

The case of Yaser Esam Hamdi

Bush claims right to jail US citizens indefinitely, without charges or hearing

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In a legal argument that could as easily be used to justify a declaration of martial law, the Justice Department last week asserted the right of the president and the military to indefinitely hold US citizens deemed “enemy combatants” incommunicado, without formal charges, the right to a hearing or legal counsel.

This assertion of extra-constitutional powers came in a protracted legal tug-of-war over Yaser Esam Hamdi, a 21-year-old detainee who was captured in Afghanistan and brought to the US detention camp at the Guantanamo Bay naval base in Cuba. Earlier this year, after it was discovered that he was born in Louisiana and in all likelihood is entitled to US citizenship, he was transferred to a Navy brig in Virginia.

The Bush administration has waged a ferocious battle to block any judicial hearing to determine Hamdi’s status and any contact between the detainee and public defenders seeking to represent him.

While a lower court ruled that he had the right to consult with a lawyer, the Justice Department filed an appeal barring any meeting. After blocking Federal Public Defender Frank W. Dunham Jr. from seeing Hamdi, it argued in court that the attorney had no standing in the case because he “has no relationship” with the detainee.

The 46-page government brief affirms that “the military has the authority to capture and detain individuals whom it has determined are enemy combatants in connection with hostilities in which the Nation is engaged, including enemy combatants claiming American citizenship. Such combatants, moreover, have no right of access to counsel to challenge their detention.”

It goes on to assert that it makes no difference whether the alleged combatants are captured overseas or in the United States.

In a derisive attack on the US District Court Judge who

ordered the military to allow Hamdi to meet with an attorney, the Justice Department insisted that once deemed an enemy combatant, an individual has no rights, and that the courts have no business questioning the decisions of the military.

“A court’s inquiry should come to an end once the military has shown ... that it has determined that the detainee is an enemy combatant,” the brief states. “[T]he court may not second-guess the military’s enemy-combatant determination.”

For the courts to question in any way an order by the military or the president to grab someone off the street and lock him up for life as an “enemy,” the Justice Department argued, would constitute interference in “an area in which they have no competence, much less institutional expertise,” and would “intrude upon the constitutional prerogative of the Commander in Chief.”

The brief goes on to warn ominously against creating “a conflict of military and judicial opinion highly comforting to the enemies of the United States.”

The legal arguments for such sweeping police-state powers are unprecedented, as are the actions that have already been taken by the Bush administration in holding individuals prisoners of the military without hearings or trial.

In addition to Hamdi, the government has announced plans to continue holding Jose Padilla, the Brooklyn-born US citizen who was grabbed by FBI agents last month as he deplaned from an international flight to Chicago. Padilla likewise is being held in a military brig without charges or a hearing, and the government has refused to allow his attorney to see him. Justice Department officials admit that they lack sufficient evidence to indict Padilla on allegations that he was part of a plot to detonate a radioactive “dirty bomb.”

In its brief in the Hamdi case, the government leaned heavily on a 1942 Supreme Court decision allowing a military trial of German saboteurs arrested in the US. That decision, however, affirmed the defendants' right to appeal their status in federal court, a right the Bush administration is abrogating. Nor did the high court then allow for indefinite detention and denial of counsel.

In the Hamdi and Padilla cases—as with those of the hundreds of immigrants who have been rounded up without charges or hearings—the government has invoked “the war effort” to justify its riding roughshod over constitutional rights.

There has been no congressional declaration of war, of course, and Bush and other administration officials have asserted that their “war on terrorism” could last for decades. This raises the specter of a permanent suspension of such core constitutional guarantees as freedom from “unreasonable searches and seizures,” and the right to due process, a jury trial and legal counsel.

The Justice Department's position likewise upends the fundamental principle of civilian control of the military, placing unprecedented power over American citizens in the hands of generals who are unelected and answerable to no one.

It should be recalled that the “dirty wars” of torture, massacres and “disappearances” carried out by US-backed military dictatorships throughout Latin America over the course of more than two decades beginning in the 1960s were all waged in the name of a “war on terrorism.”

The right of the military to detain individuals indefinitely without charges or hearings now asserted by the Bush administration in the US was upheld by the courts in Argentina, Brazil, Uruguay, Chile and other countries, resulting in the torture and murder of hundreds of thousands of workers, intellectuals and youth deemed enemies of the military regimes.

Responding to the government's arguments, the lawyers seeking to represent Hamdi pointed to this threat.

“The Executive Branch of the Government does not have the authority to detain an American citizen incommunicado and to unilaterally withdraw from the courts the power to inquire into the propriety of his detention,” wrote Assistant Federal Public Defender Robert J. Wagner in his brief to the court.

He added, “A contrary conclusion would eliminate any limitation upon [the government's] power to indefinitely detain any American citizen, under a state of war or peace, as long as the military determines that the detainee

is an enemy.”

Quoting the government's argument that the courts have no business questioning the military's designation of a detained US citizen as an “enemy combatant,” the *Washington Post* editorialized: “These words were not written by some petty dictator whose kangaroo courts rubber-stamp his every whim and whose whims may include locking up citizens he regards as enemies. They were filed yesterday by the U.S. Department of Justice ...”

The editorial, entitled “The I-said-so test,” goes on to warn: “If this is correct, any American could be locked up indefinitely, without a lawyer, on the president's say-so. You don't have to believe that Mr. Hamdi is innocent to see grave peril in this.”

What the *Washington Post* and others within the political establishment who have voiced muted protests over the Bush administration's assumption of dictatorial powers deliberately obscure, however, is the connection between this “grave peril” to democratic rights at home and the eruption of US militarism abroad.

The American Civil Liberties Union (ACLU), for example, issued a condemnation of the military detention of Jose Padilla, criticizing it from the standpoint of weakening the “war on terrorism.”

“For the United States to maintain its moral authority in the fight against terrorism,” declared Anthony D. Romero, ACLU executive director, “its actions must be implemented in accordance with core American legal and social values.”

In reality, the “moral authority” of the Bush administration's military campaigns is entirely consistent with its adoption of forms of police-state rule. Both are the expression of an increasingly desperate and disoriented ruling elite that has determined to defend its wealth and interests by means of naked force.



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