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The Pentagon's Power to Jail Americans Indefinitely

by Jacob G. Hornberger

The presiding judge in the Jose Padilla case has held that the Sixth Amendment's guarantee of a speedy trial does not protect American citizens from being indefinitely incarcerated by the Pentagon.

Padilla had filed a motion to dismiss the case based on the ground that the federal government had denied him his right to a speedy trial. Padilla has been in custody since May 2002 and his trial, which is scheduled to begin in April, is not being held until some five years later.

From May 2002 until January 2006, Padilla was held in U.S. military custody as an "enemy combatant" in the "war on terror." In January 2006, the Pentagon chose to transfer custody of Padilla to the U.S. Justice Department, which had Padilla indicted on terrorism charges in U.S. District Court. (Ever since 9/11, U.S. officials have had the option of treating people suspected of terrorism either as "enemy combatants" or as federal-court defendants.)

Last Friday, the presiding judge in the case, Marcia Cooke, denied Padilla's motion to dismiss. The judge held that when a person, including an American citizen, is held in custody by the Pentagon as an "enemy combatant," the time doesn't start running with respect to his right to a speedy trial. It only begins running, she held, when he becomes part of the federal criminal-justice system.

Gee, I wonder if the judge's reasoning applies to the rest of the Bill of Rights as well. Maybe the First Amendment doesn't apply if it's the Pentagon that is suppressing speech and assembly as part of its perpetual "war on terror." Or maybe the Second Amendment prohibits only the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), not the Pentagon, from seizing guns from the American people, as it is doing as part of the "war on terror" in Iraq.

Our 18th-century American ancestors would have found Judge Cooke's ruling to be ludicrous. If a military department of government is exempt from the restrictions of the Bill of Rights, then the entire executive branch is exempt for the obvious reason: Whenever the government wants to exempt itself from the Bill of Rights, all it has to do is employ the military to

do the dirty deed. The purpose of the Bill of Rights was to protect the American people from the federal government, not a particular department of the federal government.

What Judge Cooke obviously fails to recognize is the deep antipathy to militarism and to an enormous standing military force that characterized our American ancestors. Unlike Judge Cooke, they understood the tremendous threat to the freedom and well-being of the American people that militarism and a standing army would pose.

This week, Judge Cooke is scheduled to rule on Padilla's motion to dismiss based on the government's torture and abuse of Padilla while he was in pretrial military confinement. I wonder if Judge Cook is going to rule that that the military is also exempt from that part of the Bill of Rights that prohibits the federal government from inflicting cruel and unusual punishments on people.

The Padilla case continues to hold ominous implications for the American people, especially when Judge Cooke's ruling is considered in conjunction with the ruling of the Fourth Circuit Court of Appeals that upheld the government's "enemy-combatant" designation for Americans as part of its "war on terrorism." That means that whatever the government has done — and continues doing to Padilla — it has the authority to do to every other American.

Judge Cooke's ruling is just one more confirmation of how civil liberties have soared to the top of importance in terms of federal infringements on our freedom. Perhaps this is a good time to revisit the warning issued to the American people by President Dwight Eisenhower, who had served as supreme commander of Allied forces during World War II:

In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist. We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted.

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