UNITED STATES OF AMERICA

Appealing for justice: Supreme Court hears arguments against the detention of Yaser Esam Hamdi and José Padilla

For more than two years the United States government has exercised unfettered executive power to hold hundreds of foreign nationals as "enemy combatants" without charge or trial or access to the courts, lawyers or their families in the US naval base in Guant<namo Bay, Cuba. The government has claimed similar executive authority to detain three individuals, including two US citizens, without charge or trial in military custody on the US mainland. All such detentions are in flagrant disregard of basic principles of international law.

The US authorities have argued that the US courts do not have jurisdiction to consider appeals from the Guant<namo detainees – an issue which is currently being considered by the US Supreme Court. The government has been unable to apply this argument to detainees held in the USA, but nevertheless claims it has the executive authority to detain them indefinitely with only limited judicial review. On 28 April 2004, the Supreme Court heard oral arguments in the cases of two of the detainees in the USA – Yaser Hamdi and José Padilla. The outcome will be an important landmark in defining the scope of executive power to detain US citizens in extrajudicial military detention.

"Enemy combatants" on US soil

Yaser Hamdi and José Padilla, both US citizens, are being held without charge or trial in solitary confinement in a US military prison in Charleston, South Carolina. Yaser Hamdi was taken into custody during the war in Afghanistan and transferred to the USA, via Guantánamo, in April 2002. José Padilla was arrested at Chicago airport in May 2002 and transferred from civilian to military custody in June 2002. The International Committee of the Red Cross (ICRC) is reported to have recently visited Hamdi and Padilla in detention but the findings of such visits are not publicly reported. For most of their detention they have been held with no access to the outside world, including their families, and have only recently been granted limited visits with their attorneys.

A third man, Ali Saleh Kahlah al-Marri, a Qatari national, has also been held in military custody in South Carolina without charge or trial since June 2003. Although lawyers have filed a *habeas corpus* petition on his behalf, this has not yet reached the US Supreme Court. However, the decision in the Hamdi and Padilla cases could have an impact on the legality of his detention. Meanwhile, he remains without access to his attorney. He is also believed to have been visited by the ICRC.

The US government maintains that it is entitled to detain the above individuals as "enemy combatants" in the context of the ongoing threat from *al-Qa'ida*, under the President's wartime powers as Commander-in-Chief, and to hold them "for the duration of the hostilities". The government further contends that such action was validated by Congress

when it passed a joint resolution authorizing the use of "all necessary and appropriate force" against those responsible for the attacks of 11 September 2001 and other acts of international terrorism (Authorization for Use of Military Force, 14 September 2001).

As attorneys for the detainees have pointed out, the open-ended nature of the "hostilities" referred to could mean Yaser Hamdi and José Padilla are detained indefinitely.

Petitions for *habeas corpus* were filed separately on behalf of Hamdi and Padilla, although the arguments in both cases are similar. The petitions contend that the detentions violate the US constitution and that the President has no inherent authority to detain US citizens indefinitely without charge or trial and with no judicial review of the legality of such detention. They also contend that the Authorization of Force passed by Congress conferred no such sweeping authority in the absence of specific statutory powers. It is further argued that the US government was in breach of its obligations under the Geneva Conventions and US military regulations in failing to provide Yaser Hamdi with a hearing after he was captured in Afghanistan and denied prisoner of war status.

The cases have thus far resulted in two widely differing opinions from the US appeals courts and it is these decisions, summarized below, which the Supreme Court has agreed to review:

In January 2003 the US Court of Appeal for the Fourth Circuit ruled that it was "undisputed that Hamdi was captured in an active zone of conflict" and supported the US government's contention that, under the President's war powers, Hamdi could be detained indefinitely with only limited judicial review based on minimal information contained in a two-page declaration by a Department of Defense advisor (Mobbs declaration, see below). The US Supreme Court agreed to hear an appeal against this ruling, and oral arguments took place on 28 April 2004.

In December 2003, the US Court of Appeals for the Second Circuit ruled that the US government had no inherent constitutional authority to detain José Padilla without charge or trial outside a combat zone. The court ruled that he should be released within 30 days or transferred to civilian custody where he could be charged, and that "under any scenario" he was entitled to the constitutional protections extended to other citizens. His release was put on hold, pending a government appeal against the decision. It is this appeal which is currently under consideration by the US Supreme Court.

Numerous organizations and individuals have filed *amicus curiae* (friend of the court) briefs to the US Supreme Court on behalf of the detainees. These include experts on the laws of war and international law, former law enforcement and intelligence officials, jurists (including former federal judges), the American Bar Association and leading US civil rights organizations.

