

February 2004 Issue

**Ashcroft Watch** Nat Hentoff

## Giving Due Process Its Due

During the Constitutional Convention in Philadelphia in 1787, the most heated debates concerned the separation of powers in this emerging democracy. The reason for that concern was emphasized by James Madison in the *Federalist Papers*, often cited by the Supreme Court as a reliable guide to the intentions of the Framers: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."

On December 18, echoing the founders, the Second Circuit Court of Appeals in New York, in the case of *Padilla vs. Rumsfeld*, said to George W. Bush:

"The President, acting alone, possesses no inherent constitutional power to detain American citizens seized within the United States, away from the zone of combat, as enemy combatants."

Citizen Jose Padilla, incommunicado in a Navy brig in South Carolina for eighteen months--without charges, without access to his lawyer, and with no date of release--had no idea that his case was even in the Second Circuit. He is insulated from the world. But his case, and that of the other American citizen, Yaser Hamdi, who had also been removed from the protections of the Constitution after George W. Bush designated him as an enemy combatant, has aroused more intense criticism of the Administration's war on the Bill of Rights than any of its other actions. Law professors, former federal judges appointed by both Republican and Democratic Presidents, and members of Congress of both parties have agreed with the essence of the fiery argument in a brilliant brief to the Second Circuit in the Padilla case by Jonathan Freiman of the Lawyers Committee for Human Rights:

"The Executive's argument . . . would allow it to exile *anyone* from the protection of our Constitution and laws simply through the artifice of labeling him--*without any visible standards*--as an enemy alien." (Emphases added here and throughout.)

In a 2-to-1 decision, the Second Circuit panel has now ruled that contrary to the commander in chief's power grab, Padilla "will be entitled to the constitutional protections extended" to all other citizens. He will be able, the court ruled, to see his lawyer.

The government, of course, is appealing this decision that rejects Bush's authority entirely. But the majority opinion of the Second Circuit was so strongly rooted in both the Constitution and statutory

law that the Supreme Court will not be able to perfunctorily defer to the Executive in time of war.

Moreover, in both the Hamdi and Padilla cases, the Bush Administration has failed to provide any visible standard in constitutional law for holding any American citizen--in the United States or anywhere else--as an "enemy combatant" shorn, as Padilla and Hamdi have been, of all due process protections. Bush, Donald Rumsfeld, and John Ashcroft have created a legal black hole unprecedented in American history.

The Supreme Court will also be aware that in the Second Circuit decision, even the dissenting judge, Richard Wesley, agreed with the majority that Commander in Chief Bush had no authority to deny Padilla access to his attorney.

"No one," said Wesley, "has suspended the Great Writ"--the writ of habeas corpus, based on the Magna Carta in 1215, which, in this country, guarantees imprisoned American citizens the right to go to a federal judge who will then decide whether the imprisonment is lawful.

But in the Second Circuit's decision, the majority cut deeper into the core of the President's arrogant overreaching. The majority cited the 1971 Non-Detention Act, passed by Congress in belated reaction to the shameful imprisonment of Japanese Americans during the Second World War. That law--18 U.S.C. 4001 (a)--states unequivocally that "no citizen shall be . . . detained by the United States except pursuant to an Act of Congress."

In addition, the Supreme Court had declared in 1936 (*Valentine v. U.S.*) that "the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law."

The Second Circuit emphasized that Congress has not passed in the post-9/11 war against terrorism any law giving the President, as commander in chief, the unilateral power to hold Padilla without the fundamental right to due process to which all Americans are entitled.

Contrary to the government's argument, the Second Circuit declared that the Congressional Authorization for Use of Military Force Joint Resolution against those who committed the 9/11 attacks, and continue to operate around the world, does not in any way authorize the President's unilateral detention of American citizens. In sum, George W. Bush is a lawbreaker.

