Appellate court slams Bush Administration for holding al-Marri as “enemy combatant”

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In another rebuke to the Bush administration’s attack on constitutional rights, a Court of Appeals panel issued a sharp ruling Monday condemning Bush’s claim that by labeling someone an “enemy combatant” he may be incarcerated indefinitely in a military prison. The court likened the Bush administration’s policies to “martial law” and the excesses of King George III.

The decision reverses the trial court’s denial of habeas corpus for Ali Saleh Kahlah al-Marri, a citizen of Qatar living legally in the United States, and ordered the military to release him from the isolation cell in a Charleston, South Carolina, brig where he has been held for the last four years.

The 77-page decision was by Circuit Judge Diana Gribbon Motz, a 1994 Clinton appointee, and joined by Circuit Judge Roger L. Gregory, originally named by Clinton in 2000 as a recess appointment, but renominated by Bush, both sitting members of Fourth Circuit Court of Appeals, which covers the states of Virginia, West Virginia, Maryland and both Carolinas. A district court judge sitting by special assignment, Republican Henry Hudson, dissented. The decision can be accessed here.

The ruling does not mean al-Marri will be freed, however. In fact, the ruling will probably never take effect. Attorney General Alberto Gonzales, after calling al-Marri a “dangerous individual,” announced the government will appeal the decision to the Fourth Circuit as a whole (“en banc”), where a reversal is likely. Regardless, the losing side will petition to the Supreme Court, meaning a final decision may not be reached for another year.

Moreover, even under the ruling al-Marri does not have to be released altogether. He can still be charged with a crime, held as a material witness, deported, or detained up to six months by civilian authorities pursuant to a reactionary provision of the Patriot Act which allows for the “temporary” detention of “terrorist aliens.”

Nevertheless, the ruling is significant because for the first time an appellate court has rejected the assertion that Bush, as president, has the inherent power as Commander in Chief to issue an executive order declaring a non-citizen to be an “enemy combatant” subject to indefinite detention in a military jail. The ruling also rejected the Bush administration’s back-up claim that the cursory Congressional Authorization to Use Military Force (AUMF) passed shortly after the September 11 attacks granted him the power to make such executive determinations and arrests.

“To sanction such presidential authority to order the military to seize and indefinitely detain civilians, even if the President calls them ‘enemy combatants,’” Judge Motz wrote, “would have disastrous consequences for the Constitution—and the country. For a court to uphold a claim to such extraordinary power would do more than render lifeless the Suspension [of habeas corpus] Clause, the Due Process Clause, and the rights to criminal process in the Fourth, Fifth, Sixth, and Eighth Amendments [of the Bill of Rights]; it would effectively undermine all of the freedoms guaranteed by the Constitution. . . . We refuse to recognize a claim to power that would so alter the constitutional foundations of our Republic.”

Jonathan L. Hafetz, al-Marri’s lawyer, in a press released issued by New York University’s Liberty & National Security Project, said the decision “soundly and rightly rejected the Administration’s attempt to treat the globe as a battlefield that is exempt from rule of law.” Had it not, Hafetz added, “the executive could effectively disappear people by picking up any immigrant in this country, locking them in a military jail, and holding the keys to the courthouse. This is exactly what separates a country that is democratic and committed to the rule of law from a country that is a police state.”

Al-Marri legally entered the United States with his family on September 10, 2001, to attend a graduate program at Bradley University, where he had obtained an undergraduate business degree in 1991.The FBI arrested him in front of his wife and five children at their Peoria, Illinois, home on December 12, supposedly as a material witness for a New York grand jury’s investigation of the September 11 attacks.

During February 2002, al-Marri was indicted for alleged credit card fraud and lying to the FBI. Those criminal proceedings dragged on until June 2003, when the court scheduled a hearing at al-Marri’s request to determine whether evidence in that case should be suppressed because it was obtained through torture. Before the hearing could take place, however, on June 23 President Bush issued an executive order designating al-Marri as an “enemy combatant,” and he was transferred to the Navy brig, where he remains imprisoned.

The government held al-Marri incommunicado for sixteen months, denying him access to his lawyers and family. After finally meeting with counsel, al-Marri filed for habeas corpus, denying any role in terrorist organizations or activities, and claiming that he was subjected to sensory deprivation, extended and abusive interrogation and threats of violence.

