Bush seeking Supreme Court precedents to dismantle democratic rights

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19 January 2004

The Bush administration is using cases of people dragooned during its so-called "war on terror" to establish broad legal precedents supporting unlimited presidential power to imprison people without charges and then to hide its operations from public scrutiny. Having already upheld the Bush administration in one such case, the same Supreme Court which intervened in the 2000 elections to halt the counting of Florida ballots and steal the election for George Bush will be deciding at least four more "war on terror" cases before its term ends in late June.

One case it will not be deciding is *Center for National Security Studies v. United States Department of Justice*. On January 12, the Supreme Court allowed to stand a ruling by the Court of Appeals for the District of Columbia Circuit which reversed a trial court order compelling the Bush administration to disclose the identities of hundreds of people swept up after the September 11 attacks. The decision, authored by Judge David B. Sentelle, a protegé of the arch-reactionary former North Carolina senator Jesse Helms, swept aside the mandatory disclosure provisions of the Freedom of Information Act, claiming that "America faces an enemy . . . with capabilities beyond the capacity of the judiciary to explore," a legal position that eliminates the relevance of the judicial branch altogether. (See "US appeals court approves secret roundup of immigrants".)

Paul M. Smith, the lawyer who filed the petition on behalf of a broad group of 22 public interest groups and media outlets, including the Associated Press, said "I think the decision that the government can make mass arrests of hundreds of people without explaining why is both unprecedented and troubling." Kate Martin, spokesperson for the lead plaintiff, the Center for National Security Studies, was more direct in her condemnation of the Supreme Court's action, accusing Attorney General John Ashcroft's Justice Department of "keeping the names secret to cover up its misconduct—holding people incommunicado and without charges."

Martin added: "The cover-up maintains the fiction that the government was going after terrorists when it instead was rounding up hundreds of innocent Arabs and Muslims. Without action by Congress or the public, the Justice Department will be free to repeat these abuses in the future." She said in a *New York Times* interview that the lower court decision approves "a secrecy regime in which arrests are off the public docket, people are held in secret, deported in secret, and two and a half years later, we still don't know the names."

There are several key cases the Supreme Court will decide. On January 9, the Supreme Court agreed to review the petition filed by Yaser Esam Hamdi, the US citizen seized in Afghanistan along with Taliban soldiers during the 2001 invasion and then transferred to a military jail in Norfolk, Virginia, where he has been held incommunicado. Last year, the ultra-conservative Fourth Circuit Court of Appeals ruled that Hamdi had no right to challenge the legality of his confinement. (See "Federal appeals court upholds indefinite detention of US citizen".) The decision is the first in US history to uphold the indefinite, incommunicado detention of an American citizen.

Within the next few months the Supreme Court will likely accept for review the decision of the Second Circuit Court of Appeals ordering the Bush administration to release Jose Padilla, the New York native arrested in Chicago, from the naval brig where he has been held for over 18 months as an "enemy combatant." Padilla's case is widely perceived as far more extreme than Hamdi's because he was not taken prisoner in a theater of war during active hostilities, but was arrested in O'Hare Airport without anything in his possession linking him to a terrorist plot. (See "Two appellate courts rule against Bush administration detentions".)

Theodore Olson, the attorney presently serving as the U.S. Solicitor General—the same man who played a key role in the Whitewater-Lewinsky destabilization campaign against the Clinton administration and then represented Bush in the Supreme Court during the theft of the 2000 election—filed papers to delay Padilla's release pending a High Court decision. The brief claims that the Second Circuit's order "undermines the President's constitutional authority to protect the Nation from additional enemy attacks in wartime, and has resulted in an unprecedented order directing the President to release an individual whom the President, as Commander in Chief, has determined is an enemy combatant intent on committing hostile and war-like acts against the United States."

