THE NEXT ATTACK: HOLDER'S AMICUS CURIAE BRIEF AGAINST UNLIMITED PRESIDENTIAL POWER

As Jake Tapper reports, the next attack the McCarthyites have planned is on Eric Holder, for once saying in an amicus curiae brief that it's possible following the Constitution will make it harder to detain potential terrorists.

> In 2004 Attorney General Eric Holder was one of four former Clinton administration officials offering an amicus brief questioning President Bush's assertion that he had the inherent authority to indefinitely detain as "enemy combatants" American citizens captured in the US.
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> The brief, offered in the case *Donald Rumsfeld v Jose Padilla*, can be read **HERE**. Holder's co-authors include former Attorney General Janet Reno, former deputy Attorney General Philip Heymann, and the former counsel for the CIA Jeffrey Smith.
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> A Republican official on the Senate Judiciary Committee tells ABC News that Holder did not disclose this amicus brief before his confirmation hearings.

The brief is actually refreshing in its simplicity. It recites all the means the executive branch has to combat terrorism, then says the President doesn't **also** need the power to detain Americans without any judicial oversight. I can see why and how the Republicans will make a stink of it, but that doesn't mean they are right.

But there's a part of the brief that deserves particularly close attention—because it raises the implicit question of why the Bush Administration didn't just charge Jose Padilla, if they could back up the claims they made about him.

> When Padilla was arrested pursuant to the material witness warrant, his terrorist plans were thwarted. He was then available to be questioned to the same extent as any other citizen suspected of criminal activity. Moreover, **the facts set forth in the President's findings, and the facts presented to the District Court, are more than sufficient to support criminal charges against Padilla, including providing material support to designated terrorist organizations**, 18 U.S.C. § 2339B; providing material support to terrorists, id. § 2339A; conspiracy to use a weapon of mass destruction, 18 U.S.C. § 2332a; and attempted use of a weapon of mass destruction, id. § 2332a(a)(1).36 Finally, Padilla's history of travel outside the United States, previous criminal record, and terrorism-related activities clearly justified detaining him. 18 U.S.C. § 3142(e). In short, the procedures of the criminal law provided an ample basis to detain Padilla, to subject him to interrogation, and to keep him from carrying out any violent acts against the United States or any of its citizens. **It is difficult to imagine any circumstances in which a terrorist would meet the standards for designation as an enemy combatant described by the government**, see Pet. Br. at 27, and not be subject to arrest as a material witness or a criminal.
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> The difference between what the government did in this case, and what existing law authorizes it to do, is one

> of accountability and transparency. The government could have continued to detain Padilla, **but would have been required to justify the detention to a court in an adversary proceeding**, based on the traditional probable cause standard. [my emphasis]

But therein may lie the problem. Here's footnote 36, describing the allegations the Bush Administration made against Padilla:

> 36 The government claims that Padilla traveled to Afghanistan, **approached a senior officer of al Qaeda**, proposed stealing radioactive material to build a "dirty bomb" and detonate it in the United States, researched such a project at an al Qaeda safe house in Pakistan, **had "extended contacts" with al Qaeda**, received training in furtherance of terrorist activities from al Qaeda, and was sent to the United States to conduct reconnaissance or terrorist attacks on behalf of al Qaeda. Padilla, 233 F. Supp. 2d at 572-73. [my emphasis]

Given what the government said it had against Padilla, Holder and the others say, "it is difficult to imagine any circumstances" in which the government couldn't either charge Padilla criminally or continue to hold him on a material witness charge. They then rattle off the charges that would follow from the claims the government made against Padilla, the evidence they said they had.

And then noted that the only thing that would be required to hold Padilla would be an adversary hearing.

But that would very quickly bring us back to the charges, starting with the charge that Padilla had ties to Al Qaeda leaders. Leaders like Abu Zubadayah, on whose testimony these charges at least partly rely.

And for that—for not imagining that the Bush Administration had already made it nearly impossible to charge someone of these allegations because they had based it all on torture—for that Holder will be made the next target of the McCarthyites wrath.