USA

‘CONGRESS HAS MADE NO SUCH DECISION’

THREE BRANCHES OF GOVERNMENT, ZERO REMEDY FOR COUNTER-TERRORISM ABUSES

COURT DISMISSES PADILLA LAWSUIT

AMNESTY INTERNATIONAL

Amnesty International Publications

First published in February 2012 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

Index: AMR 51/008/2012
Original Language: English
Printed by Amnesty International, International Secretariat, United Kingdom

Amnesty International is a global movement of 3 million people in more than 150 countries and territories, who campaign on human rights. Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments. We research, campaign, advocate and mobilize to end abuses of human rights. Amnesty International is independent of any government, political ideology, economic interest or religion. Our work is largely financed by contributions from our membership and donations

AMNESTY
INTERNATIONAL

Table of contents

INTRODUCTION – 'CONGRESS HAS MADE NO SUCH DECISION'

Of course Congress may decide that providing a damages remedy to enemy combatants would serve to promote a desirable accountability on the part of officials involved... But to date Congress has made no such decision

US Court of Appeals for the Fourth Circuit, 23 January 2012

It is a fundamental rule of international law that any person whose human rights have been violated shall have access to an effective remedy. However, the administration of President Barack Obama, like its predecessor, has systematically blocked, or sought to have the courts block, access to remedy for current or former detainees held in US custody in the counter-terrorism context over the past decade. Congress, meanwhile, has done little or nothing to bring the USA into line with its international obligations on this issue.

The latest in a series of judicial decisions blocking remedy comes from the US Court of Appeals for the Fourth Circuit in the case of José Padilla, a US citizen who was held without charge or trial as an "enemy combatant" in a military brig in Charleston, South Carolina, for some three and a half years before being transferred in 2006 to civilian jurisdiction (from which he had been removed by presidential order in 2002), brought to trial and convicted of terrorism-related offences. José Padilla (and his mother as "next friend") filed a lawsuit in 2007 against various former officials. Among other things, it sought a declaration that the policies which led to his designation as an "enemy combatant" and subsequent ill-treatment were unconstitutional. He also sought one dollar in symbolic damages from each defendant.

By the time the lawsuit was before the Fourth Circuit, it named as defendants four former senior Pentagon officials and two former commanders of the Charleston military brig.[1] In the lower US District Court, it had also targeted unnamed lawyers, medical professionals, interrogators and guards directly involved in formulating and carrying out his detention and treatment. These "John Does", as well as several other named former officials, were dropped from the lawsuit by the plaintiffs in December 2010. Now it was focussed on former senior policy-makers or military officers as the "architects" of José Padilla's "sufferings".[2]

On 23 January 2012, a three-judge panel of the Fourth Circuit dismissed the lawsuit, granting a motion by the defendants which had been supported with a brief filed by the Obama administration. The judges said that this was a case in which the political branches of government – the executive and the legislature – had "formulated policies with profound implications for national security". It said that "being judicial requires that we be judicious", and that under the US Constitution, fidelity to the judiciary's role in such a case meant that the court should "await affirmative action by Congress" on the question of remedy. Congress had taken no such action, the panel pointed out, and until it did, the judiciary should stay its hand: "creating a cause of action here is more appropriately for those who write the laws, rather than for those who interpret them".[3]

The three-branch system of government the USA tells itself protects against arbitrary or high-handed government is proving to be an abject failure in ensuring the country lives up to its obligations to respect international human rights law in the counter-terrorism context.[4] Moreover, the Padilla case further illustrates the damage done over the past decade and still being done to respect for human rights by the USA's framing of its counter-terrorism policies as a global "war". The administration justified his arbitrary and prolonged incommunicado detention in military custody on the grounds of this war. Now the government is essentially invoking the "global war" framework to justify depriving him of access to any effective means of obtaining a remedy for the human rights violations he says he suffered.

YEARS OF UNLAWFUL DETENTION AND ALLEGED ILL-TREATMENT

José Padilla was arrested by FBI agents upon arrival at Chicago's O'Hare International Airport after flying from Pakistan via Switzerland on 8 May 2002. He was transferred to New York and held in civilian federal custody on a 'material witness' warrant issued by US District Court Judge Michael Mukasey in relation to a grand jury investigation of the attacks of 11 September 2001. José Padilla was provided access to a lawyer.

The material witness warrant was issued on the basis of a classified affidavit signed by an FBI agent, citing identification of Padilla by "confidential source 1" and "subject 1", two detainees in custody outside the USA. The former is believed to have been Zayn al Abidin Muhammad Husayn, more commonly known as Abu Zubaydah, who at that time was in the first month of what would become four and a half years in secret CIA detention at undisclosed locations following his arrest in Pakistan in late March 2002. "Subject 1" is believed to have been Binyam Mohamed, who was arrested at Karachi airport in early April 2002 and who at the time of José Padilla's arrest was under interrogation in Pakistan prior to being "rendered" in July 2002 to Morocco for 18 months before being taken to Afghanistan and then Guantánamo. According to the FBI affidavit, on or about 23 April 2002 Abu Zubaydah had been shown two photographs by FBI interrogators and identified the men depicted in them as Binyam Mohamed and José Padilla.[5] The CIA subsequently claimed that Abu Zubaydah identified the two men as "al-Qa'ida operatives who had plans to detonate a uranium-tipped 'dirty bomb' in either Washington, DC, or New York City".[6]

On 8 June 2002, the Office of Legal Counsel (OLC) at the US Department of Justice responded to Attorney General John Ashcroft's request for advice on whether he should recommend to the Secretary of Defense that José Padilla "qualifies as an enemy combatant under the laws of armed conflict and whether he may be detained by the United States Armed Forces". The OLC, which would subsequently give the green light for the use of interrogation techniques that violated the prohibition of torture and other ill-treatment,[7] advised that there were "ample grounds" for Padilla to be taken into military custody as an "enemy combatant" in the context of the "international armed conflict between the United States and the al Qaeda organization". The OLC emphasised the alleged "dirty bomb" plot, that "the nature of Padilla's plan in itself qualifies him as a belligerent", and "the mere fact that Padilla is still apparently in the planning stages for this act and may only have entered the United States now for reconnaissance purposes in no way takes him out of the category of a combatant."[8]

According to a federal appeals court in 2003, any threat José Padilla posed had "effectively been neutralized" by his arrest and subsequent detention in a maximum security facility in New York.[9] Furthermore, it noted that the offences Padilla was alleged to have committed were "severely punishable under the criminal laws" of the USA, and that "under those laws the Executive has the power to protect national security and the classified information upon which it depends". However, on 9 June 2002, two days before there was to be a court hearing on his case, José Padilla was transferred from civilian to military custody on the basis of an executive order signed by President George W. Bush. The order asserted that the President had determined José Padilla was "closely associated with al Qaeda, an international terrorist organization with which the United States is at war", and ordered Secretary of Defense Donald Rumsfeld to take custody of him as an "enemy combatant" under the "laws of war".

INCOMMUNICADO DETENTION

For his first 20 months in military custody, José Padilla was held incommunicado, with no access to legal counsel, his family, or the courts. A few months before he was taken into custody, White House Counsel (and future Attorney General) Alberto Gonzales had drafted

advice to President Bush agreeing that "the war against terrorism is a new kind of war" which "places a high premium" on obtaining "information from captured terrorists and their sponsors", and that a reason not to apply the Geneva Conventions to such detainees was in order to reduce the threat of domestic prosecutions of US interrogators for war crimes.[10]

It became clear that the purpose of the transfer was so that José Padilla could be interrogated in indefinite incommunicado detention. In a declaration filed in court as part of the administration's effort to prevent José Padilla's access to legal counsel and to the courts, the Director of the Defense Intelligence Agency (DIA) asserted that providing Padilla access to a lawyer would break the "atmosphere of dependency and trust" that would be developed between interrogator and incommunicado detainee, and thereby risk "loss of a critical intelligence resource, resulting in a grave and direct threat to national security". He said that the dynamic of a continuous "intelligence cycle" – whereby detainees were interrogated with "new lines of questions as additional detainees are taken into custody and new information is obtained from them" – was "especially important in the War on Terrorism".[11] He suggested that incommunicado detention in this context could last for "years" (as would happen to Abu Zubaydah and others in the CIA's secret detention program operated outside the USA).

