

# US court upholds president's power to detain Americans as "enemy combatants"

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The Bush administration's contention that the president has the power to detain anyone, including US citizens, indefinitely without charges or trial by declaring them "enemy combatants" received judicial backing from a sharply divided appellate court in Richmond, Virginia Tuesday.

The 5-to-4 decision by the US Court of Appeals for the 4th Circuit made it nearly certain that this assertion of dictatorial powers by the presidency will be part of the Bush administration's dark legacy handed on to a future administration.

The ruling by the full appellate court effectively overturned a decision reached by a three-judge panel of the same court issued in June of last year, which held that the Bush administration did not have the legal authority to detain people without charges and compared its assumption of such sweeping powers to military rule and the oppression of the American colonies by King George III.

That panel had itself reversed a lower court's denial of habeas corpus for Ali Saleh Kahlah al-Marri. A Qatari national, al-Marri was a legal resident of the US and a graduate student in Peoria, Illinois, before the Bush White House declared him an enemy combatant in 2003 and ordered the military to throw him into a Navy brig in Charleston, South Carolina, where he has been held for the last five years.

While the three-judge panel ordered the military to release him into civilian custody to be either tried or deported, the full court ruling means that al-Marri will remain imprisoned without charges in the Charleston brig.

In a companion ruling, the same full court, also by a 5-to-4 decision, held that al-Marri has the right to a limited appeal of his designation as an enemy combatant based on a civilian court's review of the evidence against him. It found that a previous court proceeding, in which a defense intelligence agent issued a sworn statement asserting Marri's alleged ties to al-Qaeda, supposedly based on second and third-hand sources, did not provide an adequate review of the government's contention that he was not entitled to further due process.

This meager concession notwithstanding, the Justice Department hailed the ruling as a victory, declaring that it upheld "a vital tool in protecting the nation" and recognized "the president's authority to capture and detain al-Qaeda agents who, like the 9/11 hijackers, come to this country to commit or facilitate warlike acts."

Al-Marri arrived in the US on September 10, 2001 to pursue a master's degree in computer science at Peoria's Bradley University, where he had earned an undergraduate degree 10 years earlier. He was seized from his home by the FBI and dragged away in front of his wife and five children to be held as a material witness in the

September 11 terrorist attacks.

He was subsequently charged with credit card fraud and other offenses, accusations that he vehemently denied. Eighteen months after he was detained and on the eve of an evidentiary hearing in which he was going to challenge evidence to be used against him in an upcoming trial on the grounds that it was extracted through torture, President Bush signed a statement declaring al-Marri an "enemy combatant." He ordered the military to seize him from civilian authorities and imprison him in the Navy brig. While the government claimed that he is an Al Qaeda "sleeper agent," not a shred of evidence has ever been presented to substantiate this allegation.

He was held in the brig incommunicado for over a year and subjected to torture. He has been denied the right to see his family for five years, most of which have been spent in solitary confinement. Al-Marri's lawyers report that this cruel and inhumane treatment has left him mentally unstable.

The government has claimed that the Authorization to Use Military Force (AUMF) resolution passed by Congress in 2002 gives the president the power to carry out such detentions. Alternately, it has asserted that the "commander in chief" has unchallengeable authority to imprison anyone without charges for the duration of a global war on terror, which the administration itself asserts will last for generations. These unconstitutional and dictatorial claims were essentially upheld by the appellate court majority.

Al-Marri is the sole remaining person detained on US soil who is being held as an enemy combatant. It had previously held Jose Padilla, a US citizen detained at Chicago's O'Hare International Airport in May 2008, under the same conditions, but then charged him criminally in late 2005 to preempt a Supreme Court review of his case. Another US citizen detained in Afghanistan, Yasser Esam Hamdi, was also held as an enemy combatant until 2004, when he was released to Saudi Arabia on condition of giving up his US citizenship.

While in both the Padilla and Hamdi cases, the government claimed that they could be designated as enemy combatants because they had supposedly fought alongside the Taliban in Afghanistan, in al-Marri's case there was no such allegation. In his case, the assertion of unrestrained power of executive detention was extended further, to encompass anyone, including citizens and legal residents in the US itself, on the sole say-so of the US president that they are terrorist conspirators.

The decision of the 4th District—considered the most right-wing federal appeals court in the country—tracks closely a September 2005 ruling by another three-judge panel from the same court in the Padilla case, which also upheld the power of the president to arrest and indefinitely detain US citizens arrested on American soil without

charges or a trial. Because the US Supreme Court refused to review the decision after the Bush administration charged Padilla criminally, that ruling still stands.

