



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

[fff@fff.org](mailto:fff@fff.org) [www.fff.org](http://www.fff.org)

## **The Hamdi Case Mocks Justice**

**by Jacob G. Hornberger**

Surrendering to the authority of the U.S. Supreme Court, the Pentagon and the Justice Department have decided to release “unlawful combatant” and accused “terrorist” Yaser Esam Hamdi from the bowels of the Pentagon’s military brig in South Carolina. Any day now, a U.S. military plane is due to fly Hamdi to Saudi Arabia, where he will be released from custody. In return, Hamdi has agreed to give up his U.S. citizenship and has promised not to engage in terrorism against the United States.

In July, I wrote an article entitled [“Padilla, Hamdi, and Rasul: Charge Them or Release Them,”](#) in which I argued that in the wake of the Supreme Court’s decision in *Hamdi*, the government should either charge Hamdi and other accused terrorists with a crime or release them.

The question is: Why did the government choose to release Hamdi instead of charging him with a crime, such as terrorism or treason? Keep in mind that in its ruling, the Supreme Court did not order the government to release Hamdi. Instead, it ordered that the government simply had to provide Hamdi, who was claiming to be innocent, with a hearing so that the courts could determine how then to proceed.

A criminal indictment of Hamdi would obviously have run counter to the Pentagon’s claim of omnipotent power to label and punish “enemy combatants” and “terrorists” without judicial interference. After all, by its very nature an indictment places jurisdiction over an accused in the hands of the U.S. federal court system.

Also, consider first how weak a charge of terrorism would have been against Hamdi. According to U.S. officials, Hamdi surrendered to the Northern Alliance while fighting in behalf of the Afghan government (the Taliban) during the U.S. invasion of Afghanistan. The Northern Alliance, you will recall, was a gang of [murderers and rapists](#) that had been rebelling against the Taliban government long before the 9/11 attacks. When the U.S. government invaded Afghanistan, it aligned itself with the Northern Alliance, claiming that the Taliban government and al-Qaeda had knowingly harbored Osama bin Laden and members of al-Qaeda, thereby supposedly conspiring to commit the 9/11 attacks.

Under the Geneva Convention, the U.S. government was required to release its prisoners of war upon the defeat of the Afghan government. Instead, what it did was announce that all Afghan soldiers, by virtue of having fought for a government that had effectively conspired to commit a terrorist act (i.e., knowingly harboring the perpetrators of 9/11), were “enemy combatants” and “terrorists” in the U.S. government’s ongoing “war on terrorism.” Such a designation, U.S. officials claimed, entitled them to combine Taliban soldiers with captured members of al-Qaeda and treat them all the same — as “terrorists” or “enemy combatants” in the “war on terror” who could be punished by the military without due process of law, right to counsel, habeas corpus, and the other guarantees enumerated in the Constitution and Bill of Rights.

How would Hamdi have defended himself in such a prosecution, even assuming he was part of the Taliban army?

First, assuming that Hadmi even was a Taliban soldier, he would have contended that as than a foot soldier in war, under the terms of the Geneva Convention U.S. officials were required to release him on the cessation of hostilities against the Afghan government. The government would have repeated the claim it made to the Supreme Court — the Taliban government had conspired with al-Qaeda to commit acts of terrorism, thereby converting foot soldiers in the Taliban government into “enemy combatants” or “terrorists” in the “war on terror.”

Hamdi, on the other hand, would undoubtedly have put U.S. officials in the uncomfortable position of having to disclose the evidence, if any, that showed a conspiracy between the Taliban and al-Qaeda to commit the 9/11 attacks, evidence that just might not exist. Don’t forget that in the buildup to the war, U.S. officials repeatedly promised to release their evidence that the Taliban government was involved in the 9/11 attacks but unfortunately their promise was never fulfilled.

U.S. officials might also have argued that they were justified in invading Afghanistan because the Taliban was refusing to turn bin Laden over to the United States. That argument, however, would have been problematic given that there was no extradition treaty between Afghanistan and the United States. Keep in mind that in a [similar case](#) involving an accused terrorist who has lived in Great Britain for many years, U.S. officials are unlikely to accuse the British government of having knowingly harboring a terrorist if British courts refuse to extradite the accused to the United States.

What about treason? Why didn’t U.S. officials charge Hamdi with treason, as they did with John Walker Lindh, the “American Taliban”? After all, both Hamdi and Lindh were American citizens and both of them were presumably captured on the battlefield.

U.S. officials knew that Hamdi would vigorously meet the charge by arguing that he never took up arms against the United States but instead was simply continuing to help the Afghan government to suppress a rebellion by a gang of murderers and rapists known as the Northern Alliance. Moreover, given that the Congress never declared war on Afghanistan, as required by

the Constitution, Hamdi might well have argued that he couldn't be convicted of treason for resisting government conduct that was unlawful under the supreme law of the United States.

The last thing that the president and Pentagon ever thought would happen was that the judicial branch of government would interfere in any way with U.S. military actions away from American shores. That's in fact why the Pentagon set its prisoner gulag [in Cuba](#) and other countries rather than here in the United States. That was also why U.S. military officials sent Hamdi to their base at Guantanamo Bay before they discovered he was an American citizen.

Prosecuting Hamdi would have enabled the federal judiciary to directly rule that the invasion of Afghanistan was unlawful under the supreme law of the land (the Constitution) and would have also enabled the federal courts to discard the Pentagon's newly claimed power of labeling and punishing people as "enemy combatants" and "terrorists" in the "war on terror" without habeas corpus, jury trials, counsel, and other aspects of due process of law. After all, don't forget that the Pentagon is still exercising that power in the [Padilla, Rasul \(Guantanamo\), and al-Marri cases](#) and it is still claiming that it can employ such power against everyone else, American and foreigner alike.

Thus, while the Pentagon is now claiming that the true reason that it's now releasing Hamdi is that his value as a source of intelligence has been exhausted, that claim is obviously nonsense. The real reason for Hamdi's release is that the Supreme Court put the quietus on the Pentagon's plan to incarcerate Hamdi forever, denying him a jury trial, habeas corpus, and other aspects of due process of law. The Pentagon also knew that if it continued litigating against Hamdi, an adverse judicial ruling would likely have put a final death knell on the Pentagon's hope of exercising such power against others, including Americans.

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

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