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Padilla, Hamdi, and Rasul: Charge Them or Release Them

by Jacob G. Hornberger

Now that the Supreme Court has ruled that Yaser Hamdi and Shafiq Rasul (and other Guantanamo detainees) are entitled to seek habeas corpus relief in U.S. federal district courts to challenge their detention by U.S. military officials, the question naturally arises: What relief should the federal district courts provide in those habeas corpus proceedings as well as the habeas corpus proceeding of Jose Padilla?

The correct answer is: The district court should order the government to either charge them or release them.

The three cases

Let's first review the pertinent rulings that the Supreme Court recently issued. There were three cases before the Court: the [Padilla](#) case, the [Hamdi](#) case, and the [Rasul](#) (Guantanamo) case.

The Hamdi case involved an American taken into custody in Afghanistan as part of the U.S. invasion of that country. The Guantanamo case involved the same situation — prisoners taken captive as part of the Afghan War. The Padilla case, on the other hand, involved an American arrested on American soil and accused of conspiracy to commit terrorism.

The Hamdi and Guantanamo cases, then, were different from the Padilla case in one critical aspect: Hamdi and Guantanamo involved presumptive prisoners of war taken captive on the battlefield during a real war — that is, a war between the nation-state of the United States and the nation-state of Afghanistan. The president and the Pentagon took the position that the judicial branch of government could not interfere with the president's warmaking powers and, therefore, that the federal courts lacked the authority to review the government's war operations, including its prisoner camp located at Guantanamo Bay. (The fact that the war was illegal under our form of government, given that there was no constitutionally required congressional declaration of war, doesn't affect the fact that it was in fact a war between two nation-states.)

The issue of "enemy combatants"

At least one critic of the Hamdi and Rasul decisions has suggested that the Court upheld the government's newly claimed power to detain people suspected of terrorism through the government's use of an "enemy combatant" label placed on suspected terrorists as part of the government's metaphorical "war on terrorism." (See "[The Supreme Court and Enemy Combatants](#)" by Marc Norton.) But the Court did no such thing because, again, the only issue before the Court in Hamdi and Rasul was whether people taken captive on the battlefield in time of real war have the right to file habeas corpus proceedings to test the validity of their detention.

Moreover, why would it be surprising that the Court would use the term "enemy combatants" in the context of Hamdi and Rasul? If soldiers who are presumably fighting each other on the battlefield are not "enemy combatants," then what are they? What is important is, first, that Hamdi and Rasul have the right to challenge whether they were in fact enemy soldiers and, two, that the "enemy combatant" label used in Hamdi and Rasul cannot properly be extended to the Padilla case, which, again, involved a completely different set of facts (that is, a person arrested on American soil and accused of a terrorist act). Even verbiage to that effect in Hamdi and Rasul would be no more than "dictum," which constitutes nothing more than an advisory statement of the Court that carries no precedential value.

The issues pertaining to the government's "war on terrorism" and its claimed power to indefinitely detain suspected terrorists as "enemy combatants" in such a metaphorical war were precisely the issues that were raised in the Padilla case, which the court dismissed on jurisdictional grounds. (The Court ruled that the case was erroneously filed in New York and against Donald Rumsfeld rather than in South Carolina, where Padilla was being held, and against the commanding general holding him in custody. Padilla's attorney has now refiled the case in South Carolina.) Thus, by declining to enter a ruling on the merits in the Padilla case, the Court left undecided the issue of whether an American taken into custody and accused of having committed acts of terrorism can be labeled an "enemy combatant" in the "war on terrorism" and treated in the same way that enemy combatants in real wars are treated. Put another way, no matter how valid the criticisms regarding the Court's ruling on the jurisdictional issue (see, for example, "[Who Really Won?](#)" by Elaine Cassel), such a procedural ruling nevertheless does not constitute a ruling on the merits of Padilla's claim.

The issue of habeas corpus procedure

In ruling that Hamdi and the Guantanamo detainees are entitled to habeas corpus relief, the Court was essentially saying that prisoners taken into custody on the battlefield during wartime might in fact be innocent people rather than combatants for the other side. For example, they could be journalists or simply interested bystanders swept up as prisoners during the chaos of war. Habeas corpus relief would enable them to show that they were innocent, rather than

being part of the opposing army, which obviously could save them years of captivity if the war went on for very long.

