



### E5 Is the “War on Terrorism” Killing Our Constitution?

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The goal of this presentation is to present to the forensic community an insight into the realities (versus rhetoric) of how the legal aspects of the so-called “war on terrorism” is undermining and destroying key Constitutional rights.

No one can seriously question the need for better procedures to protect America after the tragedies of September 11, 2001. But, national response – the purported “war on terrorism” – is evolving into an overt governmental attack against core and fundamental Constitutional rights. The Fourth Amendment to the Constitution requires “probable cause, supported by Oath or affirmation,” before an individual can be seized (incarcerated). The fundamental right to “Due Process of Law,” *i.e.*, the right to notice of specific charges against one arrested and the prohibition against deprivations of liberty without due process, are guaranteed by the Fifth Amendment. And, the Sixth Amendment guarantees the fundamental right to counsel – an attorney advocate – for those arrested.

The government’s handling of the cases of two American citizens allegedly with *al Queda* or Taliban connections – Hamdi and Padilla – shows how the Executive Branch has concocted a concept to eviscerate these core constitutional basics. Simply put, they have arbitrarily labeled Hamdi and Padilla as “enemy combatants” (a concept that has no specific *legal* meaning under international law), and based upon secret claims of “national security,” have arrested, detained *incommunicado* and imprisoned in a military brig these two American citizens. All without charging them with any criminal offense or violation of international law. This is *not* a defense of them, their politics or of anything they may have done which may be criminal. It is simply a defense of Constitutional rights – rights guaranteed and applicable to all American citizens.

The U.S. Constitution is a majestic legal and political document, one that has endured the test of time and many wars. The history surrounding its drafting, debate, and ratification cannot be ignored, nor can one ignore the fact that nowhere in the Constitution are there any exceptions for “national security” concerns. That, it is submitted, was intentional as the Constitution was clearly intended to encompass any and all national emergencies.

To understand this and its contextual relevance, one must remember that the Declaration of Independence specifically targeted the terrorist acts fostered by King George III’s support of “the merciless Indian Savages. . . .” History shows that the U.S. was conceived in terrorist acts – the Native American “wars,” the Boston massacre, Lexington and Concord, etc., culminating in the Revolutionary War. However, it was with this “war” background that the Constitution was born. Yet the Drafters and citizenry were not satisfied that liberty was secure, both from abroad and from government, hence the Bill of Rights was incorporated into the Constitution.

Today Hamdi and Padilla – both U.S. citizens – are incarcerated *incommunicado* in a military brig by a “military order” of the Commander in Chief, the President. The Executive Branch has declared that such orders are sacrosanct and immune from judicial scrutiny. That simply is totalitarianism at its worst and is something that James Madison warned against, “An elective despotism is not the government we fought for.” The Commander in Chief is both subject to the Constitution, and also to the expressly delegated “War Powers” granted to Congress – *not* the President – in Article I of the Constitution.

Combating terrorists, militarily or criminally, is not the issue. But, such “combat” cannot and must not destroy the Constitutional rights uniformed men and women have fought, bled and died for since 1776. And, Adolph Hitler’s warning must not be forgotten: “The greatest strength of the totalitarian state is that it will force those who fear it to imitate it.” Those who have paid the ultimate sacrifice defending the Constitution and its fundamental guarantees must be honored by climbing to a higher plateau, *viz.* respecting the Constitutional rights of all citizens.

**Due Process, Enemy-combatant, National Security**