What was happening to José Padilla was part of what the DIA Director described as the USA's "robust program of interrogating individuals who have been identified as enemy combatants in the War on Terrorism", interrogation "conducted at many locations worldwide by personnel from DIA and other organizations in the Intelligence Community".[12] By the time that José Padilla was transferred to military custody, the detentions of non-US nationals labelled as "enemy combatants" in the US Naval Base at Guantánamo Bay in Cuba had been up and running for six months. Then, the first six months of Padilla's incommunicado detention coincided with the period in which the military authorities, including the DIA, sought authorization to use "counter-resistance" interrogation techniques against some detainees, and obtained such approval from Secretary Rumsfeld, with the involvement of others including Pentagon General Counsel Haynes, and Deputy Secretary Wolfowitz (among those now named on the Padilla lawsuit). The techniques were for use against "resistant" detainees at Guantánamo, went beyond interrogation methods normally authorized for use by the US military, and violated the international prohibition against torture and other cruel, inhuman or degrading treatment. The DIA Director labelled Padilla as "even more inclined to resist interrogation than most detainees".[13]

The DIA assessed Jose Padilla as having "very high" intelligence value.[14] In this "war", being perceived by the US authorities as having "high value" put a detainee at high risk of torture or other ill-treatment. Less than two months after José Padilla was transferred from the maximum security wing of the New York Metropolitan Detention Center to the Charleston military brig, the US Department of Justice approved the use of "enhanced interrogation techniques" by the Central Intelligence Agency against Abu Zubaydah held in secret, incommunicado custody and labelled as having "high value" intelligence. The techniques included sleep deprivation, stress positions, cramped confinement, and "water-boarding".[15] It seems that as early as April and May 2002 he had been subjected to a number of such techniques, including forced nudity, sleep deprivation, loud music and extremes of temperature.[16]

Padilla's lawsuit asserts that the techniques that were authorized for use at Guantánamo were "similar, and in many cases identical, to the techniques used on Padilla, including prolonged isolation, deprivation of light, prolonged exposure to light, extreme variations in temperature, sleep adjustment, stress positions, forced grooming and removal of religious items. In addition, the lawsuit alleged that José Padilla was threatened with death, physical abuse, and rendition to torture. While these techniques were not given blanket approval by Secretary Rumsfeld for use at Guantánamo, they were considered by Pentagon General Counsel William Haynes to be "legally available".[17]

It was against this backdrop that José Padilla was kept incommunicado for almost two years after his transfer to military custody. In a brief to the US Court of Appeals for the Fourth Circuit in June 2011 his lawyers alleged:

> "Padilla was placed in solitary confinement and held completely incommunicado, permitted no contact with counsel, courts or family for almost two years – aside from a single short message to his mother, Estela Lebron, after ten months informing her that he was alive. His only human contact during this period was with interrogators or with guards delivering food through a slot in the door or standing watch when he was allowed to shower. Night and day merged – the windows blackened, artificial light glaring frequently and at any hour, no way of reckoning time – so that Padilla did not even know how to fulfil his religious obligation to pray five times a day. Removal from his cell meant additional sensory deprivation, with black-out goggles and sound-blocking earphones. All outside information – papers, radio, television – was prohibited, and even his Koran was confiscated. Padilla was denied a mattress, blanket, sheet, and pillow, and left with only a cold, steel slab. Whatever sleep he could managed was 'adjusted' by deliberate banging, constant artificial light, noxious odors, and extreme temperature variations. Interrogators injected Padilla with substances represented to be truth serums,[18] left him shackled for hours in 'stress' positions, and threatened to kill him."[19]

If all these allegations were to be proven, such a combination of treatment and conditions, imposed for such a prolonged duration and for the purpose of obtaining information, could fall within the definition of torture under international law.

HABEAS CORPUS

A habeas corpus petition challenging the lawfulness of José Padilla's detention had been filed on his behalf on 11 June 2002, by the lawyer who had been appointed to represent him when he was held in civilian custody. The Bush administration opposed habeas corpus under its global "war" paradigm. Access to the courts would mean access to legal counsel, something – "even if only for a limited duration or for a specific purpose" – the administration opposed.[20] In a "war", the administration asserted, the President had the authority to detain "enemy combatants" without charge or trial until the end of hostilities.[21]

The habeas corpus petition was first filed before Judge (and future Attorney General) Mukasey in the US District Court for the Southern District of New York, the jurisdiction from which José Padilla had been transferred.[22] Judge Mukasey ruled in late 2002 that the President had both the inherent authority and the authority under a broad resolution – the Authorization for Use of Military Force (AUMF) – passed by Congress in the immediate wake of the 9/11 attacks to detain a US citizen as an "enemy combatant".[23] He ruled also, however, that Padilla should have access to counsel to pursue his habeas corpus challenge, but this was stayed while the case went up to the US Court of Appeals for the Second Circuit. On 18 December 2003, by which time José Padilla had been held incommunicado for 18 months in military custody, a three-judge panel of the Second Circuit ruled in a split vote that the President had neither the inherent authority nor the congressionally approved authority to hold a US citizen "captured on United States soil" and ordered his charge or release within 30 days.[24] The administration immediately responded that it would "seek a stay and further judicial review" of the Second Circuit's decision, adding that "in times of war, the President must have the authority to act when an individual associated with our nation's enemies enters our country to endanger American lives."[25] José Padilla remained in incommunicado detention while the case was appealed.

On 4 February 2004, the Supreme Court said that it would consider on 20 February 2004 whether to take the case. On 11 February – in part of an apparent pattern of the Bush administration manipulating individual detainee cases to seek to minimize judicial scrutiny – the Pentagon announced it was granting José Padilla access to a lawyer for the first time since he had been transferred into military custody 20 months earlier.[26] It stressed that this

was being done "as a matter of discretion and military authority", was "not required by domestic or international law", and "should not be treated as a precedent".[27]

The Supreme Court announced on 20 February 2004 that it would review the case,[28] but it did not ultimately rule on the lawfulness of José Padilla's detention, deciding instead that the case had been filed in the wrong jurisdiction. In a related case on which the Court did rule on the same day, 28 June 2004, the Court said "Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized [by the AUMF]".[29]

With José Padilla still in isolation in the military brig in Charleston, although now with access to a lawyer, the case was re-filed in the District Court for the District of South Carolina. On 28 February 2005, the judge ruled that the President did not have the authority to detain Padilla and ordered the detainee's release from military custody within 45 days. The government appealed and on 9 September 2005, the Court of Appeals for the Fourth Circuit reversed the District Court's decision. A unanimous three-judge panel ruled that Congress had authorized the President to conduct such detentions when it passed the AUMF on 14 September 2001.[30] Expressing the Department of Justice's pleasure at the decision, Attorney General Alberto Gonzales asserted, among other things, that "the availability of criminal process cannot be determinative of the power to detain, if for no other reason than that criminal prosecution may well not achieve the very purpose for which detention is authorized in the first place – the prevention of return to the field of battle."[31]

Nevertheless, and notwithstanding that interrogation in incommunicado detention appeared to have been the primary motivation for José Padilla's military custody rather than prevention of return to "the battlefield", once review by the Supreme Court of the Fourth Circuit's ruling loomed, criminal prosecution was what the administration chose. Shortly before the administration was due to file its initial brief in the case in the Supreme Court, on 20 November 2005 President Bush issued a memorandum to the Secretary of Defense authorizing Padilla's transfer back to civilian custody to face criminal charges. However, the Fourth Circuit took the unusual step of refusing to allow the transfer on the grounds that the administration appeared to be "attempting to avoid consideration of our [9 September 2005] decision by the Supreme Court" and also because "this case presents an issue of such especial national importance".[32] The administration turned to the Supreme Court itself, which on 4 January 2006 granted the administration's transfer request and on 3 April 2006 – nearly four years after his transfer to the Charleston brig – ruled that the question of the lawfulness of Padilla's detention as an "enemy combatant" was now moot as he was out of military custody. The Court noted that "Padilla's claims raise fundamental issues respecting the separation of powers, including consideration of the role and function of the courts".

TRIAL

José Padilla was indicted in the US District Court for the Southern District of Florida with two other defendants, Adham Amin Hassoun and Kifah Wael Jayyousi, on charges of involvement in a broad terrorism-related conspiracy. A pre-trial motion filed by José Padilla's lawyers in October 2006 sought dismissal of the indictment against their client on the grounds of the government's "outrageous conduct" before bringing him to trial.[33] The trial judge denied the motion, finding that the conduct in question occurred while Padilla was "under military control", held under "Presidential orders in connection with his enemy combatant status", and when he had not been charged with the crimes he was now facing. The government had said that it would not use any "Naval Brig evidence" in its case, and the judge additionally ruled that the defence had failed to explain why "suppressing governmental use of any evidence obtained from him at the Naval Brig is insufficient [remedy] for purposes of this trial". In denying the defence motion, District Court Judge Marcia Cooke noted that José Padilla was "free to institute a *Bivens* action [see below], an action for monetary damages or any other form of redress that he is legally entitled to pursue".[34]

At the trial which opened on 16 April 2007, the government presented evidence that the defendants had "formed a support cell linked to radical Islamists worldwide and conspired to send money, recruits, and equipment overseas to groups that the defendants knew used violence in their efforts to establish Islamic states".[35] Four months after the trial began, the jury found all three defendants guilty on all counts. On 16 August 2007, José Padilla was convicted of "conspiracy to kill, kidnap, maim, or injure persons in a foreign country"; "providing material support to terrorists"; and "conspiracy to provide material support to terrorists". In January 2008, José Padilla was sentenced to 17 years and four months in prison. The government had argued for a life sentence.