One major problem in the Hamdi and Rasul cases was that the U.S. government failed to release its prisoners of war at the end of the Afghan War, as required by the Geneva Convention and the laws of war. Instead, the government's position became nebulous and was obviously designed to create confusion. First, it maintained that the detainees were legitimate POWs and that the Afghan War wasn't really over (despite the fact that the Taliban government fell long ago and was even replaced with a friendly regime); then that the prisoners had committed war crimes during the war; and finally that the prisoners were also "enemy combatants" in the government's metaphorical "war on terrorism." By morphing and applying all these concepts, the government was attempting to bamboozle the Court into staying out of the fray under the president's warmaking power, enabling the government to then claim that the Court had ratified its recently assumed and recently exercised "war on terrorism" powers against people who were suspected of committing terrorist acts.

The strategy failed to work, primarily because of the Court's ruling that the detainees could challenge their detention in a habeas corpus proceeding. The Court's reasoning on the nature of the process to be applied at such hearings was muddled, probably because the process may well turn on the exact reasons for the detention.

For example,

1. Suppose a war is ongoing and that an enemy POW taken captive on the battlefield files a petition for writ of habeas corpus in federal district court. Once the petition is filed, the court might well summarily dismiss the petition on the ground that an enemy soldier taken captive on the battlefield has no right to be released when the war is ongoing.
2. Suppose the person filing the petition claims to be a journalist erroneously taken captive on the battlefield during a real war. The court might well require clear and convincing evidence from both sides before ruling, given that the judiciary would not want to be releasing enemy soldiers during times of war. But if the evidence that the detainee is a journalist rather than an enemy soldier is overwhelming, the court could order his release at the habeas corpus hearing.
3. Suppose the detainee is a POW taken captive during the war and that he is seeking to be released under the Geneva Convention and the laws of war

on the ground that the war is now over. One could easily imagine a federal district court ordering his release under those conditions, but only after determining that the war is in fact over.

4. Suppose a POW has been charged with a war crime committed during the war, which is now over. Then the court should order the government to charge him with a war crime or release him. The government has no right to detain him indefinitely without charges if the war is in fact over.
5. Suppose a person is simply taken into custody in some city or town here in the United States or elsewhere and charged with terrorism. Then, at his habeas corpus hearing, the court should order the government to charge him with a criminal offense or release him. The government has no right to detain him indefinitely without charges.

Thus, the exact habeas corpus procedure that must be applied to a detainee's case will depend on the reason for his detention. If a district court determines that the detainee is an enemy soldier taken captive on the battlefield during a real war, the process might well be different than if the court determines that the detainee, by the government's own admission, is a person who is being accused of the criminal offense of blowing up a government building.

Criminal offenses and the Fifth and Sixth Amendments

With respect to people who are charged with criminal offenses, including terrorism, there can be no equivocation. Anyone charged with a criminal offense is entitled to the rights and guarantees provided in the Fifth and Sixth Amendments to the Constitution, including indictment, right to counsel, due process, and jury trial. It was in recognition of that principle that the government has previously indicted and prosecuted accused terrorists in federal district court, including Ramzi Yousef (convicted of bombing the World Trade Center in 1993), Zacharias Moussaoui (charged with conspiring to commit the 9/11 attacks), Ted Kaczynski (the Unibomber), Timothy McVeigh (bombing the Oklahoma City federal building), John Allen Muhammed (the D.C. sniper), and the accused terrorists who were recently acquitted by a jury in Detroit.

Here's how the Fifth and Sixth Amendments read:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,

when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Contrary to popular opinion and to government claims, these amendments do not apply only to American citizens whom the government charges with crimes. By their express language (“No person”; “the accused”), they apply to all people, foreigners and citizens alike, whom the government charges with a criminal offense. That reflects the mindset of our ancestors, who believed that rights and guarantees, both natural and procedural, are fundamental and inherent — that is, that they inhere to all people, regardless of nationality. That is one of the features that have always distinguished the American legal system from most others in the world. It is also one of the reasons why Americans should take pride in their judicial system.

Thus, when Jose Padilla’s habeas corpus hearing is held, there can be one — and only one — correct order: Charge him or release him. Under our system of government, any person taken into custody and charged with a criminal offense cannot be indefinitely detained — he must either be charged or released. That’s, in fact, the benefit of habeas corpus — it forces the government to either charge a person with a criminal offense or release him.

