disillusioned Collins. 39

Of the 300,000 tapped phone calls, the prosecution introduced just 123, only eight of which involved Padilla. In July 1997 Hassoun told Padilla: ‘The most important thing is that you tell me you’re ready’. Padilla responded: ‘God willing … it’s going to happen soon’. Hassoun allegedly paid $5,000 to the fourth defendant, Mohamed Hesham Youssef (detained in Egypt and therefore not on trial), to support him and others fighting overseas. In July 1998 Youssef called Hassoun from the middle of the fighting in Kosovo. A month later he told Hassoun he had received combat training, 70 of his fellow fighters had been killed, and ‘Dr. Ayman’s’ group was there. (Prosecutors claimed this was Dr. Ayman al-Zawahiri, bin Laden’s second in command.) Hassoun told Youssef not to mention names over the phone. Padilla left for Egypt in September 1998. In two calls to Hassoun from there, he described his difficulty in learning Arabic but said he was doing ‘better than before’ and hoped to be accepted at Al-Azhar University. ‘First, I have to get settled with my marriage [to an Egyptian woman]. Then I’m going to continue with my studies and after that … whatever Allah the Almighty has open for us’. Hassoun advised Padilla to ‘prepare yourself financially’ and said ‘I think I prepared you psychologically before you went’. Youssef told Hassoun that Padilla’s ‘endeavor is limited. The other students are strong in their studies’. 38

38 C.J. Williams ‘Padilla’s Mosque Time Recalled’ Los Angeles Times A12 (1 June 2007); J Weaver ‘Wit ness Tells of Time at Mosque’ Miami Herald A3 (1 June 2007).

‘Basically, he is a slow learner’. In September 2000 he told Hassoun that Padilla had ‘entered the area of Usama’.  

Because Hassoun’s wife said ‘we know that the lines are … always monitored’, the FBI claimed they spoke in code. Special Agent Kavanaugh claimed to have deciphered it: ‘go to the picnic’ meant travel to jihad; ‘trade’, ‘commerce’, ‘playing football’, ‘eating cheese’, and ‘fresh air’ all were jihad; to be ‘married’ was to be martyred; and ‘students’ were the Taliban. He claimed that Padilla’s two references to an ‘open door’ referred to ‘an opportunity to travel to a jihad’. But Kavanaugh did not speak Arabic, did not understand a ‘reservation on a female donkey’, admitted that one translator ‘says that tourism could be some kind of jihad or could be some relief effort’, and conceded Padilla never used any of the alleged synonyms for jihad.

Rohan Gunaratna, a Singapore professor and director of a terrorism research centre, testified that Padilla’s ‘mujahedeen data form’ ‘was for a person to go for training’. The camp he allegedly attended was not for relief: ‘they trained people to kill’. Another form in the same binder ‘pledged allegiance to Osama bin Laden’. Under cross-examination, Gunaratna acknowledged having a Justice Department contract for $53,700: $300/hour in court and $250/hour outside. He had testified for the prosecution against Sami Omas Al-Hussayen (who was acquitted), and prosecutors planned to use him against Nuradin Abdi (accused of seeking to bomb an Ohio shopping mall). (But he had also worked for John Walker Lindh, concluding he did not fit the terrorist profile.)

A CIA spokesman told Newsweek in 2003 that Gunaratna’s testimony that Khalid Sheikh Mohammed chaired a January 2000 meeting in Asia that discussed the 9/11 attacks was ‘totally incorrect’.

