# The meaning of the US Supreme Court rulings on “enemy combatants”

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The decisions handed down June 28 by the US Supreme Court on the Bush administration’s detention of alleged terrorists as “enemy combatants,” including hundreds of non-Americans at Guantanamo Bay, Cuba, and two US citizens being held in Navy brigs in the US, have vast implications for the democratic rights of the American people.

As a number of the justices acknowledged in their written opinions, the cases under consideration raised the most basic issues of democratic rights. According to what the justices themselves wrote, if the Bush administration’s claims of unlimited authority to imprison people on nothing more than the say-so of the president were to prevail, the basic foundation of civil liberties laid down in the Bill of Rights would no longer exist.

Yet in the face of this unprecedented challenge to democracy, all the Court could manage, in a series of equivocal and confused rulings, was a limited rebuff to the most extreme assertions of executive power. It could not summon a majority to decisively repudiate the authoritarian actions of the Bush administration and, notwithstanding its warnings of the dire implications of the government’s denial of due process to alleged terrorists, did not order the release of a single “enemy combatant,” including the US citizens who have been held incommunicado for more than two years in a state of legal limbo.

Contrary to the general response to this week’s rulings by the press and civil liberties organizations, which hailed the rulings as a victory for the Constitution and a vindication of the American justice system, the Court’s actions were far from a ringing defense of democratic rights.

All of those declared by the president to be enemy combatants, including US citizens Yaser Esam Hamdi and Jose Padilla, are, according to the Bush administration, excluded from the protections granted to prisoners of war by the Geneva Conventions as well as the due process rights afforded defendants in the American court system by the US Constitution and acts of Congress.

The executive branch, on the grounds of claimed war-time powers of the president as commander in chief, has arrested and imprisoned these individuals and asserted the right to hold them indefinitely, without informing them of the factual basis for their arrest, without charging them with a crime, and without allowing them legal counsel or the right to contest their detention in a court of law. The Bush administration claims the right to hold these people incommunicado for the duration of the so-called “war on terror.”

Many, but not all, of the approximately 600 foreigners being held at Guantanamo were captured by US forces in Afghanistan. Hamdi was also captured in Afghanistan during the battle against the Taliban in the fall of 2001. Padilla was nowhere near a battlefield when he was arrested two years ago. He was seized at O’ Hare International Airport outside of Chicago.

In the face of this sweeping assertion of police state powers, a divided Court, ruling in three separate cases, rejected the administration’s position that the US federal courts have no jurisdiction over the Guantanamo prisoners, and that the detainees have no right to file writs of habeas corpus to contest their incarceration.

Eight of the justices also ruled, in three different opinions, that the executive could not continue to hold Hamdi without granting him either some form of habeas corpus hearing in which he could contest his designation as an “enemy combatant,” or a criminal trial, in which he would face specific charges and have legal counsel. The “controlling” opinion, written by Justice Sandra Day O’Connor and joined by three other justices, limited Hamdi’s relief to a restricted habeas corpus hearing, which could, according to O’Connor, take the form of a military tribunal.

In the case of Padilla, whose detention is the starkest assertion by the executive branch of police state powers, the Court issued no ruling on the substantive issues. In a 5-4 vote, in which the “swing” justices O’Connor and Anthony Kennedy joined the extreme right bloc of Antonin Scalia, Chief Justice William Rehnquist and Clarence Thomas, the Court dismissed Padilla’s suit on the technical grounds that it had been originally filed in the wrong court. Padilla’s lawyers immediately announced their intention to refile their suit in the South Carolina court designated in the majority decision.

The Democratic leader in the House of Representatives, Nancy Pelosi, summed up the generally celebratory response of what passes for the liberal establishment in America to the rulings by proclaiming them “triumphs for the rule of law.”

Such celebrations are naïve, complacent and unwarranted. While the Court did not accede to the outright repudiation of the Bill of Rights or sanction the establishment of a presidential dictatorship, which is the essence of the Bush administration’s position, and delivered something of a political setback to the White House, it not only failed to repudiate the anti-democratic thrust of the administration’s actions, but it also endorsed key elements of its offensive against democratic rights.

