Bush presses ahead with "enemy combatant" detentions

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Casting fundamental constitutional guarantees aside, the Bush administration is pressing forward with its policy of detaining people indefinitely, and without charges or access to legal counsel, as part of its so-called war on terrorism. Despite growing opposition to its policy, the Bush administration is preparing to expand the practice by allocating additional cells in military prisons and camps for detainees, including US citizens.

According to a news report in the August 8 *Wall Street Journal*, the Bush administration is formulating plans for a special committee—comprised of the attorney general, the secretary of defense and the CIA director—to designate "enemy combatants." A person so labeled can then be transferred to military custody and held indefinitely in detention, incommunicado, subject to interrogations and beyond the reach of any judicial review. This policy violates multiple constitutional provisions, including the Fifth Amendment right to due process, which includes notice of charges and an opportunity to be heard, and the right to counsel.

These measures further undermine the system of "checks and balances" which underlies the constitutional framework as a whole. No longer are people subject to arrest and incarceration only for violating acts of Congress, and no longer can they obtain access to courts to protect their rights. Instead a US citizen or foreign national can be stripped of his or her civil liberties solely on the basis of an executive decree.

To accommodate this new group of prisoners, a special wing to hold 20 US citizens has been prepared at the Goose Creek, South Carolina Navy Brig. According to George Washington University Professor of Law Jonathan Turley, Attorney General John Ashcroft last week announced an additional proposal to construct detention camps for US citizens deemed "enemy combatants."

The expansion of the Bush administration's unconstitutional detention program follows the resolution of the first criminal case arising after the September 11 terrorist attacks—the criminal prosecution against John Walker Lindh, the San Francisco Bay Area youth captured with a Taliban unit. The case ended last month with a plea bargain in which the youth was sent to federal prison for two decades after agreeing to a single charge that he violated a Clinton-era regulation banning the provision of services to the Taliban.

In the months before the agreement, however, Lindh's defense attorneys established that the government denied him his right to counsel and coerced allegedly incriminating statements through deliberate mistreatment tantamount to outright torture by US military forces.

The experience with Lindh has apparently convinced the Bush administration that it must not allow detainees access to defense attorneys at all. As a "senior official" told the *Wall Street Journal*, "There is a different legal regime that we're developing." This "different legal regime" consists of using the military to lock people up indefinitely—without charges, court appearances or lawyers.

It is widely believed that Ashcroft wants to use two prisoners, Yaser Hamdi and Jose Padilla, to establish the precedent for indefinite, incommunicado detentions of US citizens.

Hamdi, a US citizen by virtue of his birth in Louisiana to Saudi Arabian parents, was captured in Afghanistan last fall. When his US citizenship was discovered during interrogations at Guantanamo Bay, Cuba, he was transferred last April to the Naval Station Brig in Norfolk, Virginia.

US District Judge Robert G. Doumar granted a legal petition by Hamdi's father compelling the government to allow Hamdi to consult with a court-appointed lawyer. Rather than follow the court's order, the Bush administration appealed it to the Fourth Circuit Court of Appeals, the most right-wing court in the United States.

In its appeal papers, Ashcroft's Justice Department attorneys argued that the petition should be dismissed because "given the constitutionally limited role of the courts in reviewing military decisions, courts may not second-guess the military's determination that an individual is an enemy combatant and should be detained as such." In other words, once the Bush administration labels someone an "enemy combatant," he or she can be incarcerated forever, cut off from any communication with the outside world, and the courts have absolutely no say in the matter.

Even the Fourth Circuit expressed differences with this abrogation of judicial authority and rejected the Bush administration's request for a dismissal. Nevertheless, it vacated the US district court's ruling and sent the case back for reconsideration "because the district court appointed counsel and ordered access to the detainee without adequately considering the implications of its actions" on the Bush administration.

Back in front of Judge Doumar on August 13, government attorneys relied entirely on a two-page affidavit by Michael H. Mobbs, a "special adviser" to the Defense Department, which stated Hamdi was an "enemy combatant." This document, they claimed, deprived the federal courts of power to order him to have access to an attorney. Doumar, a Reagan appointee, responded testily, "I tried valiantly to find a case of any kind, in any court, where a lawyer couldn't meet with a client.... This case sets the most interesting precedent in relation to that which has ever existed in Anglo-American jurisprudence since the days of the Star Chamber."

Doumar was referring to the infamous secret court of the English monarchy, which was used to eliminate its political opposition.