Over strong defence objections, the prosecution played a 1997 CNN interview of bin Laden and tapes of Padilla’s co-defendants discussing it. Hassoun told a fellow Muslim to watch it: ‘You’ll see Osama bin Laden … may God protect him’. ‘He doesn’t let the dog in the White House sleep at night’. Jayyousi called the interview ‘quite powerful’. ‘They showed what happened in Somalia’, which bin Laden called an American ‘defeat’. The prosecution said the defendants ‘talked about, taped, and celebrated’ the interview. Their enthusiasm was ‘telling’. ‘[T]hey supported this individual’ and ‘his ideol-

---


41 Ibid.

42 J Weaver ‘Rise of al Qaeda Detailed in Padilla Trial’ Miami Herald (25 June 2007).
ogy’. Clarke told jurors to view the tape not as ‘the truth’ but as bearing on Jayyousi’s and Hassoun’s states of mind.43

The defence called Raed Awad, who had been imam of the Fort Lauderdale mosque in 1995–2000 (when all three defendants attended) and had raised money to help Padilla ‘study Islam and Arabic language’. Awad distinguished between terrorists and mujahedeen defending Muslims in Chechnya, Bosnia and Somalia. ‘The mujahedeen were fighting, and in fighting there is killing. The mujahedeen are honorable people. Terrorists are people who have no goal but to maim and kill’. In response to the prosecutor, Awad said angrily that those who commit atrocities against Muslims ‘should be killed and taken to justice’. Cooke sent the jury out of the room and rebuked the witness. Mohammed Wannous, 73, flew from Helsinki to testify for an hour about a single 1997 phone call with Hassoun (his son-in-law) in which they referred to the Lebanese group Usbat al-Ansar (which prosecutors connected with bin Laden). Wannous said Hassoun was only kidding when he said ‘we are with’ that group. ‘He was joking with me, as usual. Because I know he didn’t belong to any of them’. The prosecutor noted that neither was laughing, although they laughed about family issues later in the call. Hassoun’s lawyer rested after calling seven witnesses. Padilla’s lawyer called none.44

Khalil Saab, chief of international operations at a construction firm, testified that it hired Jayyousi in 2003 to consult on military projects in Cairo and Qatar, overseen by the US Army Corps of Engineers. Jayyousi had regular access to military bases. The FBI had twice talked to Saab about Jayyousi but said nothing concerning terrorism. ‘If I knew he had connections to any terrorist organization he would not have worked for us at all’.45 John Lasswell, a retired Navy officer, testified that in the late 1980s Jayyousi and he worked for an engineering company retrofitting Navy ships, which Jayyousi had security clearances to board. Erol Bulur testified that his New Jersey warehouse shipped four containers (about 25,000 pounds each) of used clothes, canned foods and medicine from Jayyousi’s American Worldwide Relief to Chechen refugees in 1995 and 1996. Jerry White, chief of facilities at University of California, San Diego when Jayyousi worked there in 1993–95, vividly described a 1993 occasion when Jayyousi and an Israeli architect opened a bottle of champagne to celebrate the peace accords signed by Rabin and Arafat. Mumtaz Usmen, a civil engineering professor at Wayne State University who supervised Jayyousi’s doctoral dissertation, said he was always comfortable and friendly.


45 Khalil Saab quoted by C Anderson ‘Padilla Co-defendant Rests Case’ USA Today (1 August 2007).
In his closing, the prosecutor called Padilla the ‘star recruit of a terrorist support cell … discovered right in our backyard’. ‘You don’t mail away’ for the mujahedeen data form. ‘You are already inside the Al Qaeda organization when you get this form’. Padilla ‘trained to kill’. ‘That is why this is a murder conspiracy’. He ‘became an al Qaeda trainee who provided the ultimate support – himself’ for ‘training to learn how to murder, kidnap and maim’. The accused used ‘football’ for jihad. ‘Playing this kind of football was more important than anything else to these men. What they were doing was no game. It was murder’.

Padilla’s lawyer reproached the prosecution for showing a photo of the accused in a keffiyah to ‘scare’ the jury, seeking to counter it with pictures of the defendant holding his baby sons. He maintained that Padilla had moved to the Middle East only to study Arabic and Islam, noting that he was a recent convert, not fluent in Arabic, younger and less educated than the other defendants, and ‘slow’, having worked in a fast-food restaurant before moving to Egypt.