It is impossible to properly evaluate the significance of the Supreme Court rulings outside of the political realities from which the cases arose, including the record of the Court itself. The fractured character of the rulings—the “controlling” opinion in the Hamdi case failed to gain a majority—reflects the enormous divisions that exist not only on the Court, but within the American ruling elite as a whole.

These divisions arise under conditions of acute social and political crisis, and a drive by powerful sections of the ruling elite to deal with this crisis by dispensing with traditional democratic norms and establishing a form of authoritarian rule.

The pretext for all of the Bush administration’s attacks on democratic rights is the need for unprecedented executive powers, and military-police repression, in order to wage the “war on terror.” The justification for this war, in turn, is the terrorist attacks of September 11, 2001.

It is by now well known and amply documented that the Bush administration seized on 9/11 as a pretext for launching wars for oil and other imperialist aims that had been long in the planning. It is also well

established that Bush, Cheney and company have done everything in their power to conceal the facts behind the attacks of September 11, and have refused to account for the government's own failure to take elemental steps to prevent them.

This is a government that proclaimed, without any congressional declaration of war, a global "war on terror"—a war without any historical precedent, waged against unnamed enemies and of indefinite duration. The US executive has, in effect, declared a permanent state of war.

The Bush administration launched, as part of this "war on terror," an unprovoked and illegal invasion of Iraq, and employed lies on a massive scale to justify it. These are, in themselves, colossal violations of the US Constitution and US law. Bush then used the excuse of a "war-time" emergency and "ongoing combat" to justify its frontal assault on democratic rights.

This criminal enterprise includes, as is now well documented, the use of torture, in violation of both international and US law.

Thus the government, the constitutionality of whose actions the high court justices are deliberating, is a government of conspiracy, lies and criminality. It is a lawless regime. Moreover, it is a regime that was installed in defiance of the basic democratic principle of the right to vote by the very Court now considering its actions.

The nine justices are all well aware of these facts. But none of them, including the liberal dissenters, dare to challenge the legitimacy of the "war on terror" that underlies the administration's anti-democratic policies. On the contrary, all of the opinions handed down in the June 28 cases accepted more or less uncritically the basic premise of the Bush administration: that it must be granted extraordinary powers because the country is in a state of war.

The reactionary implications of this basic standpoint are clearly revealed in O'Connor's ruling in the Hamdi case. O'Connor rejected the administration's contention that the judiciary has no practical authority to review its actions in imprisoning citizens and non-citizens alike as enemy combatants. To have ruled otherwise would have been to consign the judicial branch of the government to a position of irrelevance.

Significantly, one justice, Clarence Thomas, in the sole opinion upholding in full the administration's position, adopted precisely this stance. In Thomas, the Court reflects the attitude of those within the ruling elite who openly espouse the virtues of police state rule.

However, O'Connor explicitly accepted the validity of the "war on terror" and asserted that the Authorization for the Use of Force, adopted by Congress one week after the September 11 attacks, gave the president the power, presumably for the duration of this war, to wield extraordinary war-time powers, including the seizure of people, including American citizens, and their indefinite imprisonment as enemy combatants.

This attempt to find authorization for sweeping attacks on democratic rights in the two-line resolution passed by Congress authorizing the use of force against those responsible for September 11 is patently absurd. In a dissenting opinion joined by Justice Ruth Bader Ginsburg, Justice David Souter, arguing for Hamdi's release, dismissed this claim outright.

In her opinion, O'Connor claimed to be striking a balance between individual liberties and the legitimate war-time powers of the commander in chief. She rejected the ruling of a federal court of appeals, which had turned down Hamdi's suit for a serious habeas corpus hearing, but also rejected the approach of the original trial court, on the grounds that it gave Hamdi too much leeway to prove his innocence.

O'Connor proposed a habeas corpus procedure for Hamdi, and by implication all other "enemy combatants," that is a mockery of due process as it has been up to now defined. She suggested that the presumption of innocence be jettisoned, and that the burden of proof be placed on Hamdi, rather than the state. She said the government should be allowed to introduce hearsay evidence, and suggested that Hamdi's right to appeal be curtailed.

She went so far as to suggest that a hearing before a military tribunal would suffice. This goes beyond even what the Bush administration proposed when it announced two years ago the formation of military commissions. At that time, Bush said US citizens would not be forced to appear before such tribunals.