APPEAL

On appeal, the government argued that the sentence was too low under federal sentencing guidelines and that the judge had erred in handing down the sentence she did. In a split decision on 19 September 2011, a three-judge panel of US Court of Appeals for the Eleventh Circuit agreed, ruling among other things that Padilla's sentence did not "adequately reflect his criminal history" or "adequately account for his risk of recidivism". The majority also ruled that the 152-month reduction in sentence that the District Court judge had given Padilla because of the length of his pre-trial confinement and the harsh conditions to which he was subjected was unjustifiably "extensive". José Padilla's sentence was vacated and the case sent back to the District Court for re-sentencing, "consistent with this opinion". The new sentencing was pending at the time of writing.

One of the three judges on the Eleventh Circuit panel had dissented, arguing that José Padilla's sentence was "substantively reasonable". On the question of the reduction in sentence due to the conditions of his pre-trial confinement, she wrote:

> "Padilla presented substantial, detailed, and compelling evidence about the inhumane, cruel, and physically, emotionally, and mentally painful conditions in which he had already been detained for a period of almost four years. For example, he presented evidence at sentencing of being kept in extreme isolation at the military brig in South Carolina where he was subjected to cruel interrogations, prolonged physical and mental pain, extreme environmental stresses, noise and temperature variations, and deprivation of sensory stimuli and sleep. In sentencing Padilla, the trial judge accepted the facts of his confinement that had been presented both during the trial and at sentencing, which also included evidence about the impact on one's mental health of prolonged isolation and solitary confinement, all of which were properly taken into account in deciding how much more confinement should be imposed. None of these factual findings, nor the trial judge's consideration of them in fashioning Padilla's sentence, are challenged on appeal by the government or the majority... The majority fails to identify any clear error in the trial judge's decision to vary downward, and instead arbitrarily concludes that the variance was just too much... Thus, by declaring, without explanation, that the downward variance the trial judge applied in this case due to the harsh conditions of Padilla's pre-trial confinement was too 'extensive', the majority impermissibly usurps the discretion of the sentencing judge".[36]

The trial judge's and this appeal judge's apparent acceptance of the evidence of José Padilla's conditions of detention and interrogation while held in military custody render the absence of remedy and accountability even starker.[37]

THREE BRANCHES OF GOVERNMENT, ZERO REMEDY

A decision by the government to forego use at José Padilla's trial of any statements obtained from him during his prolonged incommunicado detention in the military brig was not a full

remedy for that abuse per se, and it was in fact a clear and binding international legal obligation on the USA to the extent that the information was the product of torture or other cruel, inhuman or degrading treatment.[38] The US authorities were also obliged to investigate and bring to justice those responsible for the human rights violations committed against him and to ensure his access to meaningful remedy.

The right to an effective remedy is recognised in all major international and regional human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), ratified by the USA in 1992. Under Article 2.3 of the ICCPR, any person whose rights under the ICCPR have been violated "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". International law requires that remedies not only be available in theory, but accessible and effective in practice. Victims are entitled to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms. Full and effective reparation includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[39]

For individuals subjected to torture or other ill-treatment the right to a full and meaningful remedy goes well beyond the exclusion of any evidence obtained as a consequence of the abuse. The UN Convention against Torture, for instance, explicitly requires the USA to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible."[40]

Article 9 of the ICCPR requires that anyone deprived of their liberty be given prompt access to a court to be able to challenge the lawfulness of his or her detention, and to release if the detention is found unlawful. Under article 9.5 of the ICCPR, anyone who has been subjected to unlawful detention must be provided with "an enforceable right to compensation".

José Padilla and his mother brought a lawsuit in 2007, amended in 2008, for declaratory relief, and one dollar in symbolic damages from each defendant, against former officials they claimed were responsible for his designation as an "enemy combatant" and subsequent ill-treatment. In the absence of US legislation under which to bring a private action against federal officials for an alleged violation of constitutional rights, the lawsuit sought a remedy under the 1971 Supreme Court ruling, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* (*Bivens*), a landmark decision which recognized a private civil cause of action for money damages under the US Constitution. In the *Bivens* decision, the Court had said that in that specific case there were "no special factors counseling hesitation in the absence of affirmative action by Congress". It is this sentence that has repeatedly been used to block judicial remedy where Congress has not acted. This has now happened to the Padilla lawsuit too.

The defendants named in the Padilla lawsuit moved for its dismissal arguing that there were "special factors counseling hesitation against the federal officers, soldiers, and other officials responsible for his designation, detention, and interrogation". The remedy sought by Padilla must be declined because it "impinges upon the Executive Branch's authority to conduct war, formulate foreign policy, and protect national security from terrorist attack", and for a court to recognize a *Bivens* remedy here would "impermissibly intrude on Presidential and Congressional primacy in matters of war". [41]

US DISTRICT COURT

On 14 February 2011, Judge Richard Gergel on the US District Court for the District of South Carolina, nominated to the court by President Obama in December 2009 and

confirmed by the Senate in August 2010, held oral argument on the defendant's motion to dismiss the Padilla lawsuit. He opened by saying that "everybody understands that when we intersect liberty and security, it creates challenges for all of us to sort out, and that's what we're here to do our best". Lawyers for the defendants argued that this was "a quintessential special factors case" counseling judicial deference towards the political branches. For their part, lawyers for Padilla had argued that "the interrogation techniques and conditions of confinement that are alleged in this complaint are so extreme that they are legally and constitutionally unacceptable for any detainee... we don't think that any reasonable official could have thought that it was acceptable to do these things". Towards the end of the hearing, Judge Gergel gave an indication of his thinking when he said:

> "You know, it's easy to sit here calmly on Valentine's Day 2011, and debate these great questions... But in 2002, let's assume for a minute that they thought that [Padilla was planning terrorist acts]. Okay? And they take what is clearly an extraordinary step in the designation of Mr Padilla, an American citizen arrested on American soil, and designated him an enemy combatant. They have opinions from the Department of Justice that the methods they seek to undertake are lawful... But the point is, we're talking, and they're making a decision in real time... But you're asking for a remedy to say we're going to judge them at that time and seek money damages against them, these Government officials, for matters which at least [there] appeared to be a [plausible] argument that it was lawful at the time".[42]

Three days after the hearing, Judge Gergel issued his decision, granting the defendants' motion. The Supreme Court, he ruled, had over the past 30 years, with "increasingly strong and direct language...refused to extend the *Bivens* claim to other contexts, generally finding present 'special factors counseling hesitation'". In this case, "the designation of Padilla as an enemy combatant and his detention incommunicado were made in light of the most profound and sensitive matters of national security, foreign affairs and military affairs." The judge continued:

> "It is not for this Court, sitting comfortably in a federal courthouse nearly nine years after these events, to assess whether the policy was wise or the intelligence was accurate. The question is whether the Court should recognize a cause of action for money damages that by necessity entangles the Court in issues normally reserved for the Executive Branch, such as those issues related to national security and intelligence. This is particularly true where Congress, fully aware of the body of litigation arising out of the detention of persons following September 11, 2001, has not seen fit to fashion a statutory cause of action to provide for a remedy of money damages under these circumstances".

The judge expressed concern about what the consequences would be were the lawsuit allowed to go forward, including "numerous complicated state secret issues" and the possibility of "an international spectacle with Padilla, a convicted terrorist, summoning America's present and former leaders to a federal courthouse to answer his charges". He concluded that "special factors" were present in the case counselling against sanctioning a *Bivens* claim to go forward in the absence of express Congressional authorization, and dismissed the lawsuit.

Even in a time of war, or threat of war, or in an emergency which threatens the life of the nation, a government cannot derogate from the prohibition of torture or other ill-treatment, or the prohibition of arbitrary deprivations of liberty.[43] The UN Human Rights Committee, established under the ICCPR to oversee its implementation, has reminded states (about a year before José Padilla was transferred from civilian to military custody) that "all persons

deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person", and that this is a "norm of general international law not subject to derogation." The Committee also affirmed that the right to an effective remedy can never be derogated from, even during times of national emergency. The fact that an individual who has been subjected to torture, prolonged incommunicado detention, or other human rights violations, is subsequently convicted of serious crimes, does not deprive the person of the right to access to an effective remedy for the violations, or relieve the state of its obligations fully to investigate and to bring those responsible to justice.

