

# Court upholds power of White House to jail citizens as “enemy combatants”

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In a ruling with vast implications for basic democratic rights, a three-judge panel of the United States Court of Appeals for the Fourth Circuit ruled Friday that the Bush administration can continue to incarcerate Jose Padilla, seized May 8, 2002 at Chicago's O'Hare airport, in a military prison, without filing any charges against him.

The ruling attacks the right to be free from arbitrary imprisonment, the fundamental liberty dating back in Anglo-American law to the Magna Carta of 1215, as well as basic notions of due process. It demonstrates the extent to which the American ruling elite has broken with democratic standards and traditions.

The sole basis for Padilla's imprisonment is President Bush's June 9, 2002 proclamation that he “is, and at the time he entered the United States in May 2002 was, an enemy combatant.” No attempt has ever been made to actually prove this charge, and the category “enemy combatant” itself is without precedent in domestic and international law.

The Bush administration came up with the designation after the September 11 terrorist attacks to place people outside both criminal law, with its attendant panoply of constitutional rights, and the Geneva Conventions on the treatment of prisoners of war. While so far used only against alleged fundamentalist Islamic militants, its rationale supports a much wider application—the rounding up and imprisonment of opponents of US imperialism generally.

The FBI arrested Padilla after he walked off a plane from Switzerland on a “material witness” warrant issued by a New York Grand Jury. The seizure was not made public until a month later, however, when then-Attorney General John Ashcroft announced in a televised press conference that the arrest had frustrated Padilla's plan to detonate a “dirty bomb”—a conventional explosive wrapped in radioactive material—inside a major US city. The government has since withdrawn the “dirty bomb” claim, and now contends that Padilla was planning to fill apartments with natural gas and detonate them with timing devices.

Padilla was initially held in a New York City federal jail. After his public defender, Donna Newman, filed court papers seeking his release, the Bush administration moved him to a naval brig in Charleston, South Carolina. The New York federal court and the Second Circuit Court of Appeals both found that the government's shell game did not deprive them of jurisdiction over Padilla's habeas corpus petition and ruled in his favor, ordering Secretary of Defense Donald Rumsfeld to turn him over to civilian authorities for criminal prosecution, or release him. (See “Two appellate courts rule against Bush administration detentions”.)

The Bush administration's appeal reached the US Supreme Court at the same time as the habeas corpus petition filed on behalf of Yasser Hamdi, a US citizen born to Saudi parents who was captured among Taliban fighters by the Northern Alliance in November 2001, after the US invaded Afghanistan. In June 2004, the Supreme Court rejected the Bush administration's position that Hamdi could be held without any hearing into his status as an “enemy combatant.” It did not review Padilla's habeas corpus petition, however, ruling instead that the petition should

have been brought in South Carolina, within the Fourth Circuit, the most right-wing federal court in the nation.

Padilla's lawyers refiled in South Carolina, where United States District Judge Henry F. Floyd came to the same conclusion as the Second Circuit, again ordering the government either to charge Padilla with a crime or release him. In a stinging rebuke, Floyd—himself a recent Bush appointee—wrote that if the government's “position were ever adopted by the courts, it would totally eviscerate the limits placed on Presidential authority to protect the citizenry's individual liberties.” (See “Judge orders end to indefinite detention of Jose Padilla”.)

The Fourth Circuit reversed Floyd's ruling, adopting the government's position granting Bush virtually unlimited power to declare people unlawful combatants and imprison them without trial.

Significantly, the author of Friday's ruling is Judge J. Michael Luttig, one of the likely candidates to replace Sandra Day O'Connor as an associate justice on the Supreme Court. A prominent member of the coterie of right-wing Republican judges and lawyers who now dominate the federal judiciary, he began his own legal career as a law clerk for Antonin Scalia before Scalia's own appointment to the high court, and then served as a law clerk for Chief Justice Warren Burger. After a few years in private practice, Luttig joined the Justice Department during the administration of George H. W. Bush, who appointed him to the Fourth Circuit at the unusually young age of 37.

Luttig is a prominent cog in the Republican machine. Almost all of his former law clerks on the Fourth Circuit, who are sometimes referred to as “Luttigators,” subsequently clerked for one of the three right-wing Supreme Court justices—Scalia, Chief Justice William Rehnquist, or Clarence Thomas—before going on to politically connected jobs in private firms or the government. Luttig himself presided over the wedding of key right-wing Republican operative Theodore Olson, and then gave a eulogy for his wife, Barbara Olson, after she died in the Sept. 11 terrorist attacks.

It was revealed recently that the Bush administration privately interviewed John Roberts, the present nominee for Supreme Court chief justice, while he was one of the three judges on the District of Columbia Circuit considering an appeal of a ruling against the Bush administration on the rights of Guantánamo prisoners—a clear violation of judicial ethics. Robert joined the majority in reversing the lower court and upholding hearings that make a mockery of due process.

Since Luttig was on the same “short list” as Roberts, there is reason to suspect that the same ethical violation took place in relation to the Padilla case as well.

Taken together, the rulings on Guantánamo prisoners' rights and on Padilla, and the participation in them of judges favored by the Bush administration for elevation to the Supreme Court, underscore the deeply anti-democratic agenda guiding the government's efforts to reshape the high court. Of central importance to the far right forces for whom the administration speaks is vastly expanding the powers of the executive branch and building up the police powers of the state, at the expense of

constitutionally guaranteed civil liberties.