It would appear that the type of kangaroo court proceeding proposed by O'Connor for Hamdi, a US citizen, would apply as well to the foreign detainees being held at Guantanamo.

O'Connor's ruling in no way addressed the flagrantly anti-democratic and unconstitutional implications of the "enemy combatant" category itself. She did not object to people being excluded from the protections of both the Geneva Conventions statutes on prisoners or war and the due process rights provided by the criminal justice system. Thus, under her ruling, Hamdi will continue to be held without having been charged with any crime unless and until he is able to prove, in a truncated and prejudicial habeas corpus hearing, that he is not an enemy combatant. Should he lose in such a hearing, he will presumably be subject to indefinite detention, without any access to the criminal courts.

Those labeled "enemy combatants" by the president are thrown into a legal "black hole," which is not remedied by Monday's Supreme Court rulings. For example, there are no sentencing laws to determine the duration of an enemy combatant's imprisonment. Indeed, the very concept of "enemy combatant" is undefined. In her opinion, O'Connor admitted as much, writing: "There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such."

How can an alleged enemy combatant effectively challenge his incarceration if the very meaning of the term is unclear? This anomaly only underscores the fundamentally anti-democratic character of both the category and the Court's ruling upholding it.

O'Connor's puzzlement over the meaning of "enemy combatant" is indicative of the justices' own sense, reflected in many of the opinions filed in the three cases, that they are dealing with an unprecedented situation and navigating uncharted legal waters. Similarly, her suggestions for some kind of truncated habeas corpus hearing are improvisations, resting on neither law nor legal precedent.

It is clear from the statements of several of the justices that they find themselves confronted, in the actions of the Bush administration, with an immediate and unprecedented threat to traditional democratic procedures. As Justice John Paul Stevens suggested, in his majority opinion in the Guantanamo case, at stake are not only the principles of American democracy, but democratic conceptions that go back nearly 800 years—to the Magna Carta.

Stevens quoted an earlier decision on the habeas corpus rights of non-citizens that was written by Justice Robert Jackson, who served as the US prosecutor at the Nuremberg trials. Jackson wrote: "Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint."

Stevens also authored the dissent from the majority ruling dismissing Padilla's suit on technical grounds. In it, he made a direct reference to the government's use of torture against alleged terrorist prisoners, including its treatment of Padilla in that category.

Granting that executive detention of "subversive" citizens might sometimes be justified, he said, "it may not, however, be justified by the naked interest in using unlawful procedures to extract information." He continued: "Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this nation is to remain true to the ideals symbolized by its flag, it

must not wield the tools of tyrants even to resist an assault by the forces of tyranny."

At another point he wrote: "At stake in this case is nothing less than the essence of a free society... Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber."

Souter, in his dissent in the Hamdi case, also harked back to the writings of Justice Jackson: "It is instructive to recall Justice Jackson's observation that the president is not commander in chief of the country, only of the military."

Even O'Connor, in her Hamdi ruling, raised the specter of dictatorship, writing that "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression..."

These quotations provide a measure of how far advanced the disintegration of American democracy really is. In the face of an executive that is prepared to abrogate the Bill of Rights, the response of the Supreme Court, itself complicit in the government's actions, is anything but a demonstration that "the system works."

There does not exist a majority on the Court to repudiate the anti-democratic and unconstitutional actions of the government. There is, in fact, a firm bloc of three reactionaries—Scalia, Rehnquist and Thomas—that supports the executive branch's arrogation of unprecedented police powers. There are several liberals who register their dissent against the radical character of the executive's actions, but do not challenge their basic premises. And there are the "swing" justices, such as O'Connor and Kennedy, who seek to mediate between the reactionaries and liberals, generally siding with the reactionaries on the critical issues.

Taken as whole, the June 28 rulings are signposts in the process of fundamentally redefining the basic conceptions of democracy in America. Long established rights, previously taken for granted by Americans, are now being eviscerated or revoked outright.

Reflected in the legal contortions of a fractured Supreme Court is an attempt to arrive at a new framework of political rule, with the appropriate constitutional trappings, that will better correspond to the requirements of a ruling elite pursuing violent and aggressive imperialist aims abroad, and defending its massive wealth and power under conditions of ever-widening social inequality at home.