Judge Gergel also considered the question of whether the former officials in question had qualified immunity under US law. He ruled that they did, applying the US constitutional law standard that their conduct did "not violate clearly established statutory or constitutional rights of what a reasonable person would have known at the time the action was taken". He noted the litigation history of Padilla's habeas corpus challenge – and the differing decisions by different courts – to illustrate that the lawfulness of indefinite military detention of a US "enemy combatant" was an unsettled question. On the interrogation question, he pointed to the fact that the Department of Justice had issued "lengthy memoranda, prior to and after Padilla's detention, concluding that various coercive interrogation techniques, including ones allegedly utilized in Padilla's interrogations, were lawful". Even if the latter were controversial, concluded Judge Gergel, "to say the scope and nature of Padilla's legal rights at that time (2002-2006) were unsettled would be an understatement".[44] He ruled:

> "At the time of Padilla's detention by the Department of Defense, there were few 'bright lines' establishing controlling law on the rights of enemy combatants. No court had specifically and definitively addressed the rights of enemy combatants, and the Department of Justice had officially sanctioned the use of the techniques in question… Taking the allegations of the Plaintiffs' Complaint as true for purposes of this motion, the Court finds that it was not clearly established at the time of his designation and detention that Padilla's treatment as an enemy combatant, including his interrogations, was a violation of law. Therefore, to the extent a viable claim under the Constitution were found to exist, the Court finds that the defendants are entitled to qualified immunity regarding all claims of alleged constitutional violations arising out of Padilla's detention as an enemy combatant."[45]

Torture and other cruel, inhuman or degrading treatment were clearly, universally, and absolutely prohibited under international law long before José Padilla was taken into military custody, held for 20 months incommunicado, and allegedly subjected to other interrogation techniques and conditions of detention that violated this prohibition.[46] A decade before President Bush designated Padilla as an "enemy combatant", the USA had in 1992 ratified the ICCPR which not only articulated this non-derogable prohibition (supplemented by the UN Convention against Torture, ratified by the USA in 1994), but also the prohibition against arbitrary detention and the right of anyone deprived of their liberty to have prompt and effective access to a court to challenge the lawfulness of their detention.

US COURT OF APPEALS FOR THE FOURTH CIRCUIT

Judge Gergel's decision was appealed to the US Court of Appeals for the Fourth Circuit. A brief for former Secretary of Defense Rumsfeld argued to the court that recognizing a *Bivens* remedy in favour of "detained (even in error) enemy combatants" would impose "an impossible burden on the civilian and military personnel charged with defending the Nation against armed attack". Padilla, the Rumsfeld brief argued, was held "neither as a criminal suspect nor a civilly detained person", but as an "enemy combatant in wartime, and his rights were appropriately defined by law applicable to that status". Indeed, the "alleged restrictions on Padilla's access to counsel, courts, and the outside world, as well as on his

religious practices, in addition to his military detention and interrogation, were a direct result of, and justified by, his enemy combatant designation".[47]

A brief for the other defendants – former Deputy Secretary of Defense Wolfowitz; former Pentagon General Counsel Haynes; former DIA Director Jacoby; and two former Commanders of the Consolidated Brig in Charleston, Catherine Hanft and Melanie Marr – argued that "it is difficult to imagine a more compelling set of special factors" counselling against allowing a *Bivens* remedy. The brief asserted that the Padilla lawsuit concerned the "development and implementation of policy designed to secure the US homeland against potentially devastating attack by a Congressionally declared enemy". If successful, it noted, the principle advanced by the plaintiffs "would extend damages claims to a range of ongoing counter-terrorism policies, including detention of enemy combatants at Guantánamo, drone strikes directed against US citizens, and the right to detain, as enemy combatants, terrorists whose criminal trials resulted in acquittals."[48] The former officials were warning against setting a precedent on remedy that might impact on current policies which continue to raise serious human rights concerns.

The Obama administration also filed a brief asserting its interest in the case, urging the Fourth Circuit to dismiss the Padilla lawsuit. It has become clear over the past three years that there is a substantial degree of consensus between the Obama administration and its predecessor on the global war paradigm and its impact on human rights.[49] Not only has this left scores of foreign nationals held in indefinite military detention at Guantánamo Bay, but it has meant all but zero progress towards the USA complying with its obligations on remedy and accountability for human rights violations for which it has been responsible.

So the line taken by the Obama administration in July 2011 seeking to have the Padilla lawsuit dismissed had by then become depressingly familiar: the "judicial creation of a damages remedy is inappropriate because this case implicates national security and war powers where the judicial branch normally stays its hand". On the question of habeas corpus, the Obama administration asserted that "by bringing a habeas action, Padilla was able to challenge the lawfulness of his detention and seek access to counsel to make that remedy meaningful… Thus, Padilla had a congressionally-authorized mechanism for challenging the lawfulness of his detention…. The fact that the habeas statute provides no damage remedy or personal redress against Defense Department officials is not a ground for supplementing that remedy with a judicially-created money damage claim".[50]

José Padilla had been unable to take any part in his habeas corpus challenge – not for days but for almost two years during the time he was denied access to counsel and when no-one had access to him but his captors. The UN Human Rights Committee has consistently interpreted the right to an effective opportunity to challenge lawfulness of detention, under article 9(4) of the ICCPR, as entailing a right of access to independent legal counsel, finding violations of this right after periods of as little as 10 days' incommunicado detention.[51] The essence of habeas corpus proceedings has for centuries been that government authorities are required to bring an individual physically before the court and demonstrate that a clear legal basis exists for their detention. Normally, if the government is unable to do so promptly, the court is to order the individual released.[52] This is the bedrock guarantee against arbitrary detention (again, reflected in article 9(4) of the ICCPR, for example). If it is not fully respected by the government and courts in every case, the right to liberty and the rule of law are more generally undermined.

Seeking dismissal of Padilla's lawsuit, the Obama administration continued that "with respect to allegations regarding Padilla's treatment, Congress has provided a set of enforcement mechanisms to prevent detainee mistreatment by the military." Here it was referring to the system within the US military providing for the investigation into allegations

of detainee mistreatment, although it acknowledged that "to be sure, military regulations might preclude or limit a claim brought by an 'enemy combatant' detainee like Padilla". The Obama administration also cited the fact that Congress had passed the Detainee Treatment Act (DTA), prohibiting cruel, inhuman or degrading treatment (though only as narrowly defined in US law) of detainees in US custody, which was passed more than three years *after* José Padilla was transferred to military custody and more than a year *after* he emerged from incommunicado detention. The DTA anyway contains no provisions for remedy – and indeed furthered impunity by creating a special "ignorance of the law"-type defence in civil or criminal proceedings relating to detention and interrogation of foreign nationals suspected of involvement or association with "international terrorist activity".[53]

The Obama administration argued that, the fact that Congress had "declined to create a damages remedy" should "preclude" the courts from creating one. The Obama administration's brief continued that: "If Congress wishes to provide a damage remedy in this very sensitive setting, it may do so. In the absence of such congressional action, however, such a remedy should not be created by the court."[54]

The Fourth Circuit gave the officials from the Bush administration named in the lawsuit and the Obama administration what they asked for. Like Judge Gergel, it noted that "the Supreme Court has long counselled restraint in implying new remedies at law" and in the four decades since the *Bivens* ruling had frequently reminded the courts that "Congress is in a better position to decide whether or not the public interest would be served by creating *Bivens* actions in new situations". Against this backdrop, the Fourth Circuit panel said, the Padilla lawsuit must be approached "with scepticism".

The Fourth Circuit noted the substantial paper trail of memorandums and other documents generated under the Bush administration "discussing the scope of presidential authority under the AUMR, application of the Geneva Conventions to members of al Qaeda, and permissible forms of interrogation". These, it said, were an indicator of the extensive deliberations on detentions that had taken place within the executive. It continued:

> "In short, Padilla's complaint seeks quite candidly to have the judiciary review and disapprove sensitive military decisions made after extensive deliberations within the executive branch as to what the law permitted, what national security required, and how best to reconcile competing values. It takes little enough imagination to understand that a judicially devised damages action would expose past executive deliberations affecting sensitive matters of national security to the prospect of searching judicial scrutiny. It would affect future discussions as well, shadowed as they might be by the thought that those involved would face prolonged civil litigation and potential personal liability".[55]

The Fourth Circuit then went on to discuss the role of Congress:

> "Of course Congress may decide that providing a damages remedy to enemy combatants would serve to promote a desirable accountability on the part of officials involved in decisions of the kinds described above. But to date Congress has made no such decision. This was not through inadvertence. Congress was no idle bystander to this debate".

