

“ENEMY COMBATANTS”

The largest category of individuals in detention comprises the so-called “enemy combatants.” These are individuals being treated not as civilians (as in INS and criminal cases), but as members of a military force, either al Qaeda or the Taliban, and as participants in an armed conflict pitting those forces against the United States. The administration has designated these men as “unlawful combatants,” or “enemy combatants,”¹ rather than as “prisoners of war,” for the express purpose of denying them the rights that combatants normally receive. At the same time, by considering these detainees as “combatants,” the administration in effect asserts the right to detain them indefinitely and without trial. Under international humanitarian law, combatants in armed conflict who are captured by the enemy may be held in detention until the “cessation of active hostilities.”² In this instance, the administration construes this term to mean the end of the “war against terrorism.”

One of the principal rights the administration aims at denying the detainees, by using the term “unlawful combatants,” is their right to a hearing, an entitlement specified in Article 5 of the Third Geneva Convention. A competent tribunal could weigh, among other things, the merits of defendants’ claims that they are not combatants at all. Individuals designated as combatants may be in some cases only people caught in the wrong place at the wrong time, or victims of parties (such as bounty hunters) improperly motivated by personal, ethnic, or political rivalries unrelated to the conflict between the United States, and al Qaeda and the Taliban.³

While many of these “enemy combatant” detainees were taken into custody in or near the battle zone in Afghanistan, others were apprehended in Pakistan; still others came from even further away, such as six Algerian detainees arrested and transported to Guantanamo from Bosnia, after a local court had ordered their release for lack of evidence.⁴ The Guantanamo base is the best-known detention center for these men, but an unknown number are being held in other locations both in Afghanistan and elsewhere.

¹ The administration has used the term “unlawful combatant” to stress that the detainees are not considered “prisoners of war.” A basis for this claim is the supposed failure of al Qaeda and the Taliban to comply with the laws of war. For similar reasons, and with similar intent, the government has also used the term “enemy combatant” to describe these individuals. As used by the administration, the two terms are interchangeable.

² Article 118 of the Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949 (the Third Geneva Convention), provides that “prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.” The Third Geneva Convention is available at <http://www.icrc.org/ihl.nsf/WebCONVFULL/OpenView> (accessed February 10, 2003).

³ See, e.g., Complaint in the case of *Odah, et al., v. United States of America, et al.* (D. D.C., May 1, 2002) (“The Family Members believe that the Kuwaiti Detainees were in Afghanistan or Pakistan, some before and some after September 11, 2001, as volunteers for charitable purposes to provide humanitarian aid to the people of those countries...[and] that none of the Kuwaiti Detainees is or ever has been a member or supporter of al Qaida or the Taliban, or of any terrorist organization.”).

⁴ “Bosnia Suspects Handed to U.S.,” CNN.com, January 18, 2002, available at <http://www.cnn.com/2002/WORLD/europe/01/18/inv.bosnia.cuba/> (accessed February 10, 2003).

Particularly troubling has been the government's inclusion of U.S. citizens within the category of "enemy combatants," while rejecting debate on the appropriateness of the term. By unilaterally imposing the "enemy combatant" label on citizens whom it suspects of terrorist activities, the Executive Branch is attempting to bypass all criminal procedures and constitutionally mandated protections. U.S. citizens José Padilla and Yaser Hamdi are currently being detained in the United States as alleged enemy combatants.

These cases are unprecedented in U.S. legal history. In these cases, the administration in effect has reserved for itself the authority to deny those so labeled, regardless of citizenship, all legal rights and remedies, whether under international human rights or humanitarian law, U.S. criminal law, the Uniform Code of Military Justice, or the U.S. Constitution. The terminology of "unlawful" or "enemy combatants" improperly collapses the crucial distinction between, on the one hand, individuals captured while participating in an armed conflict (such as the armed conflict in Afghanistan between the United States and the Taliban government and its al Qaeda allies), and, on the other hand, those implicated in serious terrorist crimes plotted or executed outside a zone of conflict, that are properly handled within the criminal justice system.

THE COURTS AND "ENEMY COMBATANTS"

Since September 2002, there have been a number of important developments with respect to the treatment of those labeled "enemy combatants," affecting both U.S. citizens and non-citizens.

Although public attention to the Guantanamo detainees has dwindled, approximately 650 people are still interned there, many for more than a year with no end in sight. In Afghanistan there are increasing reports in the news media that U.S. interrogators are using psychological and physical coercion. In some cases, moreover, prisoners have been transferred for interrogation to states known to use torture, such as Egypt, Jordan, Morocco, and Syria.

Finally, some reports have indicated that the Pentagon may be preparing to begin trying captives in military commissions. The military commissions have been designed to bypass both the U.S. criminal justice system and the military court system, which operates under the Uniform Code of Military Justice. There are indications that the government, unhappy with developments in the prosecution of Zacarias Moussaoui — the so-called "20th hijacker" — may remove his case from the civilian courts and try him instead in a military commission.