Two appellate courts rule against Bush administration detentions

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23 December 2003

Two separate appellate court panels—one on the east coast and the other on the west—last week ruled 2-1 against the Bush administration's policy of indefinitely imprisoning people it deems "enemy combatants."

Both cases are headed to the Supreme Court, where the outcome is uncertain. Three of the nine high court judges, Chief Justice William Rehnquist and associate justices Sandra Day O'Connor and Antonin Scalia, have given public speeches since the September 11, 2001, terrorist attacks indicating their support for the abridgment of civil liberties during periods of war.

In *Padilla v. Rumsfeld*, the Second Circuit Court of Appeals, which reviews cases arising in New York and surrounding states, ruled unlawful the Bush administration's ongoing incommunicado detention of Jose Padilla, who is being held in a military brig without criminal charges or access to a lawyer. Padilla is a US citizen. A native of New York, he was arrested in Chicago in May 2002.

The court found that the imprisonment exceeded the president's constitutional powers and violated a federal law prohibiting detentions not authorized by Congress. It gave Secretary of Defense Donald Rumsfeld 30 days to release Padilla or turn him over to civilian authorities for criminal prosecution.

In *Gherebi v. Bush*, the Ninth Circuit, which covers the western United States, held that US courts have jurisdiction to review petitions for *habeas corpus* challenging the legality of incarcerating foreigners at Guantánamo Bay, Cuba. The decision will have no immediate effect because the Supreme Court has already agreed to review the same issue in a case from the Fourth Circuit. The opinion is notable, however, for the manner in which it berates the Bush administration for its disregard for US and international law

While employing an approach more understated than the Ninth Circuit's, the Second Circuit's ruling—on the Padilla case—is potentially the more explosive of the two, as it represents the most direct repudiation to date of any Bush administration measure taken in connection with the so-called "war on terror."

Padilla was arrested at Chicago's O'Hare Airport on May 8, 2002, as a "material witness" for a New York grand jury investigating the September 11 terrorist attacks. A month later, after his court-appointed lawyer brought a motion for his release, Attorney General John Ashcroft went on national television to claim that Padilla was part of a plot to detonate a nuclear "dirty bomb" for Al Qaeda. Bush declared Padilla an "enemy combatant," and he has been held ever since in a naval brig in Charleston, South Carolina.

After 18 months, the Bush administration is still denying that Padilla even has the right to speak to an attorney. The implications of the government's position in *Padilla* are staggering. The Bush administration is claiming that the September 11 attacks transformed the territory of the United States into a battleground, and Bush, as commander-in-chief, has unlimited authority to capture persons, including US citizens, it designates "enemy combatants" and hold them indefinitely.

The fact that Padilla is thus far the only US citizen arrested on US soil to be designated an enemy combatant indicates that the Bush administration is using him as a test case to establish a precedent—most likely in the Supreme Court—to "disappear" more people, citizens and non-citizens alike, in the future.

An *amicus curiae* "friend of the court brief" filed by the National Association of Criminal Defense Lawyers correctly labeled the Bush administration position tantamount to "martial law." If sanctioned by the courts, there would be nothing stopping the Bush administration from using charges of "support for terrorism" to round up political opponents and jail them indefinitely without lawyers or hearings. The very fact that the Bush administration is asserting it has such power and one of the Second Circuit judges, Richard C. Wesley—a former Republican officeholder appointed by Bush last June—voted to sustain it demonstrates beyond question that a substantial section of the ruling class is ready to break entirely with constitutional norms and establish a form of presidential dictatorship in the United States.

A second *amicus* brief filed by a group of experts on the law of war analyzed the Geneva Conventions and other relevant treaties to demonstrate that the Bush administration's characterization of Padilla as an enemy combatant has nothing to do with international law, which requires that combatants be either acknowledged soldiers or civilians directly supporting troops in a combat zone. The experts say that Padilla must be treated as an alleged criminal, with all the protections afforded by the Constitution.

The Bush administration is effectively inventing new rules to put Padilla in a legal black hole outside both domestic and international law, where it can do to him whatever it likes.

Additional *amicus* briefs condemning the Bush administration's position were filed by groups as diverse as the right-wing, libertarian Cato Institute and the liberal People for the American

Way, along with a group of retired federal judges and the American Bar Association, which represents over 50,000 lawyers throughout the United States. There were no *amicus* briefs filed in support of the Bush administration's positions.

