

The release of Yaser Hamdi: legal manipulation of “enemy combatant” cases

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After spending almost three years imprisoned incommunicado by the United States military following his November 2001 capture in Afghanistan, Yaser Esam Hamdi is being taken by US military aircraft to Saudi Arabia, where he will be reunited with his family. In exchange for his release, he has agreed to renounce his US citizenship and restrict his travel.

Hamdi was the subject of the June 28 Supreme Court decision that allows the US military to incarcerate people, including US citizens, as “enemy combatants,” a classification concocted by the Bush administration to avoid both criminal procedures and the provisions of the Geneva Conventions for treatment of prisoners of war.

At the same time, according to the “controlling” opinion by Associate Justice Sandra Day O’Connor—none of the opinions received the necessary five votes to become binding precedent—Hamdi is entitled to some form of “due process,” including access to an attorney and a tribunal, to challenge his continued incarceration.

Hamdi’s release has been widely viewed by legal commentators as “damage control” by the Bush administration, which got as much mileage as it could from the case and wanted to avoid a potentially embarrassing courtroom showdown.

Department of Justice spokesperson Mark Corallo announced the release on September 22: “As we have repeatedly stated, the United States has no interest in detaining enemy combatants beyond the point that they pose a threat to the US and our allies.”

This is all the Bush administration has to say about the release of a man alleged to be too dangerous to be permitted to consult an attorney.

Hamdi’s principal lawyer, federal public defender Frank Dunham Jr., expressed relief that his client’s ordeal is finally ending. “I am gratified at the prospect that Mr. Hamdi’s return to Saudi Arabia and his family is now only days away,” Dunham said in a prepared statement last week.

If the case were to proceed to a hearing, the Bush administration would have to explain publicly the basis on which it declared Hamdi an “enemy combatant” but not a “prisoner of war” entitled to the full panoply of protections provided by the Geneva Conventions. POWs are required to be housed together and given access to the Red Cross or Red Crescent. They cannot be interrogated beyond basic identifying information, and must be released upon the cessation of hostilities.

The Bush administration has ignored all such obligations in

regard to Hamdi and all of the Guantánamo prisoners.

Hamdi, who turned 24 on Sunday, was born of Saudi parents while his father was working in the Louisiana oil industry. He grew up in Saudi Arabia, and was enrolled at King Fahd University in Dhahran, Saudi Arabia. According to his father, Esam Fouad Hamdi, “Yaser left our home in Saudi Arabia for Pakistan and then Afghanistan on July 15, 2001, to do relief work in those countries.”

The family denies Hamdi was fighting for the Taliban and claims he was trying to return home to resume his studies when the September 11 terrorist attacks occurred.

Hamdi was captured amongst an estimated 10,000 Taliban fighters who surrendered in November 2001 to the Northern Alliance shortly after the US invaded Afghanistan. While the Afghani Taliban were released immediately and allowed to return home, thousands of “foreign Taliban,” after being promised safe passage, were massacred by units under the control of the notorious warlord Abdul Rashid Dostum, a leading ally of the US.

Like John Walker Lindh, the Californian imprisoned on criminal charges for supporting the Taliban, Hamdi was among a handful of young men who survived the slaughter of more than 600 foreign Taliban prisoners at the Qala-i-Janghi fortress near Mazar-i-Sharif. Thousands more perished after being crammed into unventilated shipping containers and left for days without food or water. There has never been a full accounting of the number buried in mass, unmarked graves in the Afghanistan desert. (See “Further evidence of a massacre of Taliban prisoners”.)

Hamdi was one of about 500 Afghanistan war prisoners taken to Guantánamo Bay, Cuba, in early 2002. When interrogators discovered his US citizenship in April of that year, Hamdi was moved to the Navy base in Norfolk, Virginia.

In retrospect, it is clear that the Bush administration moved Hamdi because it wanted no US citizens at Guantánamo Bay. It claimed in subsequent court proceedings that aliens being held outside “sovereign” territories of the United States have no habeas corpus rights in US courts. (The Supreme Court rejected that argument in another June 28 decision.) Since Hamdi was a US citizen, it could not, on this basis, deny his constitutional rights to consult a lawyer and seek redress in the courts.

Hamdi’s status as a US citizen being held in the United States provided the Bush administration with a test case to create a precedent authorizing the summary imprisonment of a US citizen as an “enemy combatant.” By moving Hamdi to Virginia, the

Bush administration placed him within the jurisdiction, should there be an appeal of his indefinite imprisonment, of the Fourth Circuit Court of Appeals, the most right-wing federal court in the United States.