The Administration suffered two other setbacks before the Second Circuit's denunciation came down on December 18. In the November 10 *Los Angeles Times*, Viet Dinh--the principal drafter of John Ashcroft's USA Patriot Act and long a loyal defender of his policies--was interviewed. Now a law professor at the Georgetown University Law Center, Dinh startled his former boss by saying that the government's argument in the Padilla case before the High Court would be "unsustainable" because "there must be an actual process or discernible set of procedures" by which the accused can defend himself. That means he must have contact with his lawyer.

In a *Los Angeles Times* November 30 story, Michael Chertoff, who was intricately involved, as head of the Justice Department's Criminal Division, with Ashcroft's multiple revisions of the Bill of Rights--and has been rewarded with a seat on the Third Circuit Court of Appeals--also disturbed the Administration by saying: "We need to debate a long-term and sustainable architecture for the process of determining when, why, and for how long someone may be detained as an enemy combatant, and *what judicial review should be available.*"

After the *Los Angeles Times* story on Viet Dinh and Chertoff's warning to the Administration, there was no direct response from the President or John Ashcroft.

However, on December 2--more than two weeks before the Second Circuit decision on Padilla--the Defense Department, announced in a press statement that Hamdi would be "allowed access to a lawyer."

The Administration had to somehow soften the blow it apprehensively expected to receive from the Second Circuit as it prepared to appear before the Supreme Court in the Hamdi case.

This concession, not accidentally, was released the day before the Justice Department was required to file a brief to the Supreme Court in the Hamdi case--in behalf of the President's power to hold American citizens as enemy combatants without access to their lawyers.

Three days before the Second Circuit ruled against the Administration there was a *Wall Street Journal* op-ed piece "Justice for All," by Viet Dinh, asserting that "the developments in the Hamdi and Padilla cases should comfort those who fear executive authority because . . . [this] should affirm faith that the Administration is exercising its constitutional manner in light of changed circumstances."

But in plain truth, the basic position of the Administration had *not* changed. The Defense Department, speaking for the President, emphasized that giving Hamdi access to a lawyer "is not required by domestic or international law *and should not be treated as a precedent.*"

And, on the day after Hamdi was given permission to see his lawyer, the government, in its brief to the Supreme Court in his case, continued to insist on the Administration's previous claims of the President's right to his unilateral authority to designate and hold enemy combatants indefinitely without access to their lawyers. As Neil Lewis noted in the December 4 *New York Times*: "The Administration does not concede in its brief that it *has any obligation to allow Mr. Hamdi to meet with his lawyer.* . . . The Pentagon explicitly said that its decision was at its discretion and was taken only because intelligence officials had finished questioning Mr. Hamdi and no longer felt the need to keep him incommunicado."

The Supreme Court has taken the Hamdi case. Will it see through this clumsy last-minute strategy designed to give the appearance that the Administration still adheres to the rule of law in terms of access to a lawyer, if only temporarily?

In deciding the Hamdi and Padilla cases, the High Court is faced with this fundamental question: Where in our laws, and in the Constitution, does this or any President have this power to hold Americans indefinitely, without charges--and with access to lawyers only within its discretion?

I put that question to Viet Dinh, and he did not try to entirely evade the question. "I cannot say," he said, "that it exists within any legal terminology."

The Supreme Court will decide not only the futures of Jose Padilla, Yaser Hamdi, and any other enemy combatants to come. It will rule on whether the President of the United States can, entirely on his own, dispense with Congress and the Constitution to protect our liberties, as he puts it.

On National Public Radio's *Weekend Edition* on December 20, Daniel Schorr, the veteran news

correspondent and analyst, asked a further question: "What if this President says no to the Supreme Court?"

For a journalist of Schorr's stature to pose such a question about George W. Bush is disquieting, wouldn't you say?

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Click here to read the January article from *The Progressive* also mentioning Jonathan Freiman entitled "The normal system does not apply.(Ashcroft Watch)(enemy combatant)."