

Federal appeals court upholds indefinite detention of US citizen

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On January 8, the United States Court of Appeals for the Fourth Circuit ruled that the Bush administration could continue to detain Yaser Esam Hamdi as an “enemy combatant.” Hamdi is a US citizen discovered among men taken prisoner in late 2001 by Northern Alliance forces allied with the US military in Afghanistan.

The decision in *Hamdi v. Rumsfeld* sanctions the indefinite, incommunicado imprisonment of US citizens on US soil—without criminal charges, legal representation or meaningful judicial review.

The ruling was widely denounced by human rights organizations, charging that it dismantled basic constitutional safeguards against police state methods. “The decision is a shocking abdication of responsibility by the court,” said Elisa Massimino, director of the Washington office of the Lawyers Committee for Human Rights (LCHR). “The court has adopted a ‘we’ll-look-the-other-way’ posture in this case, which leaves unfulfilled its duty to act as a check on administrative power.”

Born of Saudi parents in Louisiana but raised in the Middle East, Hamdi was captured near Konduz, Afghanistan. Like John Walker Lindh, the Californian sentenced to 20 years in prison for aiding the Taliban, Hamdi survived the massacre of Taliban prisoners at the Qalati-Janghi fortress near Mazar-i-Sharif. His citizenship was discovered during interrogations at Camp X-Ray in Guantanamo Bay, Cuba, and he has been held incommunicado at the Norfolk (Virginia) Naval Station Brig since last April.

After Hamdi’s identity became public, his father, Esam Fouad Hamdi, filed a petition for a writ of habeas corpus, the standard procedure for challenging the legality of a detention. The Bush administration responded by claiming that no one other than Hamdi himself could bring such an action (an impossibility since he is held incommunicado), and that regardless, the court did not have any jurisdiction to review the administration’s determination that Hamdi was an enemy combatant. These contentions were rejected in an earlier appeal, and the government was required to provide evidence.

The trial court judge, Reagan appointee Robert Doumars, ordered the government to allow Hamdi’s lawyer access to his client, explicitly comparing the Bush administration’s legal isolation tactics to those of the infamous Star Chamber. That ruling was reversed by the Fourth Circuit, however, which ruled that Doumars had to consider the circumstances of Hamdi’s detention before allowing him access to counsel.

The Bush administration then submitted a cursory nine-paragraph declaration by Michael Mobbs, a defense department official, stating that Hamdi received military training from the Taliban, was captured by the Northern Alliance in Afghanistan, and has been designated an “enemy combatant.” Doumars ruled Mobbs’ statement to be

inadequate and ordered the government’s lawyers to provide details of Hamdi’s capture so he could determine whether Hamdi should have access to his lawyer and, ultimately, whether he should be released. The government then filed the appeal that was the subject of last week’s ruling.

The Fourth Circuit not only reversed Doumar’s disclosure orders, it dismissed the habeas corpus proceedings entirely, writing that “despite his status as an American citizen currently detained on American soil, Hamdi is not entitled to challenge the facts presented in the Mobbs declaration.” This means Hamdi will stay isolated in the brig as long as the Bush administration wants him there, unless the Fourth Circuit is overruled on appeal by the US Supreme Court—an unlikely outcome given the publicly stated support for Bush’s anti-democratic measures by both Chief Justice William Rehnquist and Associate Justice Sandra Day O’Connor.

The Fourth Circuit claimed to base its ruling on “the importance of limitations on judicial activities during wartime.” Relying almost exclusively on a once obscure decision, *Ex Parte Quirin*, arising from the capture of Nazi saboteurs on US soil during World War II, the court ruled that it had to give “deference” to executive branch decisions regarding the “detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces.”

To uphold the Bush administration in the Hamdi case, the Fourth Circuit dismissed whatever legal obstacles stood in its path. The first is a federal law, 18 USC. § 4001, which states that “no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” This statute is a clear statement of the principle that people can lose their freedom only for violations of express rules. That did not happen in Hamdi’s case, as he is not being prosecuted for violating any law. The court instead said that Bush had the power to incarcerate enemy combatants because of a generally written September 18, 2001 congressional resolution authorizing a military response to the September 11 terrorist attacks.

The Fourth Circuit similarly disposed of Article 5 of the Geneva Convention, which provides that prisoners of war are entitled to formal determinations of their status “by a competent tribunal.” The court ruled that this provision did not give prisoners any rights, and that violations of the provision by the United States could only be addressed “by diplomatic means.”

In Hamdi’s case, as well as in those of many other prisoners of war from the Afghan conflict, the US military is flaunting the Geneva Convention, which requires prisoners to be housed together and prohibits their interrogation unless a tribunal first determines them to be “illegal combatants.” Hamdi is being held alone and subjected to

questioning despite the fact that no tribunal has determined him to be an illegal combatant.