Hassoun’s lawyer insisted his client just wanted to ‘give relief’ to Muslim victims of atrocities in Bosnia, Chechnya and Kosovo. ‘Football, as Adham talks about it, is not about murder – it’s all about helping people’. Because the FBI had taped the group’s phone calls for six years but stopped in 2000 and did not arrest the suspects for two more years the present case was ‘politically motivated … born out of a desperate need to prosece people for terrorism after 9/11’. ‘They want to scare you … That is what is going on in this country today. Don’t fall for it.’ But Judge Cooke rejected a defence instruction that the jury should acquit a defendant who believed violence was ‘intended to prevent or defend against unlawful attacks by others’ and accepted a prosecution instruction that the defendants could be convicted even if they ‘may have believed that the conduct was religiously, politically or morally required, or that ultimate good would result’.

Jayyousi’s lawyer told jurors that prosecutors repeatedly referred to al Qaeda because ‘the government is trying to appeal to your fears. If they get you scared, maybe you’ll let your guard down and say, “maybe we better go with the government on this one.”’ The government had demonstrated no link between Padilla and Jayyousi, whose ‘motto’ had always been: ‘I have nothing to hide’.

On 16 August, after deliberating just over a day, the jury convicted each defendant of conspiring to commit illegal violent acts outside the US, as well as conspiring to provide and providing material support in furtherance of this goal. One juror said later she had made up her mind before the deliberations began. ‘We wanted to make sure we went through all the evidence. But the
evidence was strong, and we all agreed on that'.

Attorney General Gonzales (under attack on many fronts) was exultant: ‘The conviction of Jose Padilla – an American who provided material support to terrorists and trained for violent jihad – is a significant victory in our efforts to fight the threat posed by terrorists and their supporters’. Acting Deputy Attorney General Morford declared: ‘Frankly, America is a better place today’. ‘This clearly shows that in some cases, yes, the process can handle it. You have to look at it on a case-by-case basis’. A White House spokesman commended the jury for its work and thanked it ‘for upholding a core American principle of impartial justice for all. Jose Padilla received a fair trial and a just verdict’. Hassoun’s lawyer maintained he would have been acquitted without Padilla. ‘We’ve always thought this was a political trial. Jose Padilla’s presence in this trial was a problem’. The Florida ACLU executive director said ‘this trial clearly undermines the Bush administration’s unfounded fear that terrorists cannot … be tried in our criminal courts’. The verdict proves ‘that the Bush administration should close Guantanamo and pursue terrorists in the criminal justice system, not outside the confines of the rule of law’.

(c) Aftermath

Newspapers generally portrayed the verdict as vindicating the criminal justice system. The New York Times found it ‘hard to disagree with the jury’s guilty verdict’, which was ‘good news’, since ‘a would-be terrorist will be going to jail’. But it criticised ‘the Bush administration’s serial abuse of the American legal system in the name of fighting terrorism’. ‘On the way to this verdict, the government repeatedly trampled on the Constitution’. The prosecution ‘was so cynical and inept that the crime [Padilla] was convicted of … bears no relation to the ambitious plot to wreak mass destruction inside the US, which the Justice Department first loudly proclaimed’ and for which ‘he will likely never be brought to trial’. From the outset he ‘should have been charged as a criminal and put on trial in a civilian court’. The Los Angeles Times called it ‘Justice, at last’. ‘The conviction of Jose Padilla by a jury of his peers demonstrates that accused terrorists can be tried in civilian courts offering a panoply of protections for the defendants’. But despite this ‘vindication of the rule of law … the legal shell game to which Padilla was subjected continues to shame the administration’. Although he ‘finally had his day in court’, the Washington Post called ‘the five-year path to a verdict … an indictment of the administration’. The trial itself was ‘unremarkable’. ‘What was extraordinary, and reprehensible, was how long Mr. Padilla had to wait for the kind of due process most Americans take for granted’. Although civil libertarians would

50 'Padilla is Guilty on All Charges in Terror Trial' New York Times (17 August 2007).
51 P Whoriskey ‘Jury Convicts Jose Padilla on Terror Charges’ Washington Post (17 August 2007)
52 Ibid.
54 Whoriskey note 51 above.
now claim that ‘every terrorism prosecution can and should be channeled through U.S. Courts … there will be genuine enemy combatants who may not belong in civilian courts. But every person held by the government … must have due process to challenge that detention’.