Among the Congressional actions cited by the Fourth Circuit as illustrative of its engagement in the issue was passage of the Military Commissions Act of 2006 (MCA). From a human rights perspective, this is particularly galling. While Congress has systematically failed since the attacks of 11 September 2001 to ensure that the USA meets its human rights obligations in the counter-terrorism context, one of the starkest examples of this was when it passed the

MCA. Instead of taking any measures to ensure accountability for crimes under international law after President Bush confirmed on 6 September 2006 that the CIA had for the past four and a half years been running a program of enforced disappearance, a few weeks later it passed the MCA. This legislation furthered impunity, sought to strip courts of habeas corpus jurisdiction, provided for unfair trials by military commission, and gave the green light, as the administration interpreted it, for the CIA's secret detention program to continue.[56]

In addition to the "structural constitutional concerns" requiring judicial deference to the war roles of the executive and Congress – the Fourth Circuit pointed to another reason for caution, namely that "Any defense to Padilla's claims – which effectively challenge the whole of the government's detainee policy – could require current and former officials, both military and civilian, to testify as to the rationale for that policy" and any number of issues relating to intelligence gathering.

PART OF A PATTERN

Here the Fourth Circuit noted that when the Second Circuit Court of Appeals had in 2009 dismissed a lawsuit brought by **Maher Arar**, a Canadian citizen with Syrian dual nationality who was arrested at New York airport in 2002 and sent, via Jordan, to Syria, where he was held for a year, including 10 months in a small underground cell, it had taken an approach deferential to the other branches of government. The Fourth Circuit quoted the Second Circuit's ruling that "a suit seeking a damages remedy against senior officials who implement an extraordinary rendition policy would enmesh the courts ineluctably in an assessment of the validity and rationale of that policy and its implementation in this particular case, matters that directly affect significant diplomatic and national security concerns". The Second Circuit had ruled that "it is for the executive in the first instance to decide how to implement extraordinary rendition, and for the elected members of Congress – and not for us judges – to decide whether an individual may seek compensation from government officers and employees directly, or from the government, for a constitutional violation". On 14 June 2010, the US Supreme Court announced that it was refusing to consider the Arar case, leaving the lower court's ruling intact and Maher Arar without judicial remedy in the USA.

The Fourth Circuit's citing in the Padilla case of the Second Circuit ruling in the Arar case reminds us that dismissal of the Padilla lawsuit is part of a pattern. For example:

- **Khaled el-Masri**: this German national's 2005 lawsuit alleging rendition in 2004 from Macedonia to arbitrary detention and ill-treatment in secret US custody in Afghanistan was dismissed by a US District Court judge in May 2006. The judge upheld the Bush administration's invocation of the state secrets doctrine in dismissing the lawsuit. He noted that it was "clear from the result reached here that the only sources of that remedy must be the Executive Branch or the Legislative Branch, not the Judicial Branch". In 2007, the Fourth Circuit Court of Appeals affirmed the District Court's ruling, asserting that the federal courts in the USA were assigned a "modest role" under the Constitution, and could not "ferret out and strike down executive excess". On 9 October 2007, the US Supreme Court declined to review the Fourth Circuit's ruling.

- **Shafiq Rasul, Asif Iqbal, Rhuhel Ahmed** and **Jamal al-Harith** – These four UK nationals, held without charge or trial in Guantánamo for two years from 2002 after being transferred there from Afghanistan, sued for damages for prolonged arbitrary detention, as well as torture and other cruel, inhuman or degrading treatment. The Obama administration argued that it would be "unfair" to subject government employees to financial damages when the constitutional rights being asserted "were not clearly established at the time of the alleged acts in question

here". In April 2009, the US Court of Appeals for the District of Columbia Circuit upheld District Court ruling that their claims were not based on rights that were "clearly established" at the time they were detained and "the doctrine of qualified immunity shields government officials from civil liability". On 14 December 2009 the Supreme Court announced that it was not taking the case.

- **Binyam Mohamed**, **Abou Elkassim Britel, Ahmed Agiza, Muhammad Faraj Ahmed Bashmilah,** and **Bisher al-Rawi** – On 8 September 2010 the US Court of Appeals for the Ninth Circuit upheld, by six votes to five, the Obama administration's invocation of the "state secrets privilege" and agreed to dismiss the lawsuit brought by these five men who claimed that they had been subjected to enforced disappearance, torture and other cruel, inhuman or degrading treatment at the hands of US personnel and agents of other governments as part of the CIA's rendition program. Again, the court pointed to the political branches as the route to remedy, with the six judges in the majority saying that the ruling was "not intended to foreclose – or to prejudge – possible *non-judicial* relief, should it be warranted for any of the plaintiffs". On 16 May 2011, the US Supreme Court announced that it was refusing to take the case.

Urging the US Supreme Court to let the dismissal of the Mohamed lawsuit stand, the Obama administration said: "This case does not concern the propriety of torture. Torture is illegal and the government has repudiated it in the strongest possible terms". In similar vein, its November 2009 brief in the *Rasul* lawsuit asserted that "torture is illegal under federal law, and the United States government repudiates it". It repeated it again in July 2011 when it urged the Fourth Circuit Court of Appeals to dismiss the Padilla lawsuit:

> "Notwithstanding the nature of Padilla's allegations, this case does not require the court to consider the definition of torture. Torture is flatly illegal and the government has repudiated it in the strongest possible terms".[57]

The US government does not just have the duty to "repudiate" torture and other human rights violations, however, but a legal obligation to ensure that anyone subjected to such abuse has access to effective remedy and that those responsible are brought to justice.

ANOTHER DISMISSAL IN THE PIPELINE? *YOO V. PADILLA*

The Fourth Circuit's ruling may yet have a negative impact in another lawsuit brought by José Padilla. In June 2009, a US District Court judge in California denied former Justice Department lawyer John Yoo's motion to dismiss a lawsuit against him brought by Padilla. The lawsuit alleged that John Yoo, then a Deputy Assistant Attorney General, was involved in Padilla's designation as an "enemy combatant" in June 2002 and the use of abusive interrogation techniques and detention conditions against him. John Yoo was the signatory on a number of controversial legal opinions on interrogations, detentions and executive power emanating from the Justice Department's Office of Legal Counsel (OLC) after 9/11 and is believed to have co-authored a number of opinions signed by others.[58]

Denying John Yoo's motion to dismiss the lawsuit, unlike what had happened in the District of South Carolina in the *Padilla v. Rumsfeld* case four months earlier, Judge Jeffrey White wrote that "this lawsuit poses the question addressed by our founding fathers about how to strike the proper balance of fighting a war *against* terror, at home and abroad, and fighting a war *using* tactics of terror". Judge White ruled that "the federal courts' power to grant relief not expressly authorized by Congress is firmly established… [T]he federal courts have

jurisdiction to decide all cases arising under the Constitution, laws, or treaties of the United States". The US federal judiciary, he wrote, has the authority to "choose among available judicial remedies in order to vindicate constitutional rights".

In November 2009, lawyers for John Yoo filed an appeal in the US Court of Appeals for the Ninth Circuit against Judge White's decision to allow the lawsuit to go ahead. The brief argued that Judge White had erred by "implying a damages remedy against a government lawyer who allegedly provided legal advice to the President regarding the designation, detention, and treatment of enemy combatants." The appeal argued that "habeas corpus is the proper vehicle for citizens detained as enemy combatants to challenge their detention", an ironic position considering John Yoo's role in an administration that had sought for years to deny habeas corpus review to José Padilla and others. The appeal argued that holding John Yoo personally liable "would chill executive branch attorneys from offering candid legal advice to the President on issues of national security and foreign policy", and moreover John Yoo "is entitled to qualified immunity" as he was "not personally responsible for any of the alleged constitutional or statutory violations" against Padilla.[59]

As it would later in the *Padilla v. Rumsfeld* lawsuit in the Fourth Circuit, the Obama administration filed a brief in the *Padilla v. Yoo* case seeking to have the Ninth Circuit dismiss the lawsuit. There were "compelling special factors that strongly counsel against judicial creation of a money-damage remedy, in the absence of congressional action", the administration argued. Where there are "special considerations or sensitivities raised by a particular context, the courts recognize that it is appropriate for the courts to defer to Congress and wait for it to enact a private damage remedy if it so chooses. That course is clearly appropriate here, where the claims directly implicate matters of national security and the President's war powers". As in the Rumsfeld case, the Obama administration argued that if Congress "were to want to authorize" such actions for redress by people held as "enemy detainees during an armed conflict", or to permit them to "seek money damages against those Executive Branch officials who detain or authorize the military detention, it could do so". Likewise, Congress could provide a "cause of action for money damages against those who provide advice to the President and/or the military".[60]