At the oral arguments on 28 April 2004 in the US Supreme Court, both parties in both cases were closely questioned by the Justices.[1] In the Hamdi case, for example, Justice

[1] The oral arguments can be heard on http://www.oyez.org/oyez/resource/case/1723/audioresources and http://www.oyez.org/oyez/resource/case/1730/audioresources

Ginsburg asked how the government justified its apparent inconsistencies in its approach to different detainees. For example, John Walker Lindh, a US citizen, captured in Afghanistan in apparently similar circumstances to Yaser Hamdi, was given a lawyer, brought to court, and sentenced to a prison term under a plea bargain. For the government, Deputy Solicitor General Paul D. Clement responded that this differentiated approach "reflects the sound exercise of prosecutorial and executive function". In his summing up for the petitioner, public defender Frank Dunham said: "Mr Clement is a worthy advocate and he can stand up here and make the unreasonable sound reasonable. But when you take his argument at core, it is "trust us". And who is saying trust us? The executive branch…". He concluded: "I would urge the court to find that citizens can only be detained by law. And here there is no law. If there is any law at all, it is the executive's own secret definition of whatever enemy combatant is".

Trust in the executive is also what the government is asking for in the Padilla case. Deputy Solicitor General Clement, when asked what constraints were placed on the executive, argued to the Justices: "You have to recognize that in a situation where the government is on a war footing, you have to trust the executive." For Padilla, law professor Jennifer Martinez argued: "Even in wartime, America has always been a nation governed by the rule of law. Today the government asks this Court for a broad ruling that would allow the President unlimited power to imprison any American anywhere at any time without trial simply by labelling him an enemy combatant… Mr Padilla is entitled to be charged with a crime and to have his day in court."

The US Supreme Court is expected to issue its decision at the end of June 2004.

Padilla and Hamdi have been denied access to their legal counsel for most of their detention in US custody. It was not until December 2003 that the US government decided to allow the lawyer representing Yaser Hamdi (a court-appointed public defender) to visit him "subject to appropriate security restrictions". For the first time in more than two years of detention, Hamdi met with his attorney on 2 February and 2 March 2004. Military observers reportedly attended the first visit and recorded the meeting, and the lawyer was not able to question him about his conditions of detention. The second visit was reportedly unmonitored.

Although a federal district court ruled in December 2002 that Padilla was entitled to see his lawyer, access was not granted by the government until February 2004. Padilla's lawyer visited him in March 2004. She told Amnesty International that the meeting was video-taped and guards remained outside and inside the visiting room. She was barred from discussing Padilla's conditions of detention.

International standards

The oral arguments heard by the US Supreme Court on 28 April dealt mainly with issues relating to US constitutional rather than international law, although the latter will form part of the case and has been addressed in various *amicus curiae* briefs as well in the parts of the Hamdi briefs relating to the Geneva Convention. As Amnesty International has stated in previous reports and appeals in these cases, it considers that the detentions of Yaser Hamdi and José Padilla, as well as Ali Saleh Kahlad al-Marri, violate fundamental principles of international human rights and humanitarian law, in particular the prohibition against arbitrary detention.

It is a basic principle of international law that no-one may be arbitrarily deprived of liberty. Article 9 (1) of the International Covenant on Civil and Political Rights (ICCPR), to which the USA is a party, provides that "[e]veryone has the right to liberty and security of the person. No-one shall be subjected to arbitrary arrest or detention". A basic safeguard against arbitrary detention is the right to judicial review. Article 9(4) of the ICCPR states: "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 the detention and order his release if the detention is unlawful."

The Human Rights Committee, the UN body which monitors states' compliance with the ICCPR, has stressed that this important guarantee "applies to all persons deprived of their liberty by arrest or detention" and has stated that the right to take proceedings to enable a court to decide without delay on the lawfulness of the detention, is non-derogable, even in states of emergency.[2] The Committee has stated that even if so-called preventive detention is used for reasons of public security, it must be controlled by the provisions of Article 9 of the ICCPR.

In December 2002 the United Nations (UN) Working Group against Arbitrary Detention issued an opinion finding that the detentions of Yaser Hamdi and José Padilla were arbitrary with regard to articles 9 and 14 (right to fair trial) of the ICCPR, noting that at that time they had been held for 14 months "apparently in solitary confinement, without having been officially informed of any charge, without being able to communicate with their families and without a court being asked to rule on the lawfulness of their detention." [3]

[2] Human Rights Committee General Comments on the ICCPR no 8, 30 June 1982 and no 29, 31 August 2001. Article 7 (6) of the American Convention on Human Rights (ACHR), signed by the USA provides the same right to judicial review, which also cannot be suspended even in states of emergency.

