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COMMISSION ON HUMAN RIGHTS  
Sub-Commission on the Promotion  
and Protection of Human Rights  
Fifty-sixth session  
Item 2 of the provisional agenda

**QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL  
FREEDOMS, INCLUDING POLICIES OF RACIAL DISCRIMINATION AND  
SEGREGATION, IN ALL COUNTRIES, WITH PARTICULAR REFERENCE TO  
COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES:  
REPORT OF THE SUB-COMMISSION UNDER COMMISSION ON HUMAN RIGHTS  
RESOLUTION 8 (XXIII)**

**Written statement\* submitted by the American Association of Jurists, non-governmental  
organization with special consultative status**

The Secretary-General has received the following written statement which is circulated in  
accordance with Economic and Social Council resolution 1996/31.

[1<sup>st</sup> July 2004]

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\*This written statement is issued, unedited, in the language(s) received from the  
submitting non-governmental organization(s).

I. In a direct repudiation of the Bush administration's position that the President is answerable to no one, the Supreme Court held the Guantánamo prisoners and U.S. citizen Yaser Hamdi are entitled to contest their detention in federal courts. The Court, however, punted in Jose Padilla's case, holding that he filed his case against the wrong person in the wrong court. The Bush administration denied these men their day in court, saying that Guantánamo Bay is not a U.S. territory, and thus, U.S. courts are not available to them. This position was premised on the absurd notion that Cuba is actually sovereign over Guantánamo Bay, even though the United States exercises exclusive jurisdiction over it.

II. Fortunately, the Supreme Court's ruling in *Rasul v. Bush* has changed that. It held that the Guantánamo prisoners have the right to go to federal court to challenge their confinement. The United States exercises "complete jurisdiction and control" over the Guantánamo Bay base, wrote Justice Stevens. "Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority" under the habeas corpus statute.

The Court's opinion, however, is a bittersweet ruling. Although it provides the Guantánamo prisoners access to the courts, it implies that courts could uphold the President's "enemy combatant" designation in certain cases, resulting in lifetime confinement even without a criminal conviction. The Court tragically ignores the explicit prohibition on indefinite detention enshrined in international law.

In *Hamdi v. Rumsfeld*, the Supreme Court ruled that due process demands a U.S. citizen held in the United States as an enemy combatant is entitled to a meaningful opportunity to contest the factual basis for his detention before a neutral decision maker. That includes the right to counsel. Yaser Hamdi's detention might be lawful, however, if a court determined that the government correctly classified him as an "enemy combatant."

Justice O'Connor wrote for the Court: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." In a direct slap at Bush, O'Connor noted, "even the war power [of the President] does not remove constitutional limitations safeguarding essential liberties." O'Connor echoed a theme she has raised in prior Court decisions, which is particularly relevant today: "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."

But, instead of holding that a President cannot hold an American citizen indefinitely, the Court set forth a balancing test for determining whether the President's designation of a U.S. citizen as an enemy combatant will be upheld. Henceforth, a court reviewing a claim will weigh the private interest of the detained citizen against the governmental interest in determining whether to sustain an enemy combatant classification.

O'Connor did, however, make clear that detentions of U.S. citizens must be limited to the Afghanistan context; they are not authorized for the broader "war on terrorism." She acknowledged, "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not pose that sort of threat."

Justice Souter wrote a concurring opinion, noting that the USA Patriot Act authorizes the detention of alien terrorists for no more than seven days in the absence of criminal charges or

deportation proceedings. Congress, therefore, would require the government to clearly justify its detention of an American citizen held on home soil incommunicado.

Curiously, the right-wing Justice Scalia, in his separate opinion joined by the most liberal Justice Stevens, would not permit the indefinite detention of an American citizen in Hamdi's present situation. They would require the government to prefer criminal charges or release the individual, unless Congress were to suspend the writ of habeas corpus.

"The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders' general mistrust of military power permanently at the Executive's disposal," according to Scalia.

Only Justice Thomas held out for blind deference to the President: "This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision."

That the Rasul and Hamdi decisions are a mixed blessing is illustrated by the reactions to them. Hamdi's lawyer said he was "delighted" by the decision. The American Civil Liberties Union called the rulings "a huge defeat for the government." Likewise, the American-Arab Anti-Discrimination Committee said the decisions represent "a major victory in upholding due process rights ... a great victory in protecting our core values as Americans." In striking contrast, the conservative Wall Street Journal called them "a modest but important victory for the Presidency." Its editorial celebrated the Court's affirmation of "the authority of the Commander-in-Chief to detain enemy combatants, including U.S. citizens."

III. Finally, the Supreme Court, in a 5-4 nod to the Bush administration, elevated procedure over substantial rights, and declined to rule on Jose Padilla's case. Ironically, whereas the Guantánamo prisoners can now file habeas corpus petitions in any federal court, U.S. citizen Jose Padilla's petition was thrown out because it was filed in New York rather than South Carolina.

After he was arrested in Chicago, Padilla was taken to New York to answer a grand jury material witness warrant. While Padilla was in New York, Bush ordered Donald Rumsfeld to designate Padilla an "enemy combatant."

Rumsfeld transferred Padilla to military custody and sent him to a naval brig in South Carolina. Meanwhile, Padilla filed a habeas corpus petition in the New York Court, naming Rumsfeld as a defendant. Five of the nine justices ruled that Padilla had to re-file his petition in South Carolina and name the commander of the military brig as a defendant.

The four dissenters decried Padilla's "secret transfer" to South Carolina, which prevented his lawyer from filing in South Carolina. Once he was transferred, Padilla was denied access to his attorney until February 11, 2004. The dissent's author, Justice Stevens, wrote: "At stake in this case is nothing less than the essence of a free society." Accusing the majority of using a procedural technicality to deny Padilla fundamental rights, Stevens concluded his opinion with reference to torture:

"Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using

unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny."

Tragically, Jose Padilla remains incarcerated in limbo indefinitely until the lengthy procedure to secure the rights guaranteed him by the Constitution works its way once again through the judicial system.

George W. Bush has used the crimes against humanity committed on September 11, 2001, to launch a "war on terrorism." Under the guise of his new "war," Bush rounded up more than 1000 men in the United States solely for being Arab or Muslim. At Guantánamo, Bush has kept 600 men and boys locked up, with the intention of keeping them there incommunicado until his "war on terror" is over. In Iraq, Bush invaded a sovereign country that posed no threat to the United States, killed thousands of its people and allowed nearly 1000 of our people to be killed. In spite of the absence of any evidence linking Saddam Hussein to the September 11 attacks, Bush claims his war on Iraq is a centerpiece of his "war on terror."

The Supreme Court has bought into Bush's claim that we are fighting a "war on terror." It has declined to tell Bush he cannot hold "enemy combatants" indefinitely. But, most significantly, the Court has told Bush his power is not absolute. The 600 prisoners at Guantánamo and Yaser Hamdi finally have the right to go into court and claim their innocence.

This is indeed a victory for the rule of law.

\* Written by [Marjorie Cohn](#), professor at Thomas Jefferson School of Law, executive vice president of the National Lawyers Guild, and the U.S. representative to the executive committee of the American Association of Jurists.

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