The Obama administration also noted that government lawyers could be subjected to investigation by the Office of Professional Responsibility (OPR) at the US Department of Justice, and that "Yoo's conduct has been subject to investigation by OPR". In fact, five months before the Justice Department filed its amicus curiae brief in the Padilla case in the Ninth Circuit, the OPR had finalized – although not released publicly – its report of its four and a half year investigation into the OLC interrogation memorandums. It concluded among other things that former Deputy Assistant Attorney General John Yoo "committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice".[61]

A month after the amicus brief was filed in the *Padilla* case, Associate Deputy Attorney General David Margolis at the US Department of Justice issued a memorandum rejecting the OPR's findings of misconduct against John Yoo and stating that he would not authorize the OPR to refer the matter on to the state bar disciplinary authorities in the jurisdiction where Yoo was licenced.[62] On 25 January 2012, two days after the Fourth Circuit issued its ruling to dismiss Padilla's lawsuit against former Secretary Rumsfeld and the other former senior Pentagon officials, the Ninth Circuit issued an order to the parties in the *Padilla v. Yoo* lawsuit to brief the court on what effect the Fourth Circuit ruling had on the Yoo lawsuit, and whether Padilla was now prevented from relitigating issues that had been the subject of the case now dismissed by the Fourth Circuit. The case was pending at the time of writing.

CONCLUSION – IN BREACH OF HUMAN RIGHTS OBLIGATIONS

At the United Nations Human Rights Council in March 2011, the Obama administration responded to international criticism made during scrutiny of the USA under the Universal Periodic Review (UPR) process about the lack of remedy for US human rights violations in the counter-terrorism context. It told the international community that it could not accept recommendations from other countries concerning "reparation, redress, remedies, or compensation" because, "although mechanisms for remedies are available through US courts, we cannot make commitments regarding their outcome".[63]

As the Padilla case has once again illustrated, the reality is that the administration continues to do all it can to prevent the courts from ever actually deciding on the merits of the case. Of course no-one expects the USA to guarantee that anyone who *alleges* he or she has been subjected to a human rights violation will, after the court examines all the relevant evidence in question, necessarily succeed. It is however a basic rule of international human rights law that a person who alleges his human rights have been violated must have an opportunity to have his or her case actually examined on the merits of the evidence – but this kind of examination and determination is precisely what the USA has been systematically depriving the alleged victims of in these cases.

The UN Human Rights Committee is the expert body established under the International Covenant on Civil and Political Rights to monitor implementation of that treaty. As part of this role, the Committee receives regular reports from states that are party to the Covenant and are obliged to submit for scrutiny. Among the concerns highlighted by the Committee after scrutinizing the USA's second and third periodic reports in July 2006 were failings related to the USA's record on accountability and remedy in the counter-terrorism context (paragraph 14 of the observations). On remedy, the Committee expressed regret that the Bush administration had not provided sufficient information to it on the question of reparation to victims of human rights violations. The Committee asked that the USA inform it within a year of the "measures taken by the State party to ensure the respect of the right to reparation for the victims".[64] Since then, the Committee has sought such information until, in a letter in April 2010, its Special Rapporteur for Follow-up on Concluding Observations noted that the USA's fourth periodic report was due on 1 August 2010 and reminded the US government to submit its report by that date and to include the information requested, including in paragraph 14.

In late December 2011, the US administration filed its fourth periodic report to the Committee (to be considered at an as yet unspecified date). On remedy in the counter-terrorism context, the US government's report notes that "the Committee has asked to be informed about the measures taken by the United States to ensure the respect of the right to reparation for the victims." The administration then proceeded to respond to paragraph 14 of the Committee's concerns from the 2006 session by providing some limited information on accountability, but no specific information on reparation or redress.

The Human Rights Committee has emphasised that the obligations of the ICCPR are binding on every State Party "as a whole":

> "All branches of government (executive, legislative and judicial)... are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from

responsibility for the action and consequent incompatibility".[65]

The Committee specifically reminded countries with a federal structure of government that the ICCPR's provisions "shall extend to all parts of federal states without any limitations or exceptions" and that article 2.3 of the ICCPR "requires that States Parties make reparation to individuals whose Covenant rights have been violated".[66] In addition to compensation, reparation, it said, can involve restitution, rehabilitation, and measures of satisfaction, such as public apologies, guarantees of non-repetition,[67] changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

Ultimately it is up to the USA how it creates the legal mechanism whereby victims of human rights violations can seek an effective remedy and reparation, in most if not all cases through some form of judicial proceeding. Currently, however, the three branches of government have combined to slam shut the door on detainees and former detainees having meaningful access to remedy for the abuses they say they have suffered as a result of US counter-terrorism policies. Even the much delayed and limited remedy of habeas corpus provided to those held at Guantánamo has been restricted in its scope, and effectively neutered in its power to obtain concrete results.[68]

The bottom line is that the USA is in breach of its international human rights obligations on remedy, as well as on accountability, in the counter-terrorism context. All branches of government must now cooperate to ensure that this continuing failure to meet US obligations is ended.

SELECTED AMNESTY INTERNATIONAL DOCUMENTS

USA: Guantánamo – A decade of damage to human rights. And 10 anti-human rights messages Guantánamo still sends, 16 December 2011, http://www.amnesty.org/en/library/info/AMR51/103/2011/en

USA: Remedy blocked again: Injustice continues as Supreme Court dismisses rendition case, 25 May 2011, http://www.amnesty.org/en/library/info/AMR51/044/2011/en

USA: See no evil: Government turns the other way as judges make findings about torture and other abuse, 3 February 2011, http://www.amnesty.org/en/library/info/AMR51/005/2011/en

USA: Another door closes on accountability. US Justice Department says no prosecutions for CIA destruction of interrogation tapes, 10 November 2010, http://www.amnesty.org/en/library/info/AMR51/104/2010/en

USA: Former President's defence of torture highlights need for criminal investigations, 9 November 2010, http://www.amnesty.org/en/library/info/AMR51/103/2010/en

USA: Shadow over justice: Absence of accountability and remedy casts shadow over opening of trial of former secret detainee accused in embassy bombings, 30 September 2010, http://www.amnesty.org/en/library/info/AMR51/094/2010/en

USA: Secrecy blocks accountability, again: Federal court dismisses 'rendition' lawsuit; points to avenues for non-judicial remedy, 8 September 2010, http://www.amnesty.org/en/library/info/AMR51/081/2010/en

USA: Normalizing delay, perpetuating injustice, undermining the 'rules of the road', 22 June 2010, http://www.amnesty.org/en/library/info/AMR51/053/2010/en

USA: Impunity for crimes in CIA secret detention program continues, 29 January 2010, http://www.amnesty.org/en/library/info/AMR51/008/2010/en

USA: Missing from the US 'human rights agenda': Accountability and remedy for 'war on terror' abuses, 20 January 2010, http://www.amnesty.org/en/library/info/AMR51/005/2010/en

USA: Blocked at every turn: The absence of effective remedy for counter-terrorism abuses, 30 November 2009, http://www.amnesty.org/en/library/info/AMR51/120/2009/en

USA: Detainees continue to bear costs of delay and lack of remedy. Minimal judicial review for Guantánamo detainees 10 months after *Boumediene*, 9 April 2009, http://www.amnesty.org/en/library/info/AMR51/050/2009/en

USA: Torture in black and white, but impunity continues: Department of Justice releases interrogation memorandums, 16 April 2009, http://www.amnesty.org/en/library/info/AMR51/055/2009/en

USA: Torture acknowledged, question of accountability remains, 14 January 2009, http://www.amnesty.org/en/library/info/AMR51/003/2009/en

USA: Investigation, prosecution, remedy: Accountability for human rights violations in the 'war on terror', 4 December 2008, http://www.amnesty.org/en/library/info/AMR51/151/2008/en

ENDNOTES

[1] The seven were former Secretary of Defense Donald Rumsfeld; former Deputy Secretary of Defense Paul Wolfowitz; former General Counsel to the Department of Defense William Haynes; former Director of the Defense Intelligence Agency Lowell Jacoby; and two former Commanders of the Consolidated Brig, Catherine Hanft and Melanie Marr. The seventh person named on the lawsuit was the current Secretary of Defense Leon Panetta, as the lawsuit also sought an injunction against Padilla's future designation as an "enemy combatant" (see note 67).