Finally, the Fourth Circuit brushed aside the argument that Hamdi could no longer be held as an enemy combatant because the Afghan hostilities were over. It did so with the claim that the executive branch was “in the best position to appraise the status of the conflict.”

At the core of the Fourth Circuit’s decision is an absurd contradiction. The court wrote: “Drawing on the Bill of Rights’ historic guarantees, the judiciary plays its distinctive role in our constitutional structure when it reviews the detention of American citizens by their own government,” and therefore “the detention of United States citizens must be subject to judicial review.” In its next breath, however, the court denied Hamdi “the right to rebut the factual assertions that were submitted to support the ‘enemy combatant’ designation” because “Hamdi was captured in a zone of active combat operations in a foreign country and because any inquiry must be circumscribed to avoid encroachment into the military affairs entrusted to the executive branch.”

In other words, Hamdi has the right to have a court review the lawfulness of his detention, but he does not have the right to present his case to the court. This sort of empty democratic trapping is a hallmark of authoritarian regimes.

Moreover, while the Fourth Circuit spoke repeatedly about a general need to give “deference” to the executive branch in military matters, it did not even address what specific harm would come to the United States were Hamdi allowed to air his claim in court. This underscores the fact that the government’s declared reasons for stripping Hamdi of his constitutional rights are dishonest and cynical. The Bush administration is not driven by military necessities relating to its mopping-up operations in Afghanistan, but rather by its determination to use its open-ended and undeclared “war on terrorism” as a pretext for dismantling basic democratic rights.

The Fourth Circuit is widely viewed as the most conservative in the United States, and the Bush administration has deliberately brought key cases within its geographic area. The three-judge panel that decided the case consisted of two Reagan appointees and one judge elevated by Clinton.

The decision has generated uneasiness in sections of the press. Both the *New York Times* and the *Los Angeles Times* ran editorials arguing that the decision went too far. However, neither newspaper questioned the legitimacy of the Bush administration’s war policy, concealing the inseparable link between the administration’s war-mongering abroad and its anti-democratic, authoritarian methods at home. As with all of the anti-democratic measures taken by the government and the courts since 9/11, the response from the ostensibly liberal sections of the establishment and the Democratic Party was barely audible.

The usual right-wing outlets defended the decision. The *Wall Street Journal*’s January 9 editorial deserves special attention for its shoddy treatment of the facts. The *Journal* claimed that Hamdi was “trained by al Qaeda and captured ... when his Taliban unit surrendered to the Americans. No one, including Hamdi, disputes these facts.”

According to the Mobbs declaration, however, Hamdi received military training from the government of Afghanistan, not “al Qaeda,” and his unit surrendered to the Northern Alliance, not “the Americans.” More importantly, no one aside from a few military interrogators and those with access to their reports has any idea whether Hamdi “disputes these facts.” None of his lawyers has spoken to him, and under the recent ruling, none will be allowed to do so. According to the Fourth Circuit’s decision, Hamdi will never be given

an opportunity to “dispute these facts” in a court of law.

After dismissing “overwrought alarms about [Attorney General] John Ashcroft’s intent to ransack the Constitution,” the *Journal* concluded with the claim that the Fourth Circuit decision indicated “that the Bush Administration is striking the correct Constitutional balance between liberty and security.”

In fact, the Fourth Circuit did not accept in whole the Bush administration’s claim of immunity from judicial oversight in dealing with so-called “enemy combatants” who are US citizens. It rejected the Bush administration claim that it could prevent Hamdi from filing habeas corpus motions through his father. More fundamentally, it rejected the administration claim that courts have no jurisdiction to rule on the propriety of any executive branch designation of “enemy combatant.” The Fourth Circuit held that courts must review such claims, and stated it was upholding the designation in Hamdi’s case only because he was captured while with a fighting unit by forces allied with the US military in a foreign military theater.

The Bush administration is already seeking to broaden the reach of the *Hamdi* decision to citizens not seized on a foreign battlefield. Government lawyers filed court papers the day after the decision was rendered asking US District Judge Michael Mukasey of the New York District Court to rescind his December 4 decision that Jose Padilla could meet with an attorney. Citing *Hamdi*, government lawyers are asserting that such a meeting would “set back his interrogation by months, if not derail the process permanently.”

Padilla is the United States citizen who was taken into custody as a “material witness” in Chicago last spring, and one month later designated an “enemy combatant” after Attorney General Ashcroft accused him of plotting to detonate a nuclear device. Although the Bush administration backed down on the allegations of nuclear terrorism, Padilla remains in military custody without access to an attorney, and legal proceedings are ongoing.

The *Hamdi* case is different from Padilla’s because, as the Fourth Circuit noted several times in its opinion, Hamdi was captured in a foreign theater of war during a period of active hostilities. If the Bush administration succeeds in treating Padilla too as an “enemy combatant,” then any US citizen can be subjected to indefinite, isolated detention based solely on a presidential declaration that he or she is an “enemy combatant.”



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