Two months after moving Hamdi, Attorney General John Ashcroft announced that the government had seized a second US citizen, Jose Padilla, as an “enemy combatant.” Unlike Hamdi, who was seized in the vicinity of a battlefield, Padilla was arrested at Chicago’s O’Hare Airport. At first accused of plotting to explode a nuclear “dirty bomb” on behalf of Al Qaeda, Padilla is now alleged to have plotted to fill apartments with natural gas and detonate them. Like Hamdi, Padilla was moved to a military jail within the Fourth Circuit’s jurisdiction.

Hamdi’s father filed a habeas corpus petition in the United States District Court for Norfolk, Virginia. While never denying outright that Hamdi had the right to habeas corpus—a court challenge to the legality of his detention—Bush administration lawyers claimed that only Hamdi himself could bring the habeas petition, while at the same time defending the government’s right to hold him completely incommunicado, without access to an attorney.

Obviously, filing a habeas corpus petition under such conditions is impossible.

The administration’s motions warned that any judge who opposed the government’s action risked “a conflict of military and judicial opinion highly comforting to the enemies of the United States.” The choice of words was a deliberate attempt to intimidate any judge thinking of ruling against the government. (The US Constitution defines the crime of treason as giving “aid and comfort” to the enemy.)

The government filed a June 2002 affidavit by Col. Donald T. Woolfolk, the commander of the Guantánamo Bay lockups, which alleged that permitting Hamdi access to a lawyer “may create substantial harm to US national security interests” because “Hamdi’s background and experience, particularly in the Middle East, Afghanistan, and Pakistan, suggest considerable knowledge of Taliban and Al Qaida training and operations.”

Hamdi was supposedly so well “trained in means of covert communication” that his lawyer “could unwittingly” be used to “open an information conduit between detainee Hamdi and members of Al Qaida, the Taliban, or other terrorist groups against whom the United States is actively engaged in combat.”

The lower-court judge, Reagan appointee Robert Doumar, was clearly appalled by the government’s position. Ruling against it, he said, “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.”

The Fourth Circuit reversed Doumar, however, in a decision allowing the government virtually unlimited power over persons deemed “enemy combatants.” The Fourth Circuit decision was, in turn, reversed by the Supreme Court in O’Connor’s June 28 ruling, and the case was sent back to Doumar for further proceedings.

According to the four-page agreement filed in Doumar’s court

on September 24, the United States will not request that the Saudi government imprison Hamdi after his return, “as considerations of US national security do not require his detention.” Hamdi must renounce “terrorism and violent jihad” as well as surrender his US citizenship, according to the document. He has agreed to notify Saudi officials if he becomes aware of any planned or executed acts of terrorism.

Hamdi must not travel outside Saudi Arabia for 5 years. For 15 years, he must alert the US Embassy before leaving Saudi Arabia, and may never travel to Afghanistan, Iraq, Israel, Pakistan or Syria. He cannot travel to the United States for 10 years. After that, he must get permission from the secretaries of defense and homeland security.

Finally, the agreement bars Hamdi from suing the United States for wrongful imprisonment.

Senator Patrick Leahy, Democrat of Vermont, issued a statement questioning how the government could “release and send to Saudi Arabia someone they said was so dangerous that he had to be held for years in a military stockade and could not be allowed to consult with a lawyer.”

The answer is that Hamdi’s imprisonment was never about national security. It was about creating a legal precedent to vastly expand executive power by stripping away the basic democratic right to be free from arbitrary government detention.

The release leaves Padilla as the only US citizen being held as an “enemy combatant.” His habeas corpus petition worked its way up to the Supreme Court, only to be dismissed because it was filed within the Second Circuit, where he was first incarcerated as a “material witness” to a grand jury investigating the September 11 attacks, instead of in the Fourth Circuit, where the government moved him after his designation as an “enemy combatant.”

In response to the news of Hamdi’s release, Padilla’s lawyer, Donna Newman, said, “We have no idea what the government is considering or not considering.” She added, “We are pursuing our claim in South Carolina through a habeas petition. And our position remains the same. Either you charge him or you have got to release him.”

Finally, James Brosnahan, the attorney for John Walker Lindh, filed a petition for clemency with the Bush administration, citing the close parallels between his client’s actions and Hamdi’s. Lindh is completing the third year of a 20-year federal prison sentence after pleading guilty to charges of supporting the Taliban, a designated terrorist organization.

In the meantime, the government has quietly released 202 prisoners from Guantánamo. Former prisoners have been transferred to Pakistan, Morocco, France, Russia, Saudi Arabia, Spain, Sweden and the United Kingdom.



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