One of the most interesting responses (in light of his subsequent appointment to succeed Gonzales as Attorney General) was an Op-ed by Mukasey (who had left the bench for private practice after hearing Padilla’s original habeas petition). Although some would claim ‘that Padilla’s odyssey is a triumph for due process and the rule of law in wartime’, it actually showed ‘why current institutions and statutes are not well suited’ to dealing with ‘Islamic terrorism’. The government may have designated him an enemy combatant ‘because the initial claim, that Padilla was involved in a dirty bomb plot, could not be proved with evidence admissible in an ordinary criminal trial’, or ‘because to try him in open court potentially would compromise sources and methods of intelligence gathering’, or ‘because Padilla’s apparent contact with high-ups in al Qaeda made him more valuable as a potential intelligence source than as a defendant’. In Mukasey’s earlier terrorist trial, the requirement that the government give defendants its list of unindicted co-conspirators warned Osama bin Laden that his connection had been discovered. In another of those trials, evidence about delivery of a cellphone battery tipped off terrorists that a communication link that ‘had provided enormously valuable intelligence’ had been compromised. It ‘was immediately shut down, and further information lost’.55

The Padilla case ‘helps illustrate in miniature the inadequacy of the current approach to terrorism prosecutions’. Despite numerous attacks, ‘criminal prosecutions have yielded about three dozen convictions, and even those have strained the financial and security resources of the federal courts near to the limit’. Khalid Sheikh Mohammed allegedly ‘told his American captors that he wanted a lawyer and would see them in court’. If the Supreme Court granted him constitutional protection ‘this bold joke could become a reality’. Mukasey assailed Center for Constitutional Rights president Michael Ratner (without naming him) for threatening ‘to unleash a flood of lawyers on Guantanamo so as to paralyze interrogation of detainees’. The Supreme Court’s assertion of jurisdiction over Guantanamo might mean that ‘capture of terrorism suspects will be forgone in favor of killing them’, or they might be rendered to countries ‘that are famously not squeamish in their approach to interrogation’. If, instead, ‘standards for conviction, searches, [and] the admissibility of evidence’ are ‘relaxed … those adaptations will infect and change the standards in ordinary cases …’. He urged Congress to consider a national security court staffed by life-tenured judges and indefinite detention analogous to civil commitment of the mentally ill.56

55 United States v Ramzi Ahmed Yousef 327 F 3rd 56 (2nd Cir. 2003) quoted in S Cooper Blum The Necessary Evil of Preventive Detention in the War on Terror A Plan for a More Moderate and Sustainable Solution (2011) 177.
56 Ibid 196-7.
In September, while Padilla was awaiting sentencing, his lawyers (Yale Law School’s National Litigation Project) revealed that he had filed suit in February seeking a dollar in damages against each of 60 federal officials, including Rumsfeld and Ashcroft, for his treatment in the Navy brig. Judge Floyd will hear the case. During his confirmation hearing for Attorney General, Mukasey evaded Senator Specter’s question about whether he would follow the Convention Against Torture or defer to the president’s commander-in-chief power to determine interrogation procedures. ‘The question assumes that that method of interrogation, notwithstanding a finding that it violates the law, should proceed anyway’. Nor would he say whether detainees had a constitutional right to a hearing because the issue was before the Supreme Court. But he appeared to regret having upheld Padilla’s classification as an enemy combatant: ‘I certainly can’t say that, as of now, there is clear authority authorizing what I thought there was authority to authorize in Padilla’.

