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A Supreme Reason to Celebrate the Fourth of July

by Jacob G. Hornberger

With the Supreme Court's delivery of severe blows this week against the assumption and exercise of certain dictatorial powers by the president and the Pentagon, every American should feel freer, safer, and more secure. While the Court avoided issuing a substantive ruling in the most critical case — the Jose Padilla case — the Court's holdings and statements in the Hamdi and Guantanamo cases leave no room for doubt that Padilla will be entitled to at least the same relief provided Hamdi, if not more expansive relief.

Let's review the facts and analyze the holding in each of the three cases.

The Hamdi case

Hamdi was captured on the battlefield in Afghanistan and, along with hundreds of Taliban and al-Qaeda members, was transferred to the Pentagon's base at Guantanamo Bay, Cuba. The president and the Pentagon took the position that the Geneva Convention did not apply to the prisoners at Guantanamo and that the Pentagon's treatment of such detainees was beyond the jurisdiction of the U.S. Constitution and the U.S. federal courts.

Upon discovering that Hamdi was an American citizen, the Pentagon transferred him to a military brig in South Carolina. Claiming that he was an "enemy combatant," the Pentagon denied Hamdi due process of law, the right to an attorney, a jury trial, habeas corpus, and any access to the federal court system whatsoever, despite the fact that all these rights are guaranteed in the Fourth, Fifth, and Sixth Amendments to the Constitution, which is the supreme law of the land.

Hamdi's father filed a petition for writ of habeas corpus, a judicial remedy that is guaranteed by the Constitution; its history stretches back to medieval England. As legal scholars have long pointed out, the writ of habeas corpus is an essential keystone to a free society because it provides an innocent person the means by which to secure his liberty from wrongful detention. The writ is essentially an order issued by a judge to a person holding another person in custody to bring that person before the court and show cause why he shouldn't be released. See:

[Civil Liberty and the State: The Writ of Habeas Corpus](#) (April 2002)

[Crossing the Rubicon](#) (July 2003)

The government claimed that as an “enemy combatant” captured on the field of battle, Hamdi was not entitled to the procedural rights guaranteed by the Bill of Rights. The government also claimed that the federal courts lacked the power (the jurisdiction) to second-guess the president and the Pentagon’s accusation that Hamdi was in fact an “enemy combatant.” Hamdi contended, on the other hand, that he was entitled to due process and habeas corpus in order to show that he was, in fact, not an “enemy combatant” as the government was alleging.

[The Guantanamo cases](#)

The Guantanamo cases involved foreign citizens who were captured in Afghanistan and transferred to the Pentagon’s base at Guantanamo. The Pentagon claimed that its operations at Guantanamo were beyond the reach of the U.S. Constitution and the federal courts. The foreigners filed petitions for habeas corpus, contending that the U.S. Constitution applied to all persons, not just U.S. citizens, being held in custody by U.S. government officials, especially on foreign property owned or controlled by the U.S. government.

[The Padilla case](#)

As I have written on several occasions for the past year, the Padilla doctrine is the most frightening and ominous assumption and exercise of dictatorial powers by the president and the Pentagon since the Civil War. This is the case that should most concern Americans who care about their own freedom and well-being. See, for example:

[If This Is Freedom, What Exactly Is Dictatorship?](#) (April 2003)

[Crossing the Rubicon](#) (July 2003)

[Recent Articles on Military Tribunals and the Padilla, Hamdi, and Moussaoui Cases](#) (July 2003)

[Freedom without Due Process of Law?](#) (Dec. 2003)

[Freedom v. the Pentagon in the U.S. Supreme Court](#) (Feb. 2004)

[Lessons about Our Constitution from Abu Ghraib](#) (May 2004)

[The Padilla Doctrine Doesn’t Infringe on Freedom – It Destroys It](#) (June 2004)

Padilla is an American who was arrested on American soil and accused of conspiring to commit terrorist acts against the United States. Rather than charging him with that crime in federal district court, as the Justice Department had done with other accused terrorists (e.g., Zacharias Moussaoui, Timothy McVeigh, and the Unibomber), the president labeled Padilla an “enemy combatant” in the “war on terrorism” and turned him over to the Pentagon, which then

denied him due process of law, habeas corpus, the right to an attorney, a jury trial, and all the other procedural guarantees provided by the U.S. Constitution to people whom the government has accused of having committed a crime.