[2] *Lebron; Padilla v. Rumsfeld et al,* Brief of Plaintiffs-Appellants, US Court of Appeals for the Fourth Circuit, 13 June 2011.

[3] *Lebron; Padilla v. Rumsfeld et al*, US Court of Appeals for the Fourth Circuit, 23 January 2012.

[4] For example, see *Myers v. United States*, 272 U.S. 52 (1926) (Brandeis, J., dissenting). "The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

[5] From the "Ennis affidavit", cited in *USA v. Padilla*, Jose Padilla's motion to suppress physical evidence and issue writs and testificandum, US District Court for the Southern District of Florida, 31 May 2006.

[6] The CIA interrogation of Abu Zubaydah, March 2002 – January 2003, http://www.aclu.org/files/assets/CIA_Interrogation_of_AZ_released_04-15-10.pdf. An FBI interrogator involved in Abu Zubaydah's interrogation at the time he is said to have identified José Padilla has asserted that the Bush administration "publicly exaggerated Padilla's capabilities", and that whatever Padilla's intentions, there was "no unfolding ['dirty bomb'] plot". Ali Soufan, The Black Banners: The Inside Story of 9/11 and the War against Al-Qaeda (W.W. Norton, 2011), pages 380-381, 408 and 563.

[7] For example, see Interrogation of al Qaeda operative. Memorandum for John Rizzo, Acting General

Counsel of the Central Intelligence Agency. From Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002; Standards of conduct for interrogation under 18 U.S.C. §§2340-2340A. Memorandum for Alberto R. Gonzales, Counsel to the President, signed by Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002; Military interrogation of alien unlawful combatants held outside the United States. Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 14 March 2003.

[8] Memorandum to the Attorney General through the Deputy Attorney General: Determination of enemy belligerency and military detention. Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 8 June 2002.

[9] *Padilla v. Rumsfeld*, US Court of Appeals for the Second Circuit, 18 December 2003.

[10] Memorandum for the President. Decision re application of the Geneva Convention on Prisoners of War to the conflict with al Qaeda and the Taliban. Alberto R. Gonzales, 25 January 2002. The Geneva Conventions and their Additional Protocols form a core part of international humanitarian law, the body of international law that regulates the conduct of armed conflict.

[11] Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency, 9 January 2003 (Jacoby Declaration)

[12] Jacoby Declaration, *op. cit*.

[13] Jacoby Declaration, *op. cit*.

[14] Jacoby Declaration, *op. cit.*

[15] Interrogation of al Qaeda operative. Memorandum for John Rizzo, 1 August 2002, *op. cit*.

[16] For example, see Testimony of Ali Soufan, US Senate Committee on the Judiciary, 13 May 2009; Black banners, op. cit. pages 397-398, 414; The CIA interrogation of Abu Zubaydah, March 2002 – January 2003, *op. cit*.

[17] See Memorandum to Secretary of Defense from William J. Haynes, 27 November 2002, re: Counter-resistance techniques (signed by Secretary Rumsfeld on 2 December 2002).

[18] At a "counter-resistance" interrogation strategy meeting held at Guantánamo between various US government lawyers and military personnel on 2 October 2002, the participants discussed "ways to manipulate" the detainee's environment. Suggestions included that "truth serum" had a "placebo effect", and descriptions of sleep disruption in the form of allowing the detainee to rest "just long enough to fall asleep and wake him up about every thirty minutes and tell him it's time to pray again". The participants also discussed sleep deprivation (and the fact that it is being used against detainees in US custody in Bagram, Afghanistan). The Chief Counsel to the CIA's Counterterrorism Center asserted that while torture is prohibited under the UN Convention against Torture, US domestic law implementing the treaty was "written vaguely", and that the USA "did not sign up to" the international prohibition of cruel, inhuman or degrading treatment, giving it "more license to use more controversial techniques". Death threats, he said, should be "handled on a case by case basis". Counter Resistance strategy meeting minutes, 2 October 2002. Comments attributed to individuals are paraphrased in the record of this meeting.

[19] *Lebron; Padilla v. Rumsfeld et al*, Brief of plaintiffs-appellants, US Court of Appeals for the Fourth Cricuit, 13 June 2011.

[20] Jacoby Declaration, *op. cit.*

[21] See, for example, UN Doc. EC/N.4/2003/G/73, 7 April 2003. Letter dated 2 April 2003 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to

the secretariat of the Commission on Human Rights. ("There is broad authority under the laws and customs of war to detain enemy combatants, without any requirement to bring criminal charges while hostilities last… Likewise, under the laws and customs of war, detained enemy combatants have no right of access to counsel or the courts to challenge their detention.")

[22] Judge Mukasey subsequently was appointed to the position of US Attorney General, holding that position from November 2007 to January 2009. Since leaving office, he has been among those former administration officials who have promoted the use of "enhanced interrogation techniques" conducted against detainees held in secret detention, and has recommended the revival of such a program. See 'The waterboarding trail to bin Laden'. By Michael Mukasey, The Wall Street Journal, 6 May 2011.

[23] The AUMF remains today what the Obama administration cites as the source of its authority to indefinitely detain those still held at Guantánamo. USA: Doctrine of pervasive 'war' continues to undermine human rights. A reflection on the ninth anniversary of the AUMF, 15 September 2010, http://www.amnesty.org/en/library/info/AMR51/085/2010/en

[24] *Padilla v. Rumsfeld*, US Court of Appeals for the Second Circuit, 18 December 2003.

[25] Statement of Mark Corallo, Director of Public Affairs, on the Padilla decision. US Department of Justice news release, 18 December 2003, http://www.justice.gov/opa/pr/2003/December/03_opa_711.htm

[26] For example, see Section 4 of USA: No Substitute for habeas corpus: Six years without judicial review in Guantánamo, 1 November 2007, http://www.amnesty.org/en/library/info/AMR51/163/2007/en

[27] Padilla allowed access to lawyer. US Department of Defense News Release, 11 February 2004, http://www.defense.gov/releases/release.aspx?releaseid=7070

[28] "The Department of Justice is pleased the Supreme Court has granted the government's petition and will review the decision issued by the Second Circuit Court of Appeals in the Jose Padilla case. The President, acting as Commander in Chief in a time of war, determined that Padilla is closely associated with al Qaeda, an international terrorist organization with which the United States is at war…" Statement of Attorney General John Ashcroft regarding the Padilla case, US Department of Justice news release, 20 February 2004, http://www.justice.gov/opa/pr/2004/February/04_ag_102.htm

[29] *Hamdi v. Rumsfeld*, US Supreme Court, 28 June 2004.

[30] *Padilla v. Hanft*, US Court of Appeals for the Fourth Circuit, 9 September 2005.

[31] Statement of Attorney General Alberto R. Gonzales on the Padilla Decision, US Department of Justice news release, 9 September 2005, http://www.justice.gov/opa/pr/2005/September/05_ag_467.html

[32] *Padilla v. Hanft*, Order, US Court of Appeals for the Fourth Circuit, 21 December 2005.

[33] This claim relied upon comments in a US Supreme Court ruling, which noted that "we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction". *United States v. Russell*, 411 U.S. 423 (1973).

[34] *USA v. Padilla et al*, Order denying Padilla's motion to dismiss for outrageous government conduct. US District Court for the Southern District of Florida, 9 April 2007.

[35] *USA v. Jayyousi et al*, In the US Court of Appeals for the Eleventh Circuit, 19 September 2011. The alleged "dirty bomb" plot was not part of the government's case.

[36] *USA v. Jayyousi et al*, *op. cit.*, Judge Barkett dissenting.

[37] See also USA: See no evil: Government turns the other way as judges make findings about torture and other abuse, 3 February 2011, http://www.amnesty.org/en/library/info/AMR51/005/2011/en

[38] UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 2375 UNTS 237, 18 December 2002 (UNCAT), article 15; Human Rights Committee, General Comment no. 20 on the Prohibition of torture and other cruel, inhuman or degrading treatment or punishment under article 7 ICCPR (10 March 1992), para. 12 . General Comment no. 32 on the Right to equality before courts and tribunals and to a fair trial under article 14 ICCPR (23 August 2007), paras 6 and 41.

[39] See, among others, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005; Human Rights Committee, General Comment no. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (26 May 2004), paras 16 and 18).

[40] UNCAT, article 14(1). While article 14 refers to torture in particular, the right to remedy and reparation applies also to other cruel, inhuman or degrading treatment or punishment: see for instance Committee against Torture, *Hajrizi Dzemajl et al. v Yugoslavia*, UN Doc CAT/C/29/D/161/2000 (2 December 2002), para 9.6;; Human Rights Committee, General Comment no. 20 (1992), para 14; General Comment no. 31 (2004), para 16).