In December the CIA disclosed that in 2005 it had destroyed its tapes of coercive interrogations of high value detainees. Claiming that testimony by one of them, Abu Zubaydah, had led to Padilla’s identification and arrest, his co-defendants’ lawyers asked Judge Cooke to order the government to disclose any information about the interrogation. She denied the motion. In January, Padilla sued Yoo, again seeking a dollar in damages. Asserting that ‘a lawyer who gives the green light to clearly illegal conduct is an accomplice to that conduct’, Padilla’s counsel noted that former OLC director Jack Goldsmith called Yoo’s memos ‘legally flawed’ and ‘tendentious in substance and tone’. Yoo’s lawyer dismissed this ‘political diatribe’, which ‘belongs, at best, in a journal, not before a federal court’. The Washington Post agreed the lawsuit had ‘dubious merit’. Although Yoo’s memo was ‘breathtakingly broad and … gave too little consideration to constitutional and statutory provisions that should have been a check on the president’s power’, such a suit could ‘have a chilling effect on administration lawyers’. (Nevertheless, the federal judge denied a motion to dismiss.) However, the Post said that ‘given the sad administration record of the past six years’, Padilla’s ‘allegations are not incredible’. Congress should determine ‘whether a U.S. citizen was tortured on U.S. soil’ and, if so, ensure ‘that it never happens again’.

The prosecution sought life sentences for all three defendants, claiming that Padilla ‘stands before this court as a trained al Qaeda killer’. Noting that prosecutors consistently had described the defendants as small fry, Padilla’s lawyer said the government could not have it both ways. He sought no more than ten years in light of Padilla’s 42 months in solitary confinement. The defence made more than 50 objections to the pre-sentence report, which was based heavily on the prosecution’s case, mentioned the videotape of bin Laden’s 1997 interview, and recommended life sentences for all. Judge Cooke


endorsed the report’s ‘terrorism enhancement’ multiplier, citing the jury finding that Padilla had enrolled in an al Qaeda training camp as proof that he was ‘an instrument of the scheme’ to overthrow foreign governments and impose fundamentalist Islamic rule. She modified the report for the other two, who did not play ‘leadership roles’ in the global conspiracy, but rejected their pleas for leniency.59

Cooke sentenced Padilla to 17 years, below the sentencing guidelines. ‘There is no evidence that these defendants personally maimed, kidnapped or killed anyone in the United States or elsewhere. There was never a plot to overthrow the United States government’. She gave Padilla credit for his three-and-a-half years in the brig under conditions ‘so harsh [that they] warrant consideration in the sentencing’. Noting that Hassoun got 15 years and eight months and Jayyousi 12 and eight, the prosecution boasted that these ‘serious sentences … effectively dismantle an American support cell for terrorists’.60 Padilla could be released in less than 13 years, the others in less than ten. Jennifer Daskal of Human Rights Watch said the case shows that the criminal justice system does in fact work. The *Miami Herald* called the sentences ‘measured and fair’. The ‘judgment and trial have been good illustrations of how the U.S. justice system should work: an impartial and fair assessment of the facts and evidence’ and a far cry from the administration’s earlier ‘over-hyped and ultimately incorrect’ claims. ‘Thank goodness for courts and judges who know the constitution and follow the law’.61 All three defendants planned to appeal. Within two months the Pentagon revealed that it had found another 50 tapes of harsh interrogations, including those of Padilla in the brig.

IV HOW DID AMERICAN LAW FUNCTION UNDER STRESS?

