

DOJ's Arguments Ring Constitutional Alarms

by Edward Spannaus

In an argument made to the U.S. Fourth Circuit Court of Appeals, John Ashcroft's Justice Department has made the extraordinary claim that once someone—even a U.S. citizen—is declared an “enemy combatant” by the President, he has no rights. The Justice Department's brief making that outrageous argument was filed on June 19; the Department has since made the identical claim in at least two other court proceedings.

This signifies that the Justice Department is now attempting to obtain a rubber-stamp from the Federal courts, for Ashcroft's escalating series of police-state measures, which began with the round-up and detention incommunicado of over a thousand mostly Muslim and Arab men after Sept. 11, and has now resulted in the placement of two U.S. citizens in military custody.

Just as the administration's creation of the U.S. Northern Command threatens to eradicate the line between the military and domestic law enforcement from the Pentagon side—known as *posse comitatus*, the doctrine that prohibits the military from taking on law enforcement functions—Ashcroft is likewise crossing the same line from the civilian side, by putting suspects who are U.S. citizens in military custody, in order to avoid trials and other proceedings in the civilian courts.

In the June 21 *EIR*, we reported on the Justice Department's unilateral suspension of the rights of an American citizen—José Padilla, a.k.a. Abdullah al-Muhajir—who was arrested inside the United States, and then transferred to military custody to avoid a hearing in Federal court.

Ashcroft's latest atrocity took the form of a legal brief filed in *habeas corpus* proceedings regarding Yaser Esam Hamdi, who was captured fighting with the Taliban forces in Afghanistan. Hamdi was transported by the U.S. military to the detention facility at Guantanamo Bay, Cuba. But once it was determined that Hamdi, at first called a Saudi national, had actually been born in the United States, and was therefore eligible for all the constitutional rights available to a United States citizen, he was whisked from Guantanamo Bay to the military brig at Norfolk, Virginia, where he has been held incommunicado ever since.

The Federal district court had ordered that Hamdi be permitted to meet with a lawyer, which was vigorously opposed by the Departments of Justice and Defense.

The Justice Department brief argues that, once the Presi-

dent or the military have designated a prisoner as an “enemy combatant,” that the prisoner has no right to counsel, and that he can be held indefinitely without any charges even being brought against him. Further, the Justice Department contends that the Federal courts' inquiry “should come to an end once the military has shown . . . that it has determined that the detainee is an enemy combatant,” and moreover, that the courts cannot “second guess” the military's decision.

Moreover, the Justice Department also asserted that the district court's order, that Hamdi was entitled to meet with a lawyer, “jeopardizes compelling national security interests.” Among the national security interests cited, is the government's ability to interrogate Hamdi without any interference. As the government put it, giving Hamdi access to a lawyer “would directly interfere with—and likely thwart—ongoing efforts of the United States military to gather and evaluate intelligence about the enemy, its assets, and its plans, and its supporters.”

Frank Dunham, the Federal public defender appointed by the district court, said of the Justice Department's argument: “It's scarier than the dirty bomb. Now the government can label somebody something and then throw away the key forever. . . . The idea that the court can't inquire into these detention situations, to determine whether they are reasonable or not, is downright scary to me.”

David Cole, a Georgetown University law professor, said: “This is really an astounding assertion of authority. It's not just that you have no right to a lawyer, it's that you have no right to a hearing. . . . If that is true, then there really is no limit to the President's power to label U.S. citizens as bad people and then have them held in military custody indefinitely.”

On June 26, the Justice Department made the same arguments in the case of José Padilla; in a brief filed in Federal court in Manhattan, Ashcroft asked the court to dismiss a *habeas corpus* petition filed on Padilla's behalf, again arguing that there is no basis for the courts to interject themselves “into the President's conduct of ongoing hostilities.”

Fourth Circuit Denies Lawyer Access

On June 26, the Fourth Circuit ruled that Federal public defender Dunham cannot represent Yaser Hamdi; the ruling was made on the narrow grounds that Dunham has no legal “standing” to be designated as a “next friend” to act on Hamdi's behalf, because Dunham admittedly has no official relationship to Hamdi. The court did not address the larger issue of whether Hamdi is even entitled to a lawyer.

