

COURTS, MILITARY DETAINEES, AND THE WAR ON 21st CENTURY TERRORISM

by

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The War on Terrorism is not a criminal prosecution, and the civil courts of this country have no constitutional authority to direct the military's conduct of it. That includes directing or reviewing the military's detention and interrogation of enemy combatants, whether or not these combatants are captured abroad, and whether or not they are American citizens.

But attorneys acting on behalf of enemy combatants continue to try to involve civilian courts in matters properly left to the military. A recent appeals court decision in the District of Columbia, *Al Odah v. United States*, 321 F.3d 1134, (D.C. Cir. 2003), upholds the detention of combatants captured in Afghanistan and elsewhere. It is one of a series of cases that address the particular circumstances of this war.

The Congressional authorization enacted in response to the September 11, 2001 terrorist attacks allows the President to use "all necessary and appropriate force" against those "nations, organizations or persons" that the President determines were involved. On November 13, 2001, President George W. Bush issued a military order to provide for the detention, treatment and trial of those who assisted in the attacks. Following military action in Afghanistan, several hundred Taliban and al Qaeda combatants were transported to the United States military base at Guantanamo Bay, Cuba. Attorneys for the "next friends" of sixteen detainees, citizens of Kuwait, Australia and the United Kingdom, brought actions contesting the legality and conditions of the internment. In *Al Odah*, a three judge panel unanimously upheld a lower court ruling that dismissed these actions for lack of jurisdiction.

The *Al Odah* petitioners claimed that they had never been members of al Qaeda or other terrorist groups, and that they had no connection with the September 11th attacks. Some petitioners asserted that they were in Afghanistan and Pakistan as volunteers providing humanitarian aid and then were seized by local villagers who were seeking bounties. One petitioner claimed that he was in Pakistan for an arranged marriage, another to visit relatives. A third had been turned over to the United States military by Egyptian authorities. All sought to have the federal courts override the military's decision to detain

and interrogate them.

The *Al Odah* court found that these non-U.S. citizens held in Cuba had no constitutional protections. The opinion of Judge A. Raymond Randolph relied chiefly on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which holds that the civil courts do not have jurisdiction to issue writs of habeas corpus for enemy aliens detained by the military outside the United States. Judge Randolph's opinion in *Al Odah* states that, "If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty."

Other circuits have also recently upheld the continued detention of military detainees. In *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) the Fourth Circuit held that an American citizen captured with the Taliban in Afghanistan can be detained indefinitely by the military in the United States. The Ninth Circuit in *Coalition of Clergy, Lawyers & Law Professors v. Bush*, 310 F.3d 1153, 1165 (9th Cir. 2002), declined to interfere with the Guantanamo detentions, on the grounds that those individuals who brought the action were not proper "next friends" of the detainees.

One federal district court has sought to substitute its own judgment for that of the military in regards to the continued detention of Jose Padilla, who is also a U.S. citizen. Padilla was declared an enemy combatant after he was detained trying to reenter the United States from Pakistan. Press reports have linked him to al Qaeda plans to explode a nuclear device in Washington, D.C. He is now in custody in a military brig in Charleston, South Carolina. Before his transfer to military jurisdiction, Padilla was briefly held as a material witness in New York. A federal district court there has ordered that Padilla be given access to an attorney, even though Padilla is now a military detainee and subject to ongoing intelligence interrogations. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

In denying the government's motion for reconsideration of its order, the *Padilla* court sought to distinguish the case from *Hamdi*, by noting that Jose Padilla was arrested in the United States by civilian authorities. But the Supreme Court has previously held in *Ex parte Quirin*, 317 U.S. 1 (1942) that the military had authority to detain, and eventually execute, American citizen Herbert Hans Haupt who was captured by the FBI in the United States while acting as an enemy combatant. *Quirin* upheld the authority of the President to have such combatants tried by military tribunals, rather than in civil courts. The government has refused to follow the district court's order in *Padilla* on the grounds the court exceeded its jurisdiction. In its opposition, the government presented testimony from the Director of the Defense Intelligence Agency that allowing Padilla access to an attorney while his interrogation was ongoing may harm national security interests. Other testimony was presented under seal. The government will appeal the decision to the Second Circuit.

Consistent with their constitutional role, courts must defer to the military in matters involving combatants captured during wartime. The chief value of these detainees is the intelligence they may provide. The military is also rightly concerned that combatants not be permitted to communicate directly or indirectly with forces still fighting the United States, which is why third parties are denied access to detainees. In order to forestall further efforts to interfere with the conduct of the war, higher courts must adopt clear rules that detained individuals who are declared enemy belligerents by the President have no access to civil courts.