Judge Rosemary S. Pooler, a Clinton appointee, and Judge Barrington Parker, Jr., whom Bush himself recently elevated to the Second Circuit, jointly authored the majority opinion. They dispensed with a slew of government procedural challenges, including a contention that Padilla had to bring his challenge personally—a physical impossibility since he is locked up without access to attorneys or family. Next, they ruled "the President lacks inherent constitutional authority as Commander-in-Chief to detain American citizens on American soil outside a zone of combat." Finally, they relied on the Non-Detention Act—enacted by Congress in 1971 to prevent a recurrence of the World War II internment in California of persons of Japanese ancestry—which requires specific Congressional authorizations for the detentions of citizens.

Somewhat ominously, however, the Second Circuit did not decide whether Congress could specifically authorize a president to carry out such detentions without charges or trials. A California Democratic congressman, Adam Schiff, has already introduced legislation to allow Bush to arrest combatants. The court also did not determine the rights of persons seized in combat zones, such as Yaser Hamdi, a US citizen captured in Afghanistan. The Fourth Circuit upheld Hamdi's incarceration as an enemy combatant, and his appeal is pending before the Supreme Court.

The Ninth Circuit's decision in *Gherebi* arose from a *habeas corpus* petition filed on behalf of a Libyan man apparently captured in Afghanistan during the US invasion who is being held along with over 600 others at what is essentially a concentration camp in Guantánamo Bay. In a similar case decided earlier this year, *Al Odah v. United States*, the ultra-conservative Fourth Circuit ruled that US courts had no jurisdiction to decide whether foreigners were being held in violation of US or international law on the grounds that the nation of Cuba had sovereignty over the military base. The Supreme Court granted review of *Al Odah* last month, and its decision will supercede *Gherebi*. Nevertheless, the points made by the author of the Ninth Circuit opinion. Steven Reinhardt, a Carter appointee who has emerged over the last several years as a leading liberal jurist—and focus of attacks by the Republican right—are worth examining.

Reinhardt describes the background of the case as follows: "Starting in early January 2002, the Armed Forces began transferring to Guantánamo, a United States naval base located on territory physically situated on the island of Cuba, scores of individuals who were captured by the American military during its operations in Afghanistan. The captured individuals were labeled 'enemy combatants.' Now, for almost two years, the United States has subjected over six hundred of these captives to indefinite detention, yet has failed to afford them any means to challenge their confinement, to object to the failure to recognize them as prisoners of war, to consult with legal counsel, or even to advance claims of mistaken capture or identity. Despite US officials' recent stated intention to move to begin a sorting of the detainees, electing which to release and which to try before military tribunals on criminal charges, and the administration's designation several months ago of six detainees (including two Britons and one Australian) deemed eligible for military trials, no military tribunal has actually been convened. Nor has a single Guantanamo detainee been given the opportunity to consult an attorney, had formal charges filed against him, or been permitted to contest the basis of his detention in any way. Moreover, top US officials, including Secretary of Defense Rumsfeld, have made it clear that the detainees may be held in their present circumstances until this country's campaign against terrorism ends. The administration has, understandably, given no indication whether that event will take place in a matter of months, years, or decades, if ever."

Reinhardt continued, "Under the government's theory, it is free to imprison Gherebi indefinitely along with hundreds of other citizens of foreign countries, friendly nations among them, and to do with Gherebi and these detainees as it will, when it pleases, without any compliance with any rule of law of any kind, without permitting him to consult counsel, and without acknowledging any judicial forum in which its actions may be challenged. *Indeed, at oral argument, the government advised us that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees.* To our knowledge, prior to the current detention of prisoners at Guantanamo, the US government has never before asserted such a grave and startling proposition. Accordingly, we view Guantanamo as unique not only because the United States' territorial relationship with the Base is without parallel today, but also because it is the first time that the government has announced such an extraordinary set of principles—a position so extreme that it raises the gravest concerns under both American and international law" (Emphasis added).

The two decisions have generated howls of protests from the usual quarters. The White House issued a statement calling the *Padilla* ruling "troubling and flawed" and said it would seek a stay of the ruling. The *Wall Street Journal* editorial page, after calling Reinhardt's Guantánamo opinion "grandstanding," attacked the Second Circuit for "the view that the US is not a 'zone of combat.'"

As these cases underscore, the US is becoming a battlefield, not between the people of the United States and Al Qaeda, but between an increasingly rabid and militaristic ruling elite and the broad masses of the population.