The government’s metaphorical use of a “war on terrorism” and its labeling of “enemy combatants” in the “war on terrorism” are nothing more than a sham and a trick to avoid the constraints of the Constitution. By couching a criminal offense in terms of a “war” on that particular criminal offense, the government is trying to circumvent the constitutional guarantees associated with charging people with a particular crime. Through a sleight of hand, the government is attempting to draw on the president’s warmaking powers by making it look as though what it is doing is really no different from what it does when it takes prisoners of war in a real wartime situation. The situation would be akin to one in which the government starts taking suspected drug dealers into custody and detaining them indefinitely as “enemy combatants” in the “war on drug dealing” or Mafia members as “enemy combatants” in the government’s “war on organized crime.”

The same principle applies to foreigners who are taken into custody around the world and who are being held in the Pentagon’s worldwide [gulag archipelago](#) on suspicion of committing

terrorist acts against the United States. Regardless of where they are taken into custody, they are entitled to the same due process guarantees to which Americans and foreigners alike are entitled when taken into custody here in the United States and charged with a crime. They must either be returned to the United States and formally charged with a crime or be released. That the Pentagon is doing everything it can to avoid due process constraints, including arresting, indefinitely detaining, and inflicting cruel and unusual punishments on foreigners taken into custody on foreign soil and accused of terrorism against the United States, not only brings shame to our nation but also constitutes a grave affront to the memory of the Framers and others in history who fought so hard to enshrine due process of law into our judicial principles.

The issue of war crimes by enemy soldiers

What about POWs who are legitimately taken into custody in a real war (e.g., the Afghan War or the Iraq War) and who are charged with committing war crimes during the war? What process should be applied to them? While the Supreme Court upheld the use of military tribunals in the 1946 case of Tomoyuki Yamashita, what happened in that case itself is perfect proof of why the military cannot be trusted to seek justice against enemy soldiers, especially when there is a thirst for vengeance. As a commanding general of Japanese forces in the Pacific, Yamashita was convicted and executed for war crimes committed by troops under his command, even though it was conceded that he had not approved or condoned such war crimes and that Allied bombing campaigns had caused him to lose command and control over his men. Yet, while never renouncing or condemning what it did to Yamashita, the U.S. military is now displaying extraordinary reluctance to apply the same reasoning to American commanding generals in Iraq and Afghanistan, where troops under their command have committed torture, rape, sex abuse, murder, and other war crimes. In fact, unlike the situation in Yamashita, it is becoming increasingly clear that the Pentagon is [stonewalling](#) and [covering up](#) the involvement in such war crimes by U.S. commanding officers in the hope that the entire matter will just “blow over” and be forgotten.

Moreover, given the military’s lack of respect for traditional due process guarantees in its military tribunals (which is why U.S. criminal defense attorneys [are boycotting](#) the military tribunals planned for the Guantanamo detainees and why even military lawyers [are condemning them](#)), justice would be better served by taking the issue of war crimes committed by enemy combatants out of the hands of the military altogether and placing it under the control of federal prosecutors and the federal courts. As Justice Frank Murphy stated in his [dissenting opinion](#) in the Yamashita case,

A military commission was appointed to try the petitioner for an alleged war crime. The trial was ordered to be held in territory over which the United States has complete sovereignty. No military

necessity or other emergency demanded the suspension of the safeguards of due process. Yet petitioner was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced to be hanged. In all this needless and unseemly haste there was no serious attempt to charge or to prove that he committed a recognized violation of the laws of war. He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge. This indictment in effect permitted the military commission to make the crime whatever it willed, dependent upon its biased view as to petitioner's duties and his disregard thereof, a practice reminiscent of that pursued in certain less respected nations in recent years.

Conclusion

The Constitution was born in mistrust of omnipotent government powers. That's why the American people ensured that the fundamental and inherent rights enumerated in the Bill of Rights were expressly enumerated and expressly guaranteed — they wanted to ensure that there was no error or confusion over whether government officials should ever have the power to deny people such rights. Our ancestors knew that historically the greatest threat to the freedom and well-being of people lay with their own government, especially in times of crisis, when people, out of fear, would be most willing to surrender their rights and liberties for the sake of “security.”

As the Supreme Court put it in the 1963 case of *Kennedy v. Mendoza-Martinez*, “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.” To quote Justice Murphy again,

The Fifth Amendment guarantee of due process of law applies to “any person” who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any

status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.

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