

# Enemy combatant saga needs a constitutional conclusion

Earlier this month, the Bush administration's controversial "enemy combatant" detention policy took an unexpected turn in federal court. A July 15th decision from the Fourth Circuit Court of Appeals held that President Bush possesses the authority to hold foreign national Ali Saleh al-Marri on American soil indefinitely, without providing him access to a criminal trial. Thirteen months earlier, a separate opinion from the Fourth Circuit had come to the exact opposite conclusion.

This prior decision, coupled with the 2006 transfer of enemy combatant Jose Padilla back to criminal custody, seemed to indicate that the President's novel theory of executive power was beating a steady retreat. Instead, a muddled victory has emerged for the White House – one which stems directly from the Supreme Court's messy resolution of a prior enemy combatant case. The recent developments in the al-Marri matter demonstrate the importance of getting it right at the Supreme Court – as well as the attendant dangers of leaving loose ends behind.

After 9/11, President Bush made sweeping claims about the extent of his authority to detain both citizens and foreigners on U.S. soil as "enemy combatants", without charges or court trials. These claims were sweeping, because they lacked a basic grounding in the text of the Constitution. This extraordinary power is not vested in the President alone; rather, it can only be authorized by Congress, through a formal suspension of the writ of habeas corpus. Since 9/11, Congress has declined to suspend the writ on U.S. soil, leaving constitutional due process rights fully intact. Despite this, President Bush has taken it upon himself to conduct a limited number of detentions by executive fiat. Three of these detainee cases have since found their way into the federal court system:

## The detainees

**Yaser Hamdi.** Hamdi was captured while fighting alongside Taliban forces during the early stages of military action in Afghanistan. A Saudi national, he possessed dual citizenship by virtue of having been born in America. Once it was determined that Hamdi was a U.S. citizen, he was shipped to a military brig in South Carolina, and the President declared him an enemy combatant.

**Jose Padilla.** U.S. citizen Jose Padilla was arrested by FBI agents at Chicago's O'Hare airport. Padilla was first held as a material witness, and was scheduled to testify in a grand jury proceeding regarding another party. Then, he was abruptly transferred to military custody, and declared an enemy combatant. The White House claimed that Padilla had met with senior al Qaeda officials while in Afghanistan, and had returned to the United States to carry out acts of terror.

**Ali Saleh Al-Marri.** Like Padilla, Al-Marri was initially arrested by civilian law enforcement agents, charged with various crimes, and was then transferred to military custody after his designation as an "enemy combatant." Unlike Padilla, Al-Mari was not a U.S. citizen. His enemy combatant certification was supported by documents that claimed that he had been sent to the United States as an al-Qaida "sleeper" agent.

At this point, it should be noted that the allegations made against these individuals were serious matters, which deserved to be treated with appropriate gravity. The fact that the government sought to detain these men was not, in itself, problematic. Rather, problems stemmed from the way in which their detentions were carried out. These enemy combatant detentions involved either U.S. citizens, or persons captured on U.S. soil – two situations covered by the protections of the Constitution. By ignoring this fact, the executive branch set a dubious precedent for its future conduct. How, then, have American courts responded to this Constitutional challenge?

### **The case of Yaser Hamdi**

Hamdi's case reached the Supreme Court in 2004, and became the first significant "War on Terror" case to be decided by the high court. Hailed as a victory for civil liberties, the decision was in fact a mixed one. Writing for the majority, Justice O'Connor held that,

"... a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

The rhetoric of the *Hamdi* decision was widely cited as a repudiation of the President's broad claims, but the Court actually granted the administration a portion of what it was seeking. In essence, the decision broke down like this:

On the question of whether the President had inherent authority to detain U.S. citizens, the Court withheld its judgment. However, the Court found that Congress had allowed indefinite detentions to occur when it passed the Authorization to Use Military Force (AUMF) after 9/11. Compared to most federal statutes, the AUMF is brief. It reads:

“ ... the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

The Supreme Court maintained that this sparse language authorized the seizure of anyone – including American citizens – whom the executive claimed to be affiliated with al-Qaida, or its supporters. At the same time, they limited the application of the decision to the field of military combat in Afghanistan. For those detained on that field, the Court mandated a minimal process of review before they could be indefinitely held. While passing on the administration’s most expansive claims, the *Hamdi* court affirmed the underlying idea that the President could detain U.S. citizens without a trial – and without an explicit suspension of habeas corpus. This concept would echo through subsequent enemy combatant decisions.

