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The Imperial Presidency

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By Dahlia Lithwick

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Why is the United States poised to try Jose Padilla as a dangerous terrorist, long after it has become clear that he was just the wrong Muslim in the wrong airport on the wrong day?

Why is Washington still holding hundreds of detainees at Guantanamo Bay, Cuba, long after years of interrogation and abuse have established that few, if any, of them are the deadly terrorists they have been held out to be?

And why is President Bush still issuing grandiose and provocative signing statements, the latest of which claims that the executive branch has the power to open mail when it sees fit?

I once believed that the common thread here is presidential blindness -- an extreme executive-branch myopia that leads the chief executive to believe that these futile measures are integral to combating terrorism; a self-delusion that precludes Bush and his advisers from recognizing that Padilla is a chump and Guantanamo Bay is just a holding pen for a jumble of innocent or half-guilty wretches.

But it has finally become clear that the goal of these efforts isn't to win the war against terrorism; indeed, nothing about Padilla, Guantanamo Bay or signing statements moves the country an inch closer to eradicating terrorism. The object is a larger one: expanding executive power, for its own sake.

Two scrupulously reported pieces on the Padilla case are illuminating. On Jan. 3, Nina Totenberg of National Public Radio interviewed Mark Corallo, who was spokesman for then-Attorney General John D. Ashcroft, about the behind-the-scenes decision-making in the Padilla case -- a case that has lollled through the federal courts for years. According to Totenberg, when the Supreme Court sent Padilla's case back to the lower federal courts on technical grounds in 2004, the Bush administration's sole concern was preserving its constitutional claim that it could hold citizens as enemy combatants. "Justice Department officials warned that if the case went back to the Supreme Court, the administration would almost certainly lose," she reports, which is why Padilla was dragged back to the lower courts. Her sources further confirmed that "key players in the Defense Department and Vice President Cheney's office insisted that the power to detain Americans as enemy combatants had to be preserved."

Deborah Sontag's story on Padilla in the Jan. 4 New York Times makes the same point: He was moved from military custody to criminal court only as "a legal maneuver that kept the issue of his detention without charges out of the Supreme Court." This is why the White House moved Padilla from the brig to the high court to the federal courts and back to a Florida trial court: They were shopping for the best place to enshrine the right to detain him indefinitely. Their claims about Padilla's dirty bomb, known to be false, were a means of advancing their claims about executive power. When confronted with the possibility of losing on those claims, they pulled him back to the criminal courts so as not to lose powers they'd already won.

This need to preserve new legal ground also explains the continued operation of the detention center at Guantanamo Bay. Last week marked the fifth anniversary of the camp that -- as then-Defense Secretary Donald H. Rumsfeld claimed in 2002 -- houses only "the worst of the worst." Now that more than half of them have been released (the best of the worst?) and even though only about 80 will ever see trials, the camp remains open. Why? Civil rights groups worldwide and even close U.S. allies such as Denmark, England and Germany clamor for its closure.

But Guantanamo Bay stays open for the same reason that Padilla stays on trial. Having claimed the right to label enemy combatants and detain them indefinitely without charges, the Bush administration cannot retreat from that position without ceding ground. The president is as much a prisoner of Guantanamo Bay as the detainees are. Having gone nose to nose with Congress over his authority to craft stripped-down courts, guaranteed to produce guilty verdicts, Bush cannot call off the trials. The endgame in the war against terrorism isn't holding the line against terrorists. It's holding the line on hard-fought claims to limitless presidential authority.

Enter these signing statements. The most recent of the all-but-meaningless postscripts Bush tacks onto legislation gives him the power to "authorize a search of mail in an emergency" to "protect human life and safety" and for "foreign intelligence collection." There is some debate about whether the president has that power already, but it misses the point. The purpose of these signing statements is to plant a flag on the moon -- one more way for the chief executive to stake out the furthest corners in the field of his desired powers.

Last spring, the New Yorker's Jane Mayer profiled David Addington, Cheney's chief of staff and legal adviser. Addington's worldview in brief: a single-minded devotion to something called the New Paradigm, a constitutional theory of virtually limitless executive power, wherein "the President, as Commander-in-Chief, has the authority to disregard virtually all previously known legal boundaries, if national security demands it," Mayer describes.

Bush administration insiders told Mayer that Addington and Cheney had been "laying the groundwork" for a vast expansion of presidential power long before 9/11. And in 2002, the vice president told ABC News that the presidency was "weaker today as an institution because of the unwise compromises that have been made over the last 30 to 35 years." Rebuilding that presidency has been their goal for decades.

The image of Addington scrutinizing "every bill before President Bush signs it, searching for any language that might impinge on Presidential power," as Mayer puts it, can be amusing, sort of like the mother of the bride obsessing over a tricky seating chart. But this zeal to restore an all-powerful presidency traps the Bush administration in its own worst legal sinkholes. This newfound authority -- to maintain a disastrous Guantanamo Bay, to stage rights-free tribunals and to hold detainees forever -- is the kind of power that Richard M. Nixon could have only dreamed about, and cannot be let go.

In a heartbreaking letter from Guantanamo Bay last week, published in the Los Angeles Times, inmate Jumah al-Dossari writes: "The purpose of Guantanamo is to destroy people, and I have been destroyed." I fear he is wrong. The destruction of Dossari, Padilla, Zacarias Moussaoui, Yasser Esam Hamdi and some of our most basic civil liberties was never a purpose or a goal -- it was a byproduct. The true purpose is more abstract and more tragic: to establish a clunky post-Watergate dream of an imperial presidency, whatever the human cost may be.

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