The reason that the Padilla doctrine is so foreboding and ominous should be apparent: If the Court had ruled in favor of the president and the Pentagon in the Padilla case, military officials would then have the unfettered power to barge into people's homes in the dead of night, label them as "enemy combatants" in the "war on terrorism," take them into military custody, transfer them to Guantanamo Bay, and torture, rape, sexually abuse them, and even kill them with impunity, with the possibility of a kangaroo military tribunal thrown in for appearance sake prior to such punishments' being inflicted upon them.

The Supreme Court's rulings

In both the Hamdi and Guantanamo cases, the Court ruled that Hamdi and the foreigners could not be deprived of the right of habeas corpus to challenge their indefinite detentions. The Court was obviously mindful of the difficulties such a process could pose for a wartime situation, but the problem the Court faced was one created by the Bush administration's so-called war on terrorism. Such a war is not like a war between nation-states, where there is ultimately an ending and prisoners of war are then released, as happened with German and Japanese POWs at the end of World War II. Instead, it is a metaphorical war, akin to the war on drugs. As such, it has no definite ending. For example, in the Afghan war, the Taliban government was defeated and replaced with another regime. Yet U.S. officials have refused to release the prisoners taken captive during the war, claiming that they have the power to hold them for as long as terrorism exists in the world. As the Court pointed out in Hamdi, "If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life."

The U.S. Supreme Court in the Hamdi case held that such indefinite detentions, even of foreigners, which has always been the hallmark of dictatorial regimes, is not permitted under our system of government and our Constitution.

However, as attorney Elaine Cassel has [pointed out](#), unfortunately there are serious procedural pitfalls arising from the lead opinions in both the Hamdi and Guantanamo cases. (On this same point, see the Christian Science Monitor's [lead editorial of June 30](#) which refers to "the set of befuddling written decisions on exactly how or when the federal courts should second-guess the military on such detentions.")

For example, the Court did not rule out the use of military tribunals to review the detention of the Guantanamo detainees. As we have been pointing out ever since 9/11, such

tribunals are nothing more than kangaroo courts to create the false appearance of justice prior to punishment. See, for example:

[Emergencies, Military Tribunals, and the Constitution](#) (Nov. 2001)

[Military Tribunals: Another Step Away from Our Principles](#) (Dec. 2001)

[Does Endorsement of Military Tribunals Insult Bush](#) (Jan. 2002)

[Military Tribunal Rules Violate the Rule of Law](#) (April 2002)

[Recent Articles on Military Tribunals and the Padilla, Hamdi, and Moussaoui Cases](#) (June 2003)

[Cuban Military Tribunals Reflect Contempt for Our Constitution](#) (June 2003)

[Are Military Tribunals Worth Dying For?](#) (Aug. 2003)

Thus, it should surprise no one that the Pentagon's swift response to the Supreme Court's decision is the very worst one. Yesterday (June 29), in an obvious attempt to avoid habeas corpus proceedings in federal district court, the Pentagon announced that it would satisfy the Court's concerns over indefinite detentions of its detainees at Guantanamo by finally (after more than two years) [proceeding with its military tribunals](#). Obviously, in the light of the Abu Ghraib torture, rape, sex abuse, and murder scandals, and the resulting military cover-up, the last thing the Pentagon wants is for the Guantanamo prisoners to be showing up in a U.S. district court testifying about what's been going on in the Pentagon's very secret facilities on its side of Cuba. The big problem, as previously noted, is that the tribunals are nothing more than kangaroo proceedings designed to make it look as though the detainees are receiving due process of law, which is exactly why American criminal defense lawyers are [boycotting the proceedings](#) and why even military lawyers have [condemned the proceedings](#).

