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Foreign Policy Threatens Our Freedom

by Jacob G. Hornberger

There are four important pending U.S. terrorism legal cases, which separately and together present ominous and dangerous threats to the freedom of the American people.

The Jose Padilla case

Padilla is an American civilian who was initially arrested at the international airport in Chicago and held as a “material witness” in a terrorism investigation.

In this case, the Pentagon is seeking the authority to arrest any American (and any foreigner) suspected of terrorism and punish him without having to comply with the constraints of the Bill of Rights and without any federal court interference with such detention and punishment. A government win in the Padilla case would constitute the most major transformation in American criminal law since the inception of our nation, because it would effectively give U.S. military officials the omnipotent authority to arrest, detain, and punish anyone in the country simply by accusing him of “terrorism.”

The Pentagon’s claim is that its “war on terrorism” is akin to a real war and therefore that terrorist suspects, including those who are American, are not criminal suspects who have broken terrorism laws but rather “war combatants” who have been captured waging war illegally.

The Padilla case represents the back door to ultimate military control over the American people and would bring to the forefront the Founding Fathers’ fierce opposition to standing armies, based on the tremendous threat that an all-powerful military force poses to the freedom and well-being of the citizenry. For if the military has the omnipotent authority to take any American into custody and punish him without right to counsel, due process of law, or trial by jury, no one could be considered safe from arbitrary arrest and punishment.

The Padilla case involves Padilla’s petition for a writ of habeas corpus filed in a federal district court in South Carolina, which the government vehemently opposed. The federal district judge in that case ruled in favor of Padilla, holding that under our system of government military forces are not permitted to arrest and punish an American citizen and deny him the protections of

the Bill of Rights. The court rejected the Pentagon's "enemy combatant" argument, holding that terrorism is a criminal offense under U.S. law rather than an illegal act of war. The judge ordered the government to either charge Padilla with violating U.S. law or release him. Not surprisingly, the government has filed a notice of appeal to the Fourth Circuit Court of Appeals. Padilla has asked the Supreme Court to bypass the Court of Appeals and consider the appeal directly from the district court.

The Ali Saleh Kahlah al-Marri case

Al-Marri is a citizen of Qatar who was initially arrested in New York on terrorism-related charges. This case is now pending as a habeas corpus proceeding in the same South Carolina federal district where the Padilla case is pending. Here the government is seeking the same authority that it is seeking in the Padilla case but with respect to foreigners suspected of terrorism and arrested here in the United States. That is, the Pentagon wants to be able to detain people and punish them without having to comply with the Bill of Rights and without federal court interference.

Given the way it has been handled, this case is actually a bit more frightening than the Padilla case. Al-Marri was actually indicted by a federal grand jury in Illinois on terrorism-related charges. Thus, he was under the jurisdiction of a federal district court, where he was being accorded the procedural protections of the Bill of Rights. One day, the government asked the judge to dismiss the charges and when the request was granted, al-Marri was immediately transferred to the custody of the Pentagon, which proceeded to transfer him to the South Carolina brig in which Padilla has been jailed. (The judge dismissed the indictment "with prejudice," which means that the government is now precluded, under the constitutional bar against double jeopardy, from charging al-Marri with the same offenses contained in the indictment.)

Thus, when we combine the Padilla and al-Marri cases, we see that the Pentagon is seeking the authority to arrest any person, American or otherwise, and punish him and also the authority to yank anyone out of the federal court system and punish him — all without having to comply with the Bill of Rights and without having to deal with the federal courts.

Al-Marri's attorneys have asked the South Carolina federal district court for the same order that was issued in the Padilla case: Charge him or release him. The court's ruling is pending.

The Ahmed Omar Abu Ali case

The Abu Ali case should frighten every American, especially when it is combined with the Padilla case. In this case, Abu Ali, an American citizen, was studying in Saudi Arabia. The U.S. government, suspecting that he was conspiring to commit terrorist acts against America, had Saudi Arabian officials take him into custody and hold him for 20 months without charges. Under pressure from a U.S. federal judge in Washington, U.S. officials finally secured the extradition of

Abu Ali and are now claiming that he “voluntarily” confessed to conspiring to commit terrorism in the United States.

Abu Ali is contending that Saudi officials tortured him, a contention, not surprisingly, that U.S. and Saudi officials are now denying. But as most people know by now, there’s not one federal official who has any credibility when it comes to issuing denials about torture. U.S. military personnel do engage in torture, sex abuse, rape, and murder, as we have learned, and torture, at the very least, has been either official or unofficial U.S. policy, as best exemplified by the Pentagon’s infamous School of the Americas, which even used printed torture manuals to teach and guide military officials serving brutal U.S.-supported, right-wing regimes in Latin America.

Moreover, given the government’s long-time policy of “rendition,” whereby U.S. officials kidnap and transport suspected terrorists to friendly authoritarian regimes for the purpose of torture, denials by U.S. officials that Abu Ali was tortured lack credibility and not worthy of belief. Given the brutal authoritarian Saudi regime, it is almost a certainty that Abu Ali was tortured while in Saudi captivity, which is the most likely reason that U.S. officials sent him there and left him there for some 20 months.

Combine Padilla with Abu Ali and what you would get is an extremely dark age in American history. If the government wins in these cases, the Pentagon will have the unlimited authority to seize any American and immediately transport him on a U.S. jet to Egypt, Jordan, Syria, Saudi Arabia, Iraq, Uzbekistan, or Cuba, where he can be tortured, raped, sexually abused, or murdered — during which time he will “confess his crimes,” of course.