Padilla’s unfinished saga complements the ten South African narratives in illuminating the ways in which law can be a site of resistance to state power. First, judges’ political affiliations do not mechanically predict their behaviour. The role shapes occupants. Although appointed by Reagan, Mukasey’s experience as a federal prosecutor and judge taught him that Padilla needed a lawyer to file for habeas. The judge was confident he knew more than the military about criminal behaviour. (Mukasey was more obviously political after Bush appointed him Attorney General.) Although elevated to the Court of Appeals by Bush, Parker was an African American who had attended Yale College and Yale Law School when they were virtually all white. Although just appointed by Bush, Floyd saw Padilla as simply another criminal case and invoked the conservative shibboleth of judicial restraint to reject Bush’s claim of executive power. Luttig (and his Democratic-appointed colleagues) initially gave the government everything it wanted; but he rebuked it for changing its story, leaving him and his court exposed. Stevens, a Ford appointee, wrote a

stinging dissent to the Supreme Court’s first refusal to hear Padilla, which Ginsburg quoted when Stevens failed to cast the necessary fourth vote to grant certiorari. In order to keep Stevens on side, Kennedy (joined by Roberts) warned the administration that the courts would be watching what it did next.

Second, legislation enacted in response to one historical experience can be applied in radically different contexts. Guilt over the internment of Japanese-Americans – an act of wartime racism – led decades later to passage of the Non-Detention Act, which conferred rights that could be invoked by Muslim detainees against another such action.

Third, military detention and interrogation are inconsistent with criminal prosecution. The government threw Padilla in the brig, only to be told by Mukasey to let him see a lawyer and by Floyd to prosecute or release. Gonzales, the politician, threatened to do so, but the more lawyerly Comey recognised that government could not use Padilla’s unlawful interrogations. The Fourth Circuit accepted the administration’s argument that criminal prosecution would not serve its purpose. Fearing a Supreme Court loss, however, the government ultimately indicted Padilla on lesser charges because they could not use testimony extracted by torture from him or those held in secret prisons and Guantanamo.

Fourth, judges – even more than most of us – do not like to be trifled with. Luttig may have been angry at being passed over for the Supreme Court four times despite his loyalty to the administration. He explicitly criticised it for changing its story, leaving him and his colleagues responsible for an opinion based on factual and legal claims the government seemed to repudiate. Next time, Luttig warned, courts might not be so credulous. And he soon quit for an attractive private position – where he promptly found himself defending Boeing against charges of complicity with the administration’s renditions.

Fifth, the government expended valuable political capital each time it gamed the legal system. Instead of conducting a hearing to determine whether Hamdi was an enemy combatant (as the Supreme Court had ordered), the administration returned him to Saudi Arabia. At the end of 2004 the OLC rewrote the notorious August 2002 torture memo to ease Gonzales’s confirmation as Attorney General. When McCain succeeded in outlawing abusive treatment of detainees, Bush declared himself unconstrained by the law, and Congress stripped the courts of jurisdiction over Guantanamo. On the eve of the Supreme Court’s Hamdan hearing on the legality of military commissions, the administration changed the rules about the admissibility of evidence obtained through abusive interrogations. Fearing that the Second Circuit would release Padilla or at least grant him access to counsel, the administration secretly spirited him away to the far more conservative Fourth Circuit. And instead of risking five Supreme Court votes to grant Padilla habeas, the administration indicted him for lesser offenses. But though executive power can often trump law, playing that card leaves the executive with a weaker hand.

Finally, the government has been frustrated in trying to use criminal prosecutions either to stage public morality plays about terrorist culpability (as it did after the first World Trade Center bombing) or to protect Americans from
another attack (a danger the Bush administration constantly emphasised to justify its power grab). Lindh pleaded guilty to avoid the death penalty. After Moussaoui defiantly proclaimed his guilt, the government’s decision to seek the death penalty let him turn the penalty phase into a circus (at the cost of a life sentence). David Hicks short-circuited his military commission with a deal that got him brief imprisonment in Australia. All three (and virtually all the others convicted) were marginal, often pitiful, figures who had never gotten anywhere near committing significant terrorist acts (such as demolishing the Brooklyn Bridge with a blowtorch or blowing up the Sears Tower in Chicago). Padilla’s own lawyer portrayed his client as a loser – a fast-food worker, unable to learn Arabic. Many of the prosecutions depended on shady government informants whose conduct approached, and often constituted, entrapment.