But even conceding that the lead opinion in the Hamdi and Guantanamo cases leaves a muddled mess with respect to procedure (including who exactly has the burden of proof and what that burden will be) we should not lose sight of how important the holdings in these cases are. As I pointed out one year ago, the Pentagon set up its prisoner camp at Guantanamo with the precise objective of avoiding the constraints of the U.S. Constitution and the rulings of U.S. federal courts, reflecting the deep contempt that U.S. military officials have for our Constitution and governmental system. See:

[Cuban Military Tribunals Reflect Contempt for Our Constitution](#) (June 2003)

What Pentagon officials were striving for at Guantanamo was an independent judicial system run by the U.S. military that would be an almost perfect replica of the one that Fidel Castro has implemented on his side of the island for people accused of terrorism — that is, no due process of law, habeas corpus, right to counsel, right to confront witnesses, or other such

constitutional “nonsense.” Only punishment — that’s all ... after a speedy conviction by kangaroo courts run by military officials.

The Supreme Court has now dashed the essence of that Pentagon dream (or what some might call a nightmare). The Court has affirmed that the Pentagon, like it or not, is ultimately answerable to the judicial branch of our government and that judicial rulings are supreme over the executive branch, including the military.

With respect to Hamdi, the Court made it clear that American citizens hold exalted positions in our society and that the executive branch will not be permitted to deny citizens the fundamental procedural rights that are guaranteed to them in the Constitution before inflicting punishment on them. As Justice Sandra Day O’Connor, who authored the lead opinion put it, “A state of war is not a blank check for the president when it comes to the rights of the nation’s citizens.” Consider these words from the lead opinion in Hamdi, words that every American should carefully reflect upon:

("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property"); see also *id.*, at 266 (noting "the importance to organized society that procedural due process be observed," and emphasizing that "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions"). Indeed, as *amicus* briefs from media and relief organizations emphasize, the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process here is very real. See Brief for AmeriCares et al. as *Amici Curiae* 13-22 (noting ways in which "[t]he nature of humanitarian relief work and journalism present a significant risk of mistaken military detentions"). Moreover, as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat. See *Ex parte Milligan*, 4 Wall., at 125 ("[The Founders] knew — the history of the world told them — the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen"). Because we live in a society in which "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty," *O'Connor v. Donaldson*, 422 U. S. 563, 575 (1975), our starting point for the *Mathews v. Eldridge* analysis is unaltered by the allegations surrounding the particular detainee or the organizations with which he is alleged to have associated. We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.

Actually, the best-reasoned opinion in the Hamdi case was the one issued by Justices Scalia and Stevens. They rejected the type of nebulous procedural mish-mash found in the lead opinion to which attorney Cassel (and the *Christian Science Monitor*) referred and stated very succinctly that Americans caught fighting U.S. military forces in war could face only one procedure under our Constitution — a criminal indictment in federal district court for treason, as in the case of John Walker Lindh, an American who was captured fighting against U.S. forces in Afghanistan. Therefore, unless Congress has suspended habeas corpus, Scalia and Steven argued, an American “enemy combatant” would have the right to petition for writ of habeas corpus and, upon doing so, the government would have to either indict him for treason or release him.

What is also remarkable about the Scalia-Stevens opinion is its expression of the deep mistrust that our Founding Fathers and Framers had for standing armies and overgrown military establishments. Consider [their words](#):

The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders' general mistrust of military power permanently at the Executive's disposal. In the Founders' view, the "blessings of liberty" were threatened by "those military establishments which must gradually poison its very fountain." The Federalist No. 45, p. 238 (J. Madison). No fewer than 10 issues of the Federalist were devoted in whole or part to allaying fears of oppression from the proposed Constitution's authorization of standing armies in peacetime. Many safeguards in the Constitution reflect these concerns. Congress's authority "[t]o raise and support Armies" was hedged with the proviso that "no Appropriation of Money to that Use shall be for a longer Term than two Years." U. S. Const., Art. 1, §8, cl. 12. Except for the actual command of military forces, all authorization for their maintenance and all explicit authorization for their use is placed in the control of Congress under Article I, rather than the President under Article II. As Hamilton explained, the President's military authority would be "much inferior" to that of the British King:

"It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy: while that of the British king extends to the declaring of war, and to the *raising* and *regulating* of fleets and armies; all which, by the constitution under consideration, would appertain to the legislature." [The Federalist No. 69](#), p. 357.