“But the Pentagon said that its policy is to send only foreigners to Guantanamo,” you might respond. That was a discretionary and tactical decision that the Pentagon made early on, until it could firmly establish that its wrongful actions outside the United States were immune from the Constitution and the Bill of Rights and from federal court interference.

Imagine the public outcry if the Pentagon had started rounding up Americans right away, including newspaper editors, dissidents, and government critics. It was much smarter for the Pentagon to lie low, leaving Americans alone or having them indicted, all the while vigorously pursuing the power it so desperately seeks in the Padilla case, knowing that the Congress and the American people are sleeping.

The Pentagon knows that if it can secure a ruling in the Padilla case, it can begin playing the same games with American terrorism suspects that it has been playing with foreign terrorism suspects. If that happens, military officials will be authorized to arrest any American and send him overseas for torture, rape, sex abuse, or murder. And there won’t be anything any federal court will be able to do about it. If the government wins in the Padilla case, the American people will quickly awake from their slumber but it will be too late.

Those who think that the president's self-proclaimed power to label anyone, including Americans, an "enemy combatant" constitutes a limitation on the Pentagon's power should not delude themselves. In the "war on terrorism," the president is not about to question the judgment of the military authorities. The Pentagon will simply place several hundred blank "enemy combatant" slips on the president's desk for signing, and the Pentagon will later fill in the name of the person being taken into custody.

The Zacarias Moussaoui case

Moussaoui is a foreigner who was indicted in federal district court in Virginia for conspiring to commit the 9/11 attacks. One significance of this case is that it reveals the government's arbitrary and capricious application of the law. That is, some people — Padilla and al-Marri, for example — were thrown into the military system, which denies them the protections of the Bill of Rights and the federal court system outlined in the Constitution. Moussaoui, on the other hand, is being treated as a criminal defendant, which is the way all people accused of terrorism should be treated.

It should be noted here that another terrorist suspect — Yaser Hamdi, who was an American citizen taken into custody in Afghanistan during the recent U.S. invasion — received the "enemy combatant" treatment. When the U.S. Supreme Court held that Hamdi was entitled to seek habeas corpus relief in federal court, U.S. officials decided to release him in Saudi Arabia rather than charge him with terrorism in federal court. For a more detailed account of the Hamdi case, see my article "[Padilla, Hamdi, and Rasul: Charge Them or Release Them.](#)"

In other words, with some defendants the government says, "That defendant is an enemy combatant" in the war on terrorism, meaning that he will be punished by the military. With other defendants, the government says, "That defendant has committed the crime of terrorism," meaning that he will go through the federal court system.

Such an unequal application of the law, not to mention the arbitrary and capricious manner in which the designations are made, also violates the "rule of law" concept that President Bush loves to preach about to the world.

It's important to note, however, that even though Moussaoui is in the federal court system there are people who have suggested that the government should do to him what it did to al-Marri — secure a dismissal of the indictment and transfer him to the Pentagon for military treatment.

After fiercely contesting the case since his arrest in 2001, Moussaoui recently pled guilty to all counts of the indictment. The sentencing stage of the case is now pending.

Prior to the entry of Moussaoui's guilty plea, there was another major significance of the Moussaoui case: The government was attempting to deny him two important rights enumerated in the Bill of Rights — the right to compulsory process of witnesses and the right to confront one's accusers.

The government has witnesses in its control, who are situated somewhere in the government's secret international gulag for terrorism detainees, and who, it was claimed, would have exonerated Moussaoui with respect to his alleged involvement in the 9/11 attacks. The government wanted to be permitted to present to the jury "summaries" of what the witnesses supposedly have said rather than being required to retrieve the witnesses from the gulag and bring them to testify in person (or by videotape deposition) at the trial.

The reason the government gives for its refusal to produce the witnesses is "national security." The real reason for their refusal was probably that they were terrified that the witnesses would disclose in a federal court of law the extent to which they've been tortured and sexually abused while in U.S. control or custody, which could subject U.S. officials to criminal prosecution.

One reason that the case was so important was because of the government's attempt to use hearsay to convict Moussaoui, a principle, which if upheld, could be applied to other people accused of terrorism. Hearsay, as you may know, is a statement that someone has made about the accused outside of court. When it is allowed to be introduced in court, the defendant is unable to confront the person who made the statement and unable to cross-examine him. That's why we have the Sixth Amendment right to confront witnesses, which the Moussaoui case would have emasculated if the government had been able to get away with it.

The district judge in the Moussaoui case had ruled in favor of Moussaoui and the Constitution. However, the government appealed and prevailed in the federal Court of Appeals. Moussaoui's lawyers had appealed to the U.S. Supreme Court, which declined to hear the appeal.

If Moussaoui had later been convicted based on the hearsay evidence, he could have again taken the issue up on appeal. By pleading guilty, he has effectively waived the argument. But the principle by which the government seeks to use hearsay against other people accused on terrorism continues to stand, both for Americans and foreigners accused of terrorism in federal district court.

Conclusion

These four pending legal cases provide good examples of how the U.S. government's pro-empire and pro-interventionist foreign policy that holds our nation in its grip ultimately redounds to the detriment of the American people. That foreign policy policy is not only threatening the lives of the American people with the possibility of terrorist "blowback," — and not only threatening the lives of U.S. military personnel and the people of Iraq — and not only gradually corrupting the inner spirit of the American people — and not only threatening the economic well-being of our country with out-of-control federal spending — it is also threatening the freedom of the American people through major federal assaults on civil liberties, as the Padilla, al-Marri, Abu Ali, and Moussaoui cases demonstrate.

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