Forced (by its own abusive conduct) to abandon sensationalistic claims that Padilla was about to construct a dirty bomb or blow up apartment houses with natural gas, the administration added him to a pre-existing indictment charging two others with conspiring to provide material assistance to Muslims fighting Russia in Chechnya and Serbia in Kosovo. (Far from being threatened by those struggles, the US actively supported them; in any case, Padilla was not implicated in either.) The prosecution could use nothing it obtained from his lengthy abusive interrogation – or that of any other ‘enemy combatant’. The trial itself was ordinary (if one ignores everything that preceded it). An ex-prosecutor (like many judges), Cooke often ruled for the government. She denied motions to dismiss for outrageous conduct and to find Padilla incompetent to stand trial. (The former is almost never granted, the latter rarely.) She rejected the motions to dismiss for delay (all of which predated indictment) and to sever because of Padilla’s notoriety. The magistrate was even more pro-government, admitting Padilla’s pre-arrest statement because the FBI had interrogated him in a ‘comfortable … non-threatening setting’ and denying a motion to suppress grounded on the claim that his arrest warrant had been based on evidence obtained from detainees tortured or medicated in secret prisons. But Cooke was scrupulously fair in selecting the jury, dismissed one count (reinstated on appeal), and commented critically on the contradictions in the testimony of Atwell (albeit an unimportant witness).

As in so many other ‘terrorist’ prosecutions, the government case was amateurish. Atwell should never have been called. FBI agent Kavanaugh claimed to have broken the ‘secret code’ but could not speak Arabic. Gunaratna’s ‘expertise’ had obviously been bought by the government (if he had also sold it to Lindh). The only eight tapped phone calls involving Padilla (out of 300,000) were hopelessly ambiguous. But none of this mattered. Padilla had completed a mujaheddin registration form and gone to Afghanistan. His lawyers put on no defence. Hassoun and Jayyousi had raised money and goods for Muslim fighters in Chechnya and Kosovo. Defence attorneys emphasised that the defendants had committed no violent acts; but they were not charged with this. The jury reached a verdict in a day (one member admitting she had decided before deliberating).
The spectres of 9/11, al Qaeda and bin Laden overshadowed the trial. Prosecutors invoked them as often as possible. Cooke admitted the bin Laden interview and Hassoun’s and Jayyousi’s enthusiastic responses; it is hard to believe jurors heeded her instruction to use the videotape restrictively. Defence attorneys fruitlessly urged jurors not to be swayed by fear. The defence argued that their clients were being prosecuted for protected beliefs and words, stressed their noble motives, and translated jihad as humanitarian aid and self-defence. But the judge refused to make these jury instructions. Neither side succeeded in turning this criminal prosecution into a political trial.

The lessons for the future are unclear. Even the government claimed that the trial showed both that it is and is not possible to try alleged terrorists in criminal courts. Despite Gonzales’s ‘windy militant trash’ (reiterated a month before resigning under pressure), the trial had little to do with the American war on terror. None of Hassoun’s and Jayyousi’s actions endangered the US. Nor did Padilla’s acts in Afghanistan (for which he was convicted). Padilla may have posed a remote threat on his return; but the government disabled itself from prosecuting him for this by abusively detaining and interrogating him and others. By transferring him from military to civilian custody and excluding all the evidence it had obtained from other detainees, the government temporarily shielded its behaviour from judicial scrutiny. Legality, paradoxically, functioned to marginalise the criminal justice system as an effective tool in the war on terror. In light of this, Mukasey’s advocacy of a national security court and indefinite civil commitment is deeply troubling. Many of the other criminal prosecutions have depended on shady government informants who came very close to entrapment. In the end, all that legality may be able to do is render the government’s domestic ‘war on terror’ as misguided, wasteful, and counterproductive as its real wars in Afghanistan and Iraq.