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**Nat Hentoff**

## Liberty's Court of Last Resort

Nobody Knows Hamdi's Own Story

January 24th, 2003 5:00 PM

*Mr. Hamdi could, in fact, be entirely innocent, and yet the court says there is no judicial recourse.* —Georgetown University law professor David Cole, National Public Radio, January 8

During one of our last conversations, the late Supreme Court justice William Brennan said, "Look, pal, we've always known—the Framers knew—that liberty is a fragile thing."

Liberty has become much more fragile under the Bush-Ashcroft-Rumsfeld administration. On December 8, the Fourth Circuit Court of Appeals handed Bush's team its most significant victory so far in inflicting collateral damage on the Bill of Rights in the war on terrorism.

A unanimous three-judge panel ruled that 22-year-old **Yaser Esam Hamdi**, an American citizen, can be imprisoned indefinitely in a navy brig on American soil. He is being held without charges, and without being able to see his lawyer, federal public defender Frank Dunham. In fact, Hamdi cannot see anyone except for his guards.

Conceivably, Hamdi, if the government continues not to charge him with any crime, will be released only when the open-ended war on terrorism is over, if he lives that long. The president, on his sole authority, put Hamdi in that prison. And unless Hamdi's court of last resort, the Supreme Court, restores his basic constitutional rights as an American citizen, he will stay behind bars. There will be an appeal to the Supreme Court.

The Fourth Circuit's ruling has been hailed by John Ashcroft as "an important victory for the president's ability to protect the American people in times of war." Practically all the stories on Hamdi in the media have gone along with the administration's assertion that Hamdi, fighting with the Taliban, was captured on the battlefield in Afghanistan.

But is this true? The Fourth Circuit accepted, without rebuttal from the prisoner, who has not been allowed to appear in court, a two-page, nine-paragraph affidavit from the government justifying its claim that Hamdi was captured "in a zone of active combat" as an enemy combatant. This is "undisputed," says the court. But look closely at this sentence in the Fourth Circuit's opinion:

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"The factual averments in the affidavit, *if accurate*, are sufficient to confirm that Hamdi's detention conforms with a legitimate exercise of the war powers given to the executive. . . . Asking the executive [the president] to provide more detailed factual assertions would be to wade further into the conduct of war than we consider appropriate and is unnecessary to a meaningful judicial review of this question." (Emphasis added.)

According to the Bush administration, an American citizen can be held indefinitely, incommunicado, on its say-so that the government's facts are actually factual. This is due process? This is America? Yet the Fourth Circuit stated in the same decision that stripping any citizen of his or her constitutional protections "is not a step that any court would casually take."

Hamdi has not been allowed to be interviewed by his lawyer so that the government can be cross-examined in court on the credibility of its affidavit. In the January 9 *Washington Post*, Stephen Dycus, an expert in national security law at the Vermont Law School, said plainly and irrefutably that Hamdi is "not being given the right to refute the charges against him."

Dycus also made the crucial point that "despite some lip service about the courts preserving some role for themselves [in this case], the [Fourth Circuit] really doesn't play that role." And, as Dycus emphasized, it is the president who has "the last word" on whether the evidence against Hamdi is to be believed. Trust Bush. He's the commander in chief. But the Constitution explicitly insists on the separation of powers. That's why we have the judiciary.

In the January 8-14 *Voice*, I reported that when Hamdi's case came before Federal District Judge Robert Doumar, without Hamdi present, that judge—after reading the government's two-page affidavit from Michael Mobbs of the Defense Department—said, "I'm challenging everything in the Mobbs declaration."

Judge Doumar continued: "A close inspection of the declaration reveals that [it] *never claims that Hamdi was fighting for the Taliban, nor that he was a member of the Taliban*. . . . Is there anything in the Mobbs declaration that says Hamdi ever fired a weapon? . . . Without access to the screening criteria actually used by the government in its classification decision [declaring Hamdi an enemy combatant] this Court is unable to determine whether the government has paid adequate consideration to due process rights to which Hamdi is entitled." (Emphasis added.)

The Fourth Circuit Court of Appeals wholly ignored Judge Doumar's entirely legitimate constitutional scrutiny of the government's two pieces of paper purportedly proving the necessity of depriving this American citizen of his right to challenge the government's case against him. As Frank Dunham says of his client, "Nobody knows what his version of the facts might be."

Elisa Massimino, a director of the Lawyers Committee for Human Rights, makes this critical point in the January 9 *New York Times*: "[The Fourth Circuit] seems to be saying that it has no role whatsoever in overseeing the administration's conduct of the war on terrorism. That is particularly disturbing in the context of a potentially open-ended, as-yet-undeclared war, the beginning and end of which is left solely to the president's discretion."

In its report "A Year of Loss: Reexamining Civil Liberties Since September 11," released in September 2002, the Lawyers Committee for Human Rights declared that in addition to many lives and our sense of invulnerability, "the United States has lost something essential and defining: some of the cherished principles on which the country is founded have been eroded or disregarded."

The Supreme Court is *our* court of last resort, as well as Hamdi's. While the Fourth Circuit did not say that what happened to Hamdi could be inflicted on an American citizen captured on American soil, constitutional law professor David Cole notes, "There would be some in the government who would claim that in this conflict the combat zone is the world."

Next week: torture, American-style.



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