The Federal district court had previously granted the public defender “next friend” status (a device often used in *habeas* cases), and ordered that he be permitted by military authorities to consult with Hamdi.

However, Dunham has been barred by military authorities from meeting with his presumed client, and the Appeals Court said that Dunham didn't have sufficient personal stake in the



Attorney General John Ashcroft is fulfilling, in detail, the warning made during his confirmation hearings by Lyndon LaRouche, that Ashcroft would seize “emergencies” as the pretexts to tear up fundamental constitutional rights. An “embarrassed” White House will nonetheless not check him.

case to represent Hamdi. However, the court indicated a number of times that Hamdi’s father might be granted “next friend” status, which would allow him to act on Hamdi’s behalf.

The Justice Department opposes the designation of Hamdi’s father as a “next friend” also, and it made the cynical argument in its June 19 brief, that Hamdi “himself has not sought relief in this case,” and therefore his father cannot maintain an action on his behalf because there is no showing “that the detainee is *unable* to seek relief on his own behalf”—even though Hamdi is being held incommunicado and is unable to speak to anyone except his interrogators and guards.

At a hearing the previous day, June 25, the current Chief Judge of the Fourth Circuit, J. Harvie Wilkinson III, was reported to have appeared incredulous at the idea that Hamdi, who was captured in Afghanistan and declared an “enemy combatant,” is entitled to any constitutional rights. “What is unconstitutional about the government detaining that person and getting from that individual all the intelligence that might later save American lives?” Wilkinson asked. When the public defender said that the Constitution prohibits the indefinite detention of an American citizen, Wilkinson challenged him, asking if he was suggesting that the government could not detain a citizen, “who has taken up arms against America?”

By contrast, a Federal judge considering a *habeas* petition in Washington D.C., filed on behalf of 14 detainees being held at Guantanamo Navy Base, said in a June 27 hearing, that she is troubled by the idea that the government can hold detainees indefinitely. “Is it your contention that this detention doesn’t have an end?” she asked the government attorney. “There will be an end to the detention,” Justice Department

lawyer Paul Clement said, “but it’s the government’s contention that that decision is for the Executive Branch to make.”

On the President’s Say-So

A number of commentators and editorial writers are beginning to recognize the profound implications of Ashcroft’s actions and arguments in the Hamdi and Padilla cases. A *Washington Post* editorial on June 20 warned that, “Any American could be locked up indefinitely, without a lawyer, on the President’s say-so,” if the Justice Department’s argument in the Hamdi case were upheld. The *Post* cited the government’s claim that the court’s inquiry should end once the military has determined the detainee is an enemy combatant, and said: “These words were not written by some petty dictator whose kangaroo courts rubber-stamp his every whim and whose whims may include locking up citizens he regards as enemies. They were filed yesterday by the U.S. Department of Justice. . . .”

The question of whether Attorney General Ashcroft is violating the *posse comitatus* law was raised Gary Solis, a former Marine who now teaches on the law of war at Georgetown University Law Center, in a *Post* op-ed on June 25, “Even a ‘Bad Man’ Has Rights.” Solis said that José Padilla’s confinement in a Navy brig without charges and without a lawyer, and his being foisted on the military by the Justice Department, should raise alarms—as should also the case of Yaser Esam Hamdi.

Solis pointed out that, until now, the term “enemy combatant” used by Ashcroft, “appeared nowhere in U.S. criminal law, international law, or the law of war.” He suggested that the term was taken from the Supreme Court’s opinion in the 1942 case of the Nazi saboteurs—but the description there scarcely fits Padilla: “He didn’t come to the United States secretly, he passed through no lines, and as a U.S. citizen he is not within a military tribunal’s jurisdiction.” Solis said the term is simply being applied to Padilla and Hamdi “because it makes them sound like they *ought* to be held incommunicado, without charges and without representation.”

Solis then raised the question of whether Ashcroft has violated *posse comitatus* by putting Padilla in military custody, noting that the military did not investigate or seek Padilla, and that Padilla is outside the scope of the Uniform Code of Military Justice. Saying that the Justice Department’s action will tarnish the image of military justice, Solis castigated Ashcroft’s Justice Department as follows: “Justice has done the military no favors by saddling it with Padilla. Nor do the Justice Department’s actions serve the Constitution.”