A view of the Constitution that gives the Executive authority to use military force rather than the force of law against citizens on American soil flies in the face of the mistrust that engendered these provisions.

For more detailed information about our ancestors' antipathy to standing armies and overgrown military establishments within their midst, see "[Obedience to Orders, Part 3](#)" by Jacob G. Hornberger. Also see, "[Eisenhower Was Right](#)" by Jacob G. Hornberger.

As previously stated, the Supreme Court — in a 5-4 decision — declined to rule in the Padilla case on the technical ground that Padilla had filed his petition for writ of habeas corpus against the wrong person. Most likely, the Court was attempting to avoid addressing the difficult issues raised in the Padilla case, such as whether terrorism is a crime or an act of war. But given the relief provided to Hamdi, an American who was captured on the battlefield in Afghanistan, Padilla, an American citizen who was arrested in Chicago and accused of conspiracy to commit terrorism, will obviously be entitled to no less relief than Hamdi and, most likely, considerably more. In fact, in what would be a major victory for the American people and a major triumph of our constitutional way of life, the *Miami Herald* is [reporting on June 30](#) that U.S. prosecutors, in light of the Supreme Court's rulings this week, are now contemplating seeking a federal indictment in U.S. District Court against Padilla.

Moreover, the four dissenters in Padilla made it clear that they would have ruled in favor of Padilla on the merits, which means that all they would have needed was one additional vote from the five in the majority who were simply deciding that the Court lacked technical jurisdiction to hear the case. Consider these profound words from the four dissenters in [the Padilla case](#), again words that every single American should take to heart:

At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process.

Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.

For three years, the American people have been subjected to fear-mongering tirades from U.S. officials encouraging them to temporarily surrender their rights and their freedoms so that

the government could supposedly protect them from terrorists, [just as German officials did](#) during the war on terrorism in Germany during the 1930s, after terrorists had attacked the German congressional building. The fear-mongers have cried that 9/11 means that we now live in a different world — a world in which people would have to surrender their rights and freedoms, which stretched back all the way to Magna Carta, if they ever hoped to be safe. The fear-mongers have promised that the suspension of rights would only be temporary — until the crisis passed.

The Supreme Court, on the other hand, points out in the [Hamdi decision](#) what our Founding Fathers and the Framers understood so well:

It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad. See *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 164-165 (1963) ("The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with guarantees which, it is feared, will inhibit government action"); see also *United States v. Robel*, 389 U. S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties ... which makes the defense of the Nation worthwhile")."

Throughout this entire process, most members of Congress (Texas Congressman Ron Paul being a notable and noble exception) have cravenly and cowardly sat silent, in quiet acquiescence to the massive governmental assaults on our rights and freedoms. "Respect for the military" and "Mr. President, we are here to serve you" have been the guiding motifs of most U.S. senators and U.S. congressmen, who have been all too willing to place their blind trust in the president and the military — people who have repeatedly lied, falsely accused innocent people, violated U.S. law and international treaties, and covered up war crimes committed by U.S. higher-ups — people, that is, who are the very last ones in whom the citizenry or their elected representatives should place blind trust.

The only thing standing in the way of the president and the Pentagon in their war on the rights and freedoms of the American people has been the U.S. Supreme Court, the judicial branch of our government. As a result of the rulings and opinions in *Hamdi*, the Guantanamo cases, and *Padilla*, the president and the Pentagon are prohibited from arbitrarily seizing Americans, labeling them "enemy combatants"; denying them habeas corpus, the right to an attorney, and due process of law; and executing them. On this Fourth of July, we should be thanking our lucky stars for the wisdom and courage of our Founding Fathers and the Framers not only for including the right of habeas corpus in the Constitution and for enacting the Bill of Rights to protect us from the

president, the Pentagon, and the Congress, but also for instituting a judicial branch of government with the power to ensure that the other two branches comply with those hallowed guarantees.

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