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POLICE STATE IN AMERICA: Now Bush can lock up anyone forever without charge

The final levee has given way...

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As if the official ineptitude of the Bush administration in the aftermath of Katrina and the callousness of the Bush family were not enough to digest, a U.S. Federal appeals court has just delivered this bombshell in the Jose Padilla case:

> "The Congress of the United States, in the Authorization for Use of Military Force Joint Resolution, provided the President all powers necessary and appropriate to protect American citizens from terrorist acts by those who attacked the United States on September 11, 2001... [T]hose powers include the power to detain identified and committed enemies such as Padilla, who associated with al Qaeda and the Taliban regime, who took up arms against this Nation in its war against these enemies, and who entered the United States for the avowed purpose of further prosecuting that war by attacking American citizens and targets on our own soil..."

What this means is that unless the Supreme Court overturns this verdict, the U.S. government can keep Mr Padilla, a U.S. citizen, in jail indefinitely, without charge. Worse, the government will be tempted to invoke this power against pretty much anyone it likes since the Appeals Court made no attempt to verify the authenticity of the allegations made against the prisoner. While the American Civil Liberties Union (ACLU) says the judgment "does not authorize the government to designate and detain as an 'enemy combatant' anyone who it claims is associated with Al Qaeda or other terrorist groups", the bitter truth is that U.S. citizenship will not protect individuals from being deprived of their liberty if the Administration decides they are a threat to U.S. national security. Its Guantanamo time for everyone. And since the war on terror has been described by U.S. officials as "an endless war", the period of incarceration will also be endless. This is precisely what the Italian scholar, Giorgio Agamben, means when he says the State of Exception — which in 'democratic' countries is meant to be a 'provisional measure' — has become a normal , routine, paradigmatic form of rule.

In his *State of Exception*, published in 2004, Agamben writes:

> "President Bush's decision to refer to himself constantly as the "Commander in Chief of the Army" after September 11, 2001, must be considered in the context of this presidential claim to sovereign powers in emergency situations. If, as we have seen, the assumption of this title entails a direct reference to the state of exception, then Bush is attempting to produce a situation in which the

> emergency becomes the rule, and the very distinction between peace and war (and between foreign and civil war) becomes impossible." (Translated by Kevin Attell)

In designating Mr Padilla an 'enemy combatant', President Bush invoked his authority as Commander in Chief and instructed Defence Secretary Donald Rumsfled to detain him indefinitely. In his Writ of Habeas Corpus (2 July 2004), Mr Padilla said he disputed this designation and allegations and wanted to be able to go to trial so that the true position could be established:

> "Padilla is not an 'enemy combatant'. He has never joined a foreign Army and was not arrested on a foreign battlefield. He was arrested in a civilian setting within the United States. Padilla carried no weapons or explosives when he was arrested. He disputes the factual allegations underlying the Government's designation of him as an 'enemy combatant'."

So confident were Mr Padilla's lawyers of their client's case — and so pressing the urgency for resolution since he had already been in detention for more than two years — that on October 20, 2004, they filed a motion for summary judgment arguing that he was "entitled to judgment as a matter of law even if all of the facts pleaded [in the Government's allegations] are assumed to be true." That confidence proved well-founded when a district court in South Carolina on 28 February 2005 granted the summary judgment motion and habeas petition and ordered that Mr Padilla either be released or charged with a crime.

The U.S. government went on appeal and has now won.

The Appeal court essentially cited the Quirin precedent (the case of German saboteurs who entered the U.S. during World War II and were detained as enemy combatants) but cleverly rejected Padilla's argument that if Quirin were to apply, then he should be given the benefit of a trial as one of the defendants in that case, Haupt, also a U.S. citizen, had been. The court said:

> "We are convinced, in any event, that the availability of criminal process cannot be determinative of the power to detain, if for no other reason than that 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. Equally important, in many instances criminal prosecution would impede the Executive in its efforts to gather intelligence from the detainee and to restrict the detainee's communication with confederates so as to ensure that the detainee does not pose a continuing threat to national security even as he is confined –- impediments that would render military detention not only an appropriate, but also the necessary, course of action to be taken in the interest of national security."

Implicit in this monstrous logic is the possibility that the factual position of the Government's allegations — which the court assumed to be correct — might not stand up to scrutiny at a trial. Which, one might have thought, is precisely the reason Mr Padilla should be allowed to have his day in court.

Incidentally, the 9 September Appeal court judgment was written by Judge J. Michael Luttig on behalf of a three judge bench. Described in 2001 by CNN as "a rising star among

conservatives", Judge Luttig is one of several judges in the running for a U.S. Supreme Court slot.

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