Justice O’Connor wrote for the majority, but three others dissented. The most strident dissent came from Justice Scalia, who accused the Court of making up the law as it went along. To Scalia, the *Hamdi* case was open and shut – either Congress had to suspend habeas corpus, or it had to try Yaser Hamdi in criminal court.

### **The Jose Padilla matter**

During the same Supreme Court session as *Hamdi*, justices declined to hear the case of Jose Padilla on a technicality, and sent it back to district court for additional proceedings. The courts in Padilla’s original jurisdiction had been quite harsh in their assessment of the administration’s detention claims. Even current Attorney General Michael Mukasey - then a district court judge - had berated the Justice Department for stonewalling during one of Padilla’s proceedings. Several years later, the administration found a much more receptive audience in the Fourth Circuit, where Padilla’s case

was ultimately transferred.

In a 2005, appellate judge J. Michael Luttig handed the administration a victory in a decision that upheld many of the President's key claims. Reaching broadly, Luttig took the *Hamdi* opinion, and stretched it to cover the disparate facts of the Padilla case. Although the *Hamdi* court had limited its decision to the field of combat in Afghanistan, Luttig found it directly applicable to the arrest and detention of Padilla, which had occurred entirely on U.S. soil. Luttig also brushed aside key Constitutional challenges raised by the defense, and maintained that affording Padilla criminal process would "impede the executive in its efforts to gather intelligence."

Soon after the administration's victory in the Fourth Circuit, the Department of Defense transferred Padilla back to civilian custody, without explanation. Padilla was charged with material support for terrorism, and a trial date was set in Miami. At the time, some court observers believed that the administration saw problems ahead for the Padilla case at the Supreme Court. They speculated that the White House had simply decided to cut its losses by moving Padilla back to a criminal venue. Whatever the reason, Padilla was eventually prosecuted in federal court, and was provided his full panoply of Constitutional rights. In 2007, Padilla was convicted of various terror-related charges, and given a seventeen-year sentence. It was against this backdrop that the final domestic enemy combatant case wound its way through the American legal system.

### **The al-Marri case**

Al-Mari's petitions were initially heard in Fourth Circuit district court. Later, appellate judges took great pains to blunt the Fourth Circuit's earlier *Padilla* decision by differentiating al-Mari's circumstances. In 2007, they ruled that the President had no authority to deny criminal process to people captured on U.S. soil. Given that the administration had been wary of further Supreme Court review of its detention scheme, this saga might have ended with this unfavorable decision. Instead, White House lawyers decided to appeal the case. For the Bush administration, this move proved to be fortuitous. On July 15th, an appellate panel issued a series of seven separate opinions - many conflicting with each other - but most agreeing that at minimum, the AUMF allowed the President to hold al-Marri without charges, so long as he was afforded the kind of minimal process contemplated by the *Hamdi* court. This jumbled decision managed to

momentarily salvage what was left of the President's enemy combatant detention policy.

### **Toward resolution**

At this stage, there are two options for bringing the “enemy combatant” saga to a Constitutional resolution. On one hand, the Supreme Court could take up the matter, and roll back the Fourth Circuit's broad reading of *Hamdi*. On the other hand, Congress could step into the breach, and clarify its intentions about the scope of the AUMF. A clear statement by Congress that it did not mean to allow indefinite domestic detentions would neatly wrap-up the legal mess that has followed in the wake of the *Hamdi* opinion. Given that we are currently in an election year, there is little chance of this happening. Democrats are certain to shrink from any Congressional action that could be cast as being “weak on terror”, even if they are simply affirming long-held Constitutional principles.

The heated rhetoric that surrounds any discussion of terrorism-related legal matters has made it difficult to have a coherent national dialog about these issues. While some decry the provision of basic due process rights to terror detainees, these individuals would do well to more carefully examine what they are arguing for. In its most unvarnished form, the Fourth Circuit has held that the President has the power to detain any person on U.S. soil for as long as he wants, without the procedural checks of the criminal system. In addition, the law which the court is relying on for this grant of power contains no such language.

Those who condemn judicial activism elsewhere in the American legal system would do well to examine the most recent al-Marri opinions for an object lesson. The al-Marri case illustrates the dangers of straying from the plain language of the Constitution when setting legal precedent. Had the Court followed Justice Scalia's admonitions in *Hamdi*, the half-measures taken by the majority would not have evolved into their current, more problematic form. Far from constraining executive power, the *Hamdi* decision may yet enable the Bush administration to forge a lasting – and radical - legacy in the War on Terror.

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