The majority opinion written by Judge William Traxler, who was appointed to the bench by President Clinton, acknowledged that the US Constitution “affords all persons detained by the government the right to be charged and tried in a criminal proceeding” and bars “the government from subjecting individuals arrested inside the United States to military detention *unless* they fall within certain narrow exceptions.” Such an exception exists, Traxler contended, if an individual is “properly designated an enemy combatant pursuant to legal authority of the President.”

Traxler’s decision further spelled out that such power extends not just to foreign residents of the US, but to US citizens as well. He wrote, “The constitutional rights our court determines exist, or do not exist, for al-Marri will apply equally to our own citizens under like circumstances. This means simply protections we declare to be unavailable under the Constitution to al-Marri might likewise be unavailable to American citizens.”

In other words, all a US president has to do is sign his name to a sheet of paper and any American citizen can be thrown into a military prison and detained indefinitely without being charged with a crime or given the right to a trial.

Denying the obvious, the decision claimed that upholding al-Marri’s detention as an enemy combatant did not constitute part of “some pattern of surrender by a co-equal Congress and judiciary to a rampaging executive branch.” To support this contention, it pointed to the congressional approval of various pieces of legislation that embodied capitulation to the Bush White House, including the AUMF blank check resolution for war, the US Patriot Act and the Protect America Act of 2007.

“Those who think these acts ceded too much power to the executive may be right or they may be wrong,” the decision states. Whatever the case, it contends, they were produced by votes in Congress.

Finally, the majority essentially threw up their hands in the face of a secretive government and a supposedly omnipotent terrorist threat. “We may never know whether we have struck the proper balance between liberty and security, because we do not know every action the executive is taking and we do not know every threat global terror networks have in store,” the decision states.

The four justices voting in the minority supported a dissent by Judge Diana Gribbon Motz, another Clinton appointee who authored the three-judge panel decision last year upholding al-Marri’s right to habeas corpus.

Beginning by affirming that the US Constitution has provided a guarantee for over two centuries that “in the United States, no one will be deprived of liberty without due process of law,” Motz’s opinion spells out the gross violation of basic rights in the case of al-Marri since he was seized by the military more than five years ago:

“He has been held by the military ever since—without criminal charge or process. He has been so held, despite the fact that he was initially taken from his home in Peoria, Illinois, by civilian authorities and imprisoned awaiting trial for purported domestic crimes. He has been so held, although the Government has never alleged that he is a member of any nation’s military, has fought alongside any nation’s armed forces, or has borne arms against the United States anywhere in the world. And he has been so held, without acknowledgment of the protection afforded by the Constitution, solely because the Executive believes that his indefinite military detention—or even the indefinite

military detention of a similarly situated American citizen—is proper.”

Motz insists: “No existing law permits this extraordinary exercise of executive power. Even in times of national peril, we must follow the law, lest this country cease to be a nation of laws.

Continuing with an implicit warning that the government’s actions and their validation by the appeals court decision pose the threat of a dictatorship in the United States, Motz writes:

“To sanction such presidential authority to order the military to seize and indefinitely detain civilians, even if the President calls them ‘enemy combatants,’ 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 Clause, the Due Process Clause, and the rights to criminal process in the Fourth, Fifth, Sixth, and Eighth Amendments; it would effectively undermine all of the freedoms guaranteed by the Constitution.

“It is that power—were a court to recognize it—that could lead all our laws ‘to go unexecuted, and the government itself to go to pieces.’ We refuse to recognize a claim to power that would so alter the constitutional foundations of our Republic.”

The lawyer representing al-Marri, Jonathan Hafetz, said that the court’s decision “effectively allows the president to seize any person in the United States, a citizen or noncitizen, and detain them indefinitely without trial.” The court’s action, he continued, “cripples the most important constitutional right of all, the right to be charged and tried if suspected of wrongdoing.” He said he was considering an appeal of the ruling.

By ordering a new hearing on the evidence supporting al-Marri’s detention as an enemy combatant, Hafetz said, the court’s majority had rejected “the president’s most sweeping claims of unchecked and unreviewable executive detention power.”

However, the rights granted al-Marri by the decision are extremely circumscribed and far less than those enjoyed by any criminal defendant in the US. The court found that he is entitled under the so-called burden-shifting scheme laid out in the Supreme Court decision in the Hamdi decision to contest the government’s contention that “the balance of the competing interests weighs on the side of lessened due process protections.” The appeals court majority found that al-Marri had been denied the right to contest these diminished protections, which were imposed by a lower court as a matter of course.



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