

Justice for All  
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The Bush administration recently announced that Yasser Hamdi, an American citizen captured in Afghanistan and detained as an enemy combatant, would have access to a lawyer for the first time. This followed the government's earlier statement that it would allow Jose Padilla, another citizen detainee, access to counsel in the near future.

The capture and detention of Messrs. Hamdi and Padilla, along with other successes, illustrate the administration's resolve to destroy the terrorist networks that brought us the horror of 9/11. And the recent announcements should affirm faith that the administration is exercising its constitutional authority in a responsible manner in light of changed circumstances.

Yasser Hamdi was captured on the battlefield and transferred to a military brig in South Carolina. The vocal opposition to his detention notwithstanding, surely a military commander should have the power to incapacitate enemy combatants on the battlefield (think Eisenhower and the Nazis), and legal precedents confirm this common-sense proposition. That power extends to enemy combatants who unlawfully target innocent civilians and who would make the streets of America their battlefield. Thus, the president properly designated Jose Padilla as an unlawful combatant. Mr. Padilla was captured in O'Hare Airport with an alleged plot to detonate a radioactive bomb in the United States. That plot is a crime, but it is also a battle plan to endanger the national security in time of armed conflict.

The more difficult question, one on which past cases provide less guidance, is whether the military can hold these enemy combatants indefinitely without any process at all. The initial government position -- that it could hold Mr. Padilla for the duration of the conflict without any access to counsel and without any legal procedure to challenge the facts underlying his detention -- was problematic. The administration has since agreed for Messrs. Hamdi and Padilla to have access to lawyers. This is an important development because the government has always maintained that the courthouse doors are open to the detainees to challenge the legality of their detention. Access to counsel makes access to the courts truly meaningful, and strengthens the government's argument to a sustainable position.

Determining when to grant access to counsel and under what circumstances that access would be disruptive to the interrogation process necessarily rests with the executive in the first instance. Few would doubt that, if al Qaeda leaders like Khalid Sheik Mohammed were in U.S. custody, they would have continuing intelligence value and government efforts to extract information should not be disrupted. On the other hand, when access would not disrupt the intelligence flow, as the government has decided for Messrs. Hamdi and Padilla, the government has no reason to bar detainees from speaking with their lawyers.

There is room for the administration to move into even safer harbor by providing, after a reasonable period, some procedure for Messrs. Padilla and Hamdi to contest the underlying facts of their detention. It need not be full-dress judicial process. A military hearing to evaluate the information underlying the detention would suffice. The Supreme Court is more likely to defer to an executive judgment when the process by which it is arrived at is capable of inspection.

The developments in the Hamdi and Padilla cases should comfort those who fear executive authority because they indicate that the administration is exercising its discretion responsibly to accommodate changed circumstances. Likewise, those who support executive prerogative should applaud the administration for not pushing the envelope and risking a judicial backlash that would erode presidential authority (remember President Clinton's invocation of the so-called Secret Service privilege?).

The administration's action is especially noteworthy given Congress' silence. After two years of unofficial criticism, especially from members with presidential aspirations, it is time for Congress to contribute its voice -- either to affirm the president's authority or to suggest refinements to administration policy. As Judge Michael Chertoff, former head of the Justice Department's Criminal Division, has suggested, we need to think more systematically about a sustainable architecture for determining when, why and for how long someone may be detained as an enemy combatant.