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Freedom v. The Pentagon in the U.S. Supreme Court **by Jacob G. Hornberger**

Last week, a federal judge in Virginia, Leonie M. Brinkema (the same judge presiding in the Zacarias Moussaoui case) acquitted a man whom the feds were prosecuting for terrorism. The judge dismissed the case after the feds had presented all of their evidence in a court of a law against a person they were absolutely convinced was a terrorist. The reason for the judge's decision? Insufficient evidence of guilt.

The acquittal comes on the heels of a terrorism case brought in federal district court in Detroit, where the feds were again convinced that the people they were prosecuting were terrorists. After hearing all the government's evidence presented in the case, however, a Detroit jury acquitted two of the defendants. Federal prosecutors in that case are now being charged with wrongdoing for intentionally and knowingly withholding evidence that was favorable to the accused, which might mean that the convictions of other defendants in the case will have to be set aside.

Meanwhile, the U.S. Supreme Court has agreed to decide the case of Jose Padilla, an American citizen who has been held by U.S. military officials in a military brig located inside the United States, where they've denied him due process of law, habeas corpus, a jury trial, and access to the federal court system for some two years.

The Supreme Court has also agreed to decide the case of Yaser Hamdi, an American citizen whom U.S. military officials took into custody during their invasion of Afghanistan two years ago and whom they have also been holding in a military brig inside the United States, denying him the same rights that they have been denying Padilla.

The Pentagon's position in the Padilla and Hamdi cases? It can be summarized as follows: "Trust us. We're the military. When it comes to terrorism, we're the experts. We know who among you is a terrorist and therefore must be punished. We don't need courts to interfere with us."

Also last week, the Pentagon announced the release of several more terrorist suspects from its military base at Guantanamo, Cuba, after imprisoning them for some two years without benefit of counsel, trial, due process of law, and habeas corpus. The reason for the release? No reason has

been given because the Pentagon takes the position that its power is supreme in Cuba and, therefore, that it doesn't have to explain anything to anybody.

Much to the surprise and chagrin of U.S. military officials, the Supreme Court has also agreed to decide the constitutionality of the Pentagon's Guantanamo actions.

Question: If acts of terrorism are acts of war rather than criminal acts, as U.S. government officials maintain, empowering the Pentagon to treat suspected terrorists, Americans and foreigners alike, as "enemy combatants," denying them rights that stretch all the way back to Magna Carta, then how do the feds explain their prosecution of accused terrorists in federal district courts in Virginia and Michigan?

Indeed, why did the feds use federal courts to prosecute

- Zacarias Moussaoui (the accused "20th hijacker" in the September 11 terrorist attacks, which federal officials have said was an act of war rather than a criminal act);
- Ramzi Yousef (the terrorist who attacked the World Trade Center in 1993, which presumably the feds also considered an act of war);
- John Walker Lindh (the "American Taliban" who was captured in Afghanistan);
- Timothy McVeigh (the Oklahoma City bomber terrorist); and
- Ted Kaczynski (the Unabomber terrorist)?

Indeed, why did federal officials permit John Allen Mohammed and John Lee Malvo (the D.C. sniper terrorists) to be prosecuted and convicted in state courts rather than seize them and deliver them to the Pentagon for punishment?

In a nation that prides itself for operating under the "rule of law," how can such an ad hoc, arbitrary process — a process by which some accused terrorists are turned over to the Pentagon for punishment and others are turned over to the U.S. criminal-justice system for determination of guilt and punishment — be justified?

Like it or not, the rights and freedoms of the American people turn on how the Supreme Court decides the Padilla, Hamdi, and Guantanamo cases. If the Supreme Court rules in favor of the Pentagon, then U.S. military officials will have the same omnipotent power that the military wielded in such countries as Argentina and Chile during their "wars on terrorism." That means that the Pentagon will have the unrestricted power to take any American it wants into custody, accuse him of being a terrorist and an "illegal combatant," and "disappear" him to Cuba for

punishment, including execution — or “rendition” him to a foreign country for torture, as U.S. officials recently did to a man they sent to Syria for that purpose.

Given the overwhelming power that Americans have vested in the military-industrial complex, and given the supine and cowardly manner in which the U.S. Congress rubber-stamps actions of the Pentagon, there will be nothing the American people will be able to do to stop this deadly and destructive military process. That’s why, if the American people value their freedom, they had better hope that the Supreme Court rules in favor of freedom and against the Pentagon.

Mr. Hornberger is founder and president of The Future of Freedom Foundation.

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