[41] *Padilla v. Rumsfeld et al*, Individual federal defendants' motion to dismiss plaintiffs' third amended complaint. In the US District Court for the District of South Carolina, 25 August 2008.

[42] Transcript of hearing, filed 17 February 2011.

[43] International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966; and General Comment 29 on States of Emergency, 31 August 2001, paras 7, 11, 13(a), 13(b), 16.

[44] *Lebron et al v. Rumsfeld et al*, Order, US District Court for the District of South Carolina, 17 February 2011.

[45] *Ibid*.

[46] The UN Human Rights Committee has found prolonged incommunicado detention, in and of itself, to violate the prohibition of torture and other ill-treatment: see, e.g., *Polay Campos v Peru* (6 November 1997) UN Doc CCPR/C/61/D/577/1994 para 8.6 [one year in duration]; *Aber v Algeria* (13 July 2007) UN Doc CCPR/C/90/D/1439/2005, para 7.3 [one period of twenty-one months, another of five months]; *Kulov v Kyrgyzstan* (26 July 2010) UN Doc CCPR/C/99/D/1369/2005 para 8.2 [one period of four and a half months, another of three months].

[47] *Lebron et al v. Rumsfeld et al*, Brief for Defendant-Appellee Donald H. Rumsfeld, US Court of Appeals for the Fourth Circuit, 11 July 2011.

[48] *Lebron et al. v. Rumsfeld et al*. Brief for defendants-appellees Hanft, Haynes, Jacoby, Marr, and Wolfowitz, US Court of Appeals for the Fourth Circuit, 11 July 2011.

[49] See USA: Guantánamo – A decade of damage to human rights, 16 December 2011, http://www.amnesty.org/en/library/info/AMR51/103/2011/en.

[50] *Lebron et al. v. Padilla et al*, Brief of the United States as amicus curiae. In the US Court of Appeals for the Fourth Circuit, 18 July 2011.

[51] E.g. Human Rights Committee, Concluding Observations on Israel 2003, paras 12-13; Concluding Observations on UK, UN Doc CCPR/CO/73/UK (6 December 2001) para 19; *Paul Kelly v Jamaica* (8 April 1991) UN Doc CCPR/C/41/D/253/1987 para 5.6; *Berry v Jamaica* (7 April 1994) UN Doc CCPR/C/50/D/330/1988 para 11.1; *Rafael Marques de Morais v Angola* (29 March 2005) UN Doc CCPR/C/83/D/1128/2002 paras 6.3 and 6.5 [ten days incommunicado detention]; *Umarova (re Umarov) v Uzbekistan* (19 October 2010) UN Doc CCPR/C/100/D/1449/2006 paras 8.5-8.6 [eleven days denial of contact with lawyer]; *Bousroual v Algeria* (30 March 2006) UN Doc CCPR/C/86/992/2001, paras 9.6

and 9.7 [33 days of incommunicado detention with no access to a lawyer].

[52]Article 9(4) of the ICCPR provides: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide *without delay* on the lawfulness of his detention and order his release if the detention is not lawful" [emphasis added]. The Human Rights Committee found a violation of article 9(4) in *Bandajevsky v Belarus* (28 March 2006) UN Doc CCPR/C/86/D/1100/2002 paras 10.2-10.4, where the claimant was held for 23 days on the authorization of a public prosecutor, under a decree providing for exceptional measures in the name of countering terrorism and other particularly dangerous violent crimes, during which time he was prohibited by the decree from challenging the lawfulness of his detention before a court. Regional courts applying similar provisions under the European and American human rights treaties (to which the USA is not a party) have found even shorter delays to be incompatible with the promptness requirement: see for instance European Court of Human Rights, *Çetinkaya and Çağlayan v Turkey*, App Nos 3921/02, 35003/02 and 17261/03 (23 January 2007) para 43 [six days]; Inter-American Court of Human Rights, *Chaparro Álvarez and Lapo Íñiguez v Ecuador*, Series C No 170 (21 November 2007) para 135 [nine days].

[53] See section 1004 of the DTA as further amended by section 8 of the MCA.

[54] *Lebron et al. v. Rumsfeld et al*, Brief of the United States as amicus curiae. In the US Court of Appeals for the Fourth Circuit, 18 July 2011.

[55] *Lebron et al v. Rumsfeld et al*, US Court of Appeals for the Fourth Circuit, 23 January 2012.

[56] "The Military Commissions Act of 2006 is one of the most important pieces of legislation in the war on terror. This bill will allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders…When I proposed this legislation, I explained that I would have one test for the bill Congress introduced: Will it allow the CIA program to continue? This bill meets that test." Remarks on signing the Military Commissions Act of 2006, President George W. Bush, 17 October 2006. See also USA: Law and executive disorder: President gives green light to secret detention program, 17 August 2007, http://www.amnesty.org/en/library/info/AMR51/135/2007/en

[57] *Lebron et al. v. Padilla et al*, Brief of the United States as amicus curiae, *op. cit*.

[58] See, e.g., Military interrogation of alien unlawful combatants held outside the United States. Memorandum for William J. Haynes II, General Counsel of the Department of Defense, signed by John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 14 March 2003. Also: Standards of conduct for interrogation under 18 U.S.C. §§2340-2340A. Memorandum for Alberto R. Gonzales, Counsel to the President, signed by Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002.

[59] *Padilla and Lebron v. Yoo*, Brief for appellant, In the US Court of Appeals for the Ninth Circuit, 9 November 2009.

[60] *Lebron et al. v. Rumsfeld et al*., Brief of the United States as *Amicus Curiae*, In the US Court of Appeals for the Fourth Circuit, 18 July 2011.

[61] Investigation into the Office of Legal Counsel's memoranda concerning issues relating to the Central Intelligence Agency's use of 'enhanced interrogation techniques' on suspected terrorists. Report of the Office of Professional Responsibility, US Department of Justice, 29 July 2009, page 11.

[62] Memorandum of decision regarding the objections to the findings of professional misconduct in the Office of Professional Responsibility's report of investigation into the Office of Legal Counsel's memoranda concerning issues relating to the Central Intelligence Agency's use of 'enhanced interrogation techniques' on suspected terrorists. David Margolis, Associate Deputy Attorney General, Office of the Deputy Attorney General, US Department of Justice, 5 January 2010.

[63] UN Doc: A/HRC/16/11/Add. 1. Report of the Working Group on the Universal Periodic Review. United States of America. Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies represented by the State under review.

[64] UN Doc.: CCPR/C/USA/CO/3/Rev.1, 18 December 2006. Consideration of reports submitted by States Parties under article 40 of the Covenant. Concluding observations of the Human Rights Committee: United States of America.

[65] Human Rights Committee, General Comment no. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (26 May 2004), para. 4.

[66] *Ibid.*

[67] Also named as a defendant on Padilla's lawsuit has been the current Secretary of Defense (Robert Gates and subsequently Leon Panetta). Padilla sought declaratory and injunctive relief based upon the fear that he could be redesignated as an "enemy combatant" at some point in the future. The District Court ruled that Padilla had failed to show that such an occurrence was "concrete and imminent". It should be noted that the Obama administration has adopted the Bush administration's global "war" paradigm and its view that such detainees can be held in indefinite military detention under the law of war. In the case of acquittal by military commission (or presumably after a sentence has been served by a detainee convicted by such tribunals), it reserves the right to return the detainee to indefinite detention under the "law of war". It has indicated that it also reserves the right to do this after an acquittal in federal District Court in the USA. At a military commission arraignment at Guantánamo on 9 November 2011, the following dialogue occurred between the military judge and a prosecutor from the US Department of Justice, Assistant US Attorney Anthony Mattivi. Military Judge, Colonel Pohl: "If the accused were acquitted today, there is no legal prohibition from the government to take him under the Authorization for Use of Military Force straight back to the cell he came from? Today." US Attorney Mattivi: "Today, just as if the same thing had happened to Mr Ghailani in the Southern District in the Article III case, that's absolutely correct". Ahmed Ghailani is to date the only Guantánamo detainee to have been transferred to the US mainland for prosecution. He was sentenced to life imprisonment in 2011.

[68] Despite assertions to the contrary; at the hearing in his court on 14 February 2011, for example, US District Court Judge Richard Gergel made the assertion: "[W]e can look in the last decade of these ['enemy combatant'] cases, certainly the great writ [habeas corpus] is alive and well". See also , USA: Detainees continue to bear costs of delay and lack of remedy. Minimal judicial review for Guantánamo detainees 10 months after *Boumediene*, 9 April 2009, http://www.amnesty.org/en/library/info/AMR51/050/2009/en. Also Guantánamo – A decade of damage to human rights, *op. cit.*