Doumar continued, “I do think that due process requires something other than a basic assertion by someone named Mobbs that they have looked at some papers and therefore they have determined [Hamdi] should be held incommunicado. Just think of the impact of that. Is that what we’re fighting for?” The government attorney refused to acknowledge any limitations on the executive power over Hamdi. At one point an exasperated Doumar exclaimed, “If the military sat him in boiling oil, would that be lawful?” The government attorney’s response was that no one had suggested doing so.

Meanwhile, Hamdi’s father sent Congress an open letter casting doubt on whether his son was a “combatant” at all. The letter states: “Yaser left our home in Saudi Arabia for Pakistan and then Afghanistan on July 15, 2001, to do relief work in those countries.” He was there “less than two months prior to September 11, which is not enough time to receive any military training, so how can he be considered an enemy combatant?” According to the government, US courts are powerless to consider his claim.

While the US captured Hamdi in a theater of war, Padilla, a native of New York City also known as Abdullah al Muhajir, was seized after disembarking from an airplane in Chicago’s O’Hare International Airport, thousands of miles from any combat zone. Nevertheless, the Bush administration has labeled Padilla an “enemy combatant” and has held him incommunicado since May 8. He is presently in the Consolidated Naval Brig in Charleston, South Carolina.

Ashcroft announced Padilla’s seizure a full month after it happened. The attorney general’s dramatic claims of “multiple, independent, corroborating sources” implicating Padilla in “an unfolding terrorist plot to attack the United States by exploding a radioactive dirty bomb “were widely reported internationally.” According to Associated Press and Reuters news reports this week, however, government officials close to the case have reported that there is no evidence a plot was under way, and that Padilla was, at most, a “small fish” in the Al Qaeda network.

The current edition of *Newsweek* reports that the government never intended to bring a case against Padilla and that the purpose of his indefinite confinement is solely to extract information. “If this guy thinks he might be there for 20 years with no recourse, he might just say, ‘OK, let’s talk,’” the magazine quotes “an administration official” as saying.

The Bush administration’s disregard for the basic constitutional rights of people detained in its purported “war on terrorism” has become so brazen that the American Bar Association (ABA), which represents more than half the judges and lawyers in the United States, has taken two unprecedented actions in the past week unequivocally condemning it.

In an August 13 resolution at the close of its annual meeting, the ABA denounced the secret detention of people by immigration authorities. It urged that the Bush administration release their names, whereabouts and charges, and give them access to lawyers and family members. The government has acknowledged rounding up over 1,200 immigrants since September 11, and is believed to be still holding hundreds.

The ABA resolution follows a ruling earlier in the month by United States District Judge Gladys Kessler ordering Ashcroft to release the names of the detained foreigners. “Secret arrests,” Kessler wrote, “are a concept odious to a democratic society.” On Thursday, however, Judge Kessler issued a stay of her earlier order. She ruled that the Bush administration does not have to immediately reveal the detainees’ names and said the stay will remain in effect until a federal appeals court rules in the matter, which could take months.

On August 9, the ABA released a preliminary report by its “Task Force on Treatment of Enemy Combatants,” addressing “whether the government can—or should-be able to detain American citizens indefinitely without charges and hold them incommunicado without a hearing and without access to counsel.” It accused the Bush administration of disregarding the right to judicial review as well as section 4001(a) of the United States Criminal Code, which provides that “no citizen shall be imprisoned or otherwise detained by the United Sates except pursuant to an Act of Congress.” That law, enacted in 1971, was intended “to repeal the Emergency Detention Act of 1950,” a cold war-era statute authorizing detention camps for “individuals deemed likely to engage in espionage or sabotage.”

The report also cites international law violated by the Bush administration, including the Universal Declaration of Human Rights, adopted in 1948, which provides that “everyone has the right to an effective remedy by the competent national tribunals for acts violating ... fundamental rights” and that no one “shall be subjected to arbitrary arrest, detention or exile.” It also cited the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the United Nations in 1988, which under Principle 17(1) requires that “a detained person shall be entitled to have the assistance of a legal counsel.”

The report concludes: “The Administration has not yet attempted to explain what procedures it believes should be required to assure that detentions are consistent with Due Process, American tradition, and international law. It cannot be sufficient for a President to claim that the Executive can detain whomever it wants, whenever it wants, for as long as it wants as long as the detention bears some relationship to a terrorist act once committed by somebody against the United States. Short of such a claim, what are the limits?”

The report was not the work of civil libertarians. The Task Force was chaired by a former assistant United States attorney and included a retired brigadier general who spent 26 years as an Army Judge Advocate, as well as the current president of the National Institute of Military Justice. Moreover, judges and big business attorneys dominate the ABA itself. The repressive measures of the Bush administration, however, so undermine basic democratic structures that they are even cause for concern for sections of the judiciary and in mainstream institutions, such as the ABA.