The government responded with a declaration by a bureaucrat

named Jeffrey Rapp, who claimed that al-Marri is "closely associated with al Qaeda," trained in a "terrorist training camp in Afghanistan," was introduced to Osama bin Laden by Khalid Shaykh Muhammed, and was dispatched to the United States as a "sleeper agent" to facilitate more terrorist attacks. Regardless of whether any of these allegations are true, the government has never produced a shred of evidence in any court of law to substantiate any of it.

The government's treatment of al-Marri tracks that given other US detainees in the so-called "war on terror," such as Jose Padilla, who was also moved abruptly before an important court hearing, and denied the opportunity to answer then Attorney General John Ashcroft's notorious charge that he was plotting to detonate a "dirty bomb" in a major American city.

The Bush administration has deliberately moved its "war on terror" prisoners to military facilities within the Fourth Circuit, generally considered the nation's most conservative appellate court. But the case was assigned to Motz, perhaps the Circuit's most liberal judge.

Motz first dismantled the Bush administration's claims that the Detainee Treatment Act of 2005 (DTA) and Military Commissions Act of 2006 (MCA) deprived al-Marri of the right to seek habeas corpus in a US Court. As a lawful resident alien imprisoned in the US, al-Marri has a constitutional right to habeas corpus. The Bush administration contends the constitutional right to habeas corpus does not extend to detainees at facilities outside the United States, such as Guantánamo Bay, Cuba, and therefore the DTA and MCA can provide Combatant Status Review Tribunals (CSRT's) instead. Motz ridiculed the government's *Catch-22* argument that al-Marri, who cannot receive CSRT inside the US, is still barred by the DTA and MCA from petitioning for habeas corpus because some day he may be transferred abroad and receive a CSRT review. Even the dissenting judge, Hudson, agreed that al-Marri had the right to seek habeas corpus.

On the merits, Motz began by citing the constitutional provision that no "person"—a term that includes resident aliens—shall "be deprived of life, liberty or property, without due process of law," noting that "this concept dates back to Magna Carta, which guaranteed that government would take neither life, liberty, nor property without a trial in accord with the law of the land."

Although the laws of war allow for a belligerent nation to detain captured "enemy combatants" for the duration of hostilities, Motz explains that the Geneva Conventions distinguish between "combatants" and "civilians." Unlike Yaser Esam Hamdi, whom the Supreme Court suggested could be treated as an "enemy combatant" because he was captured fighting alongside the Taliban in Afghanistan following the 2001 US invasion, and Jose Padilla, whom the government claimed fought with the Taliban against US forces before returning to Chicago, where he was taken into custody, al-Marri never fought against US forces. He is therefore a "civilian" who cannot be categorized as a "combatant," enemy or otherwise.

"We can only conclude," Motz wrote, "that in the case at hand, the President claims power that far exceeds that granted him by the Constitution." Citing the grievances in the Declaration of Independence that King George III "affected to render the Military Independent of and superior to the Civil power" and "deprive[ed] us in many cases of the benefits of Trial by Jury," Molz summed up that "absent [Congressional] suspension of the writ of habeas corpus or declaration of martial law, the Constitution simply does not provide the President the power to exercise military authority over civilians within the United States."

In dissent, Hudson relied solely on the government's unproven charges—ignoring al-Marri's denials as well as his due process right to challenge the evidence and confront his accusers—and repeated the same tired "war on terror" rhetoric that the Bush administration has used for the last six years to stampede the US population into accepting the destruction of its fundamental democratic rights.

Al-Marri was "properly designated as an enemy combatant by the President of the United States," Hudson wrote. "Although al-Marri was not personally engaged in armed conflict with US forces, he is the type of stealth warrior used by al Qaeda to perpetrate terrorist acts against the United States."

As one would expect, the Bush administration's response to the ruling ignored the profound constitutional questions the court raised. "The president has made clear that he intends to use all available tools at his disposal to protect Americans from further al-Qaeda attack, including the capture and detention of al-Qaeda agents who enter our borders," Justice Department spokesperson Dean Boyd said.

While the decision is a setback for the Bush administration, highlighting disputes and contradictions within the ruling elite, the government trajectory remains pointed toward the widespread destruction of basic democratic rights. Larry Cox, speaking for Amnesty International, noted that although the "decision restores constitutional habeas rights to those arrested on US soil," those protected "are only a tiny subset of the many individuals whose rights have been trampled in the name of the war on terror."

"Today's ruling is plain common sense: the president can't seize civilians in the United States, hold them in military custody, and deny them habeas rights. It's a sign of how bad things have gotten that the decision comes as such a welcome glimmer of hope," Cox added.