

The following text may be printed, copy/pasted, or downloaded and emailed.

Checking presidential power

Editorial
Cincinnati Post
March 2, 2005

The most egregious assertion of power in the Bush administration's war on terror was the president's right to jail any American indefinitely without trial. The president merely had to designate that person an "enemy combatant."

That unwelcome unilateral expansion of presidential prerogatives was used only twice -- on Yaser Esam Hamdi, a U.S.-born Saudi; and Jose Padilla, an American petty criminal.

Hamdi was captured in Afghanistan in 2001, sent to Guantanamo Bay, Cuba, and then shipped to a Navy brig when the feds learned he could claim U.S. citizenship. Last June, the Supreme Court ruled that the administration had to either try him or release him, and even though Hamdi, now 24, was presumably so dangerous that he had to spend over two years in solitary, the administration tamely sent him back to his parents in Saudi Arabia on the grounds that he no longer had any useful information to give.

Padilla, now 34, wasn't so lucky. Even though an appeals court had ruled that Padilla, too, should be tried or released, the Supreme Court said his case should have been filed in South Carolina instead of New York.

Now a federal judge in South Carolina, Henry Floyd, has ruled and dealt, one hopes, a fatal blow to the assertion of an unchecked presidential power to jail a citizen indefinitely and with no access to due process -- a judge, lawyer, habeas corpus, charges, a trial, all the basic constitutional safeguards.

"The court finds that the president has no power, neither express nor implied, neither constitutional nor statutory, to hold petitioner as an enemy combatant," Floyd wrote.

Padilla was arrested at Chicago's O'Hare airport in 2002 and shipped to New York to be held as a material witness. When he demanded a lawyer, he was branded an enemy combatant and shipped to South Carolina to be held incommunicado in a Navy brig.

The Bush administration argues that the president had this power in his role as commander in chief fighting a war on terror. Floyd, a 2003 Bush appointee, said that to agree with that position would be "to engage in judicial activism," which the Bush administration in any other context would deplore.

"If such a position were ever adopted by the courts, it would totally eviscerate the limits placed on presidential authority to protect the citizenry's individual liberties," Floyd said, a prospect that many Americans forgot in the frightening aftermath of 9-11.

The Justice Department has 45 days to charge Padilla, release him or appeal. It will appeal, but thanks to Judge Floyd the higher courts have a clear guide as to how they should find.