In other words, according to his lawyers Bush has unrestricted and unreviewable power to declare any person an

"enemy combatant" and throw him into a brig indefinitely without access to lawyers or a court. The Second Circuit's ruling is "unprecedented" only because never before has an administration asserted that the constitutional provision that the "President shall be Commander in Chief of the Army and Navy of the United States" grants him the domestic powers of a military dictator.

Both *Hamdi* and *Padilla* are well known, but a third Supreme Court case is being litigated in virtual secrecy, and as a result is receiving almost no publicity. On June 27 last year the federal public defender's office in Miami Beach filed a Supreme Court petition in *M.K.B. v. Warden*, a habeas corpus proceeding. (Habeas corpus is used to challenge the legal basis for confinement.) Both the trial and appellate courts ordered their proceedings sealed. Even the existence of the case itself was under seal. The Supreme Court petition available for public review is heavily censored. It does not identify the lower courts involved and many pages are blank, including most of the seven-part appendix.

On January 5, the Bush administration submitted a motion to file its response to the petition completely under seal, meaning that it wants none of the government's papers to be available for public review. Kenneth S. Geller, a well known national authority on Supreme Court practice, called the request "extremely unusual," adding that "I can't remember a case where the entire brief was filed under seal."

As in *Hamdi* and *Padilla*, which the Bush administration view as "test cases" to establish legal precedents for seizing and imprisoning people without charges or access to lawyers or courts, the Bush administration appears to be using *M.K.B* as a test case to establish a precedent for shrouding legal proceedings in secrecy. The request to file a secret brief has no other purpose, as much of the record in *M.K.B.* is already public because of articles published in the *Miami Daily Business Review* and additional facts in the Supreme Court petition itself.

M.K.B. is Mohamed Kamel Bellahouel, an Algerian who entered the United States on a student visa and married a US citizen. He evidently worked as a waiter in a Delray Beach, Florida, restaurant apparently patronized by two September 11 hijackers. The Bush administration swept up Bellahouel along with hundreds of other Middle Eastern people after the attacks, and imprisoned him in a Miami federal jail.

During the first part of 2002, Bellahouel testified before an Alexandria, Virginia, grand jury investigating Zacarias Moussaoui, the only person facing US charges for conspiring with the hijackers. Like all the other victims of the Bush administration's post-September 11 sweeps, Bellahouel has not been charged with any crime relating to the terrorist attacks. His lack of involvement is demonstrated by the fact that the government released him on $10,000 bail last March. The only charge he presently faces is for staying too long in the United States on his student visa.

The Supreme Court will decide within the next few months whether to review the petition and, if so, whether the briefs in the case will be accessible to the public. There has never been a closed oral argument in the US Supreme Court.

Public access to courts and legal proceedings has been a cornerstone of democratic rights since the founding of the United States. The right is guaranteed by a clause in the Fifth Amendment, a critical part of the Bill of Rights.

Finally, late last year the Supreme Court granted review in *Al Odah v. United States*, which will resolve whether the more than 600 foreign nationals incarcerated at the US military base in Guantanamo Bay, Cuba, can seek habeas corpus relief in US Courts. The Bush administration is contending that US courts lack jurisdiction because the men are not being held on US soil, but on a US military base "leased" from the Cuban government under a perpetual agreement imposed on the island nation shortly after the Spanish-American war. In a similar case decided by the Ninth Circuit last month, administration lawyers claimed the right to torture and kill Guantanamo detainees. (See "Two appellate courts rule against Bush administration detentions".)

If the Bush administration prevails in these cases—and there is every reason to believe it will, since three of the nine justices recently made public statements that war justifies curtailment of constitutional rights—there will be express legal sanction for the executive branch to declare any person, whether or not a US citizen, anywhere in the world, to be an "enemy combatant" in the "War on Terrorism" and to imprison that person indefinitely without access to courts or lawyers. Any legal challenges that do arise would be resolved in secret proceedings, much like the infamous English "Star Chamber," used by the English crown to suppress and eliminate opponents of the monarchy.