Demonstrating the broad support for the Bush administration's assault on democratic rights within the ruling elite, Luttig's opinion was joined by William B. Traxler Jr. and M. Blane Michael, both of whom were appointed to the Fourth Circuit by Bill Clinton during the 1990s.

From a legal and constitutional standpoint, Luttig's opinion is a travesty, full of evasions, distortions and unwarranted assumptions. The 25-page opinion does not so much as acknowledge that serious issues of democratic rights are involved, and that upholding the position of the Bush administration carries potential dangers to civil liberties. Even a reactionary judge with some residual attachment to democratic principles would presumably feel obliged to at least pay lip service to those principles, before concluding that the exigencies of the so-called "war on terrorism" override them.

Luttig, however, reveals no concern whatsoever for the plight of a man who has now been locked up for 40 months without even having had an opportunity to respond to the charges against him. Instead, he violates every notion of judicial procedure and fair play by assuming the truth of the government's allegations against Padilla and then imposing the most far-reaching consequences on that basis.

The basic framework for Luttig's ruling is an uncritical acceptance of the government's assertion that the United States is locked in a "war against terrorism" that has no boundaries, either in time or place.

Luttig claims that Padilla served as an armed guard for the Taliban and Al Qaeda in Afghanistan at the time when US troops were engaged in combat against them, and then "traveled to the United States for the avowed purpose of further prosecuting that war on American soil, against American citizens and targets." Padilla "avowed" nothing of the sort. His habeas petition alleges that he "never joined a foreign army" and "carried no weapons or explosives when he was arrested. He disputes the factual allegations underlying the Government's designation of him as an 'enemy combatant.'"

The thrust of Luttig's opinion is that Padilla—arrested in an American airport—is indistinguishable as an "enemy combatant" from Hamdi, who was captured among Taliban troops while carrying a weapon on an Afghan battlefield.

In the *Hamdi* decision, a fractured Supreme Court—no opinion obtained a majority vote—upheld the government's power to classify Hamdi as an enemy combatant, but ordered that he be provided some form of hearing to challenge the finding. While widely heralded at the time as a defeat for the Bush administration, which had claimed its designation of someone as an "unlawful combatant" was unreviewable, the Supreme Court ruling in the Hamdi case, as the *World Socialist Web Site* explained at the time, "endorsed key elements" of the Bush administration's "offensive against democratic rights" by allowing Hamdi to "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." (See "The meaning of the US Supreme Court rulings on 'enemy combatants'".) Friday's Fourth Circuit ruling proves that this warning was entirely correct.

Associate Justice Sandra Day O'Connor's controlling plurality opinion in *Hamdi* ignored the Geneva Conventions on prisoners of war, which provide that captured enemy belligerents are presumed to be POWs entitled to a variety of rights, such as mail, access to the Red Cross or Red Crescent, and housing among other prisoners. To deny an enemy prisoner those rights on the grounds that he or she violated the laws of war—for example, by not wearing a uniform and then engaging in acts of sabotage—the capturing power must hold a tribunal and apply rules similar to courts martial within the capturing power's own armed forces. Of course, the Bush administration has done nothing of the sort.

To shoehorn Padilla into the *Hamdi* precedent, Luttig ignored the initial reasons given for the arrest—an alleged nuclear saboteur entering the

United States to commit mass murder. Instead, he wrote that Padilla "associated with forces hostile to the United States in Afghanistan and took up arms against United States forces in that country in our war against Al Qaeda."

Elementary legal principles require that such accusations be supported by evidence and be established in open hearings before they can justify imprisonment, but this allegation has never been tested in any sort of proceeding. Moreover, it was directly contradicted by Deputy Attorney General James Comey, who announced more than a year ago that Padilla was "moved out of Afghanistan because the Americans were coming."

Luttig wrote that Padilla "poses the same threat of returning to the battlefield as Hamdi posed at the time of the Supreme Court's adjudication of Hamdi's petition." The "threat" posed by Hamdi has since been exposed as a fabrication. The government released Hamdi shortly after the Supreme Court ruled he was entitled to a hearing, on condition that he renounce his US citizenship, return to Saudi Arabia and not sue for false imprisonment.

The fundamental basis of Luttig's ruling was contained in his claim that "in many instances criminal prosecution would impede the Executive in its efforts to gather intelligence from the detainee." In other words, acknowledging constitutional rights to remain silent, to consult an attorney and to be presumed innocent, not to mention the right not to be deprived of liberty without due process of law, might interfere with the Bush administration's policy of extracting confessions from its prisoners—this in the aftermath of the Abu Ghraib scandal and other revelations of US government complicity in the torture of detainees.

Luttig does not discuss the case of John Walker Lindh, a California man who was, in fact, captured on an Afghan battlefield and prosecuted under federal criminal statutes.

Moreover, the term "war" has a very specific meaning under the US Constitution, and requires a Congressional declaration. There has been no declaration of war against Al Qaeda or any other country or entity. This point is essential to US democracy. The founders repeatedly expressed their concern over the executive branch's unbridled use of the war power and consciously intended to limit it by requiring a Congressional declaration. Luttig's decision allows the continued detention of Padilla for the "duration of the relevant hostilities," that is, for the indefinite duration of the so-called "war on terror."

Donna Newman commented on behalf of her client, "They're not giving him a chance to fight this. They're telling him he's going to be held forever, that he has no rights. What they're saying is worse than a life sentence."

While the Fourth Circuit's decision is subject to review by the Supreme Court—which could soon include Luttig—it demonstrates that the process is far advanced of establishing the juridical framework for transforming the United States from a constitutional democracy into a dictatorship.



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