[3] E/CN.4/2003/8, 16 December 2002.

Although the cases are now before the US courts, the detainees remain deprived of fundamental rights. Not only has the government failed to charge or try them, but it has actively hindered the process of judicial review by failing to provide the courts with a detailed factual basis for the detentions. It has also failed to provide the detainees with a meaningful opportunity to challenge their detentions by refusing to allow them to participate in the proceedings and failing to provide adequate access to counsel.

When the government finally granted Hamdi and Padilla limited access to their lawyers – after some two years of delay – it declared that this was a discretionary decision "not required by domestic or international law and should not be treated as a precedent". However, access to counsel is an essential component of the right to seek judicial review of the lawfulness of a detention. International standards are clear that access to attorneys must be provided at every stage of arrest or detention, not just when an individual is facing criminal charges. The standards provide that such access should be granted without delay and in full confidentiality.[4]

Few details have been provided about the conditions under which the detainees are being held at the Charleston naval facility. However, prolonged solitary confinement and denial of access to their families may have serious consequences for the detainees' physical and mental health and such conditions may constitute cruel, inhuman or degrading treatment. Incommunicado detention has been condemned by human rights bodies, including the UN Commission on Human Rights and the UN Special Rapporteur on Torture, as a human rights violation which can lead to other violations such as torture or ill-treatment. Amnesty International is concerned that lawyers for Hamdi and Padilla are reportedly limited during visits to discussing the legal case, not their clients' conditions of detention, and is urging that these restrictions be immediately rescinded.

Amnesty International understands that Ali Saleh Kahlah al-Marri has not had access to a Qatari consular official since his transfer to military detention in June 2003 (he reportedly had such access before his transfer, when he was held as a criminal defendant in a federal correctional facility). If he is being denied access to a consular official while in military

[4] For example, Principle 7 of the UN Basic Principles on the Role of Lawyers states: "Governments shall …ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest and detention". The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by consensus by the UN General Assembly in 1988, states that access to a lawyer may be restricted in the most exceptional circumstances "to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority to maintain security or good order" but that, even here, this should not be delayed beyond a few days. Principle 8 of the Basic Principles on the Role of Lawyers states: "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials."

detention, absent an express wish that he does not wish such access, this would be in violation of the USA's obligations under Article 36 of the Vienna Convention on Consular Relations, which the US ratified without reservations in 1969.[5]

Geneva Conventions and laws of war

As Yaser Hamdi was detained during the war in Afghanistan, reportedly after surrendering to the Northern Alliance forces in late 2001, he was entitled to the protections of the Geneva Conventions while being held in the context of that conflict. However, the US government refused to grant him prisoner of war status or, in case of doubt, allow his status to be determined by a competent tribunal, as required under Article 5 of the Third Geneva Convention.[6] Although the US government claims Hamdi was "affiliated" with the Taliban, his role in Afghanistan and the exact circumstances of his surrender remain unclear and have never been examined by any court or independent body.

The US government has argued that Article 5 applies only where there is "doubt" as to whether a detainee is entitled to prisoner of war status and that "no such doubt exists here because the President has conclusively determined that al-Qaeda and Taleban detainees are not entitled to those privileges".[7] However, as Amnesty International has previously reported with regard to the Guantánamo detainees, authoritative international bodies have emphasised that the competent authority to make such a determination is not the executive, but the judiciary.[8]

As the international armed conflict in Afghanistan has ended, Amnesty International has submitted that the USA has no authority to continue to hold any of those arrested as combatants in that war, unless they are charged with recognizably criminal offences and tried before a fair procedure.[9] The US government cannot claim open-ended "war powers" outside the situation of armed conflict specified in the Geneva Conventions to bypass the norms of law enforcement and the criminal justice system.[10]

[5] Article 36(c) of the Convention provides that "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation ... consular officials shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action".

[6] Under Article 4 of the Third Geneva Convention members of the armed forces of a party to an international armed conflict, as well as members of militias or volunteer corps forming part of such armed forces, are entitled to be granted prisoner of war status. Under Article 5 of the Third Geneva Convention any dispute about the status of those taken into custody during such armed conflict must be determined on a case by case basis by a "competent tribunal", operating through due process.

[7] Brief for the Respondents in the US Supreme Court in *Hamdi v Rumsfeld*, March 2004

[8] The UN Working Group on Arbitrary Detention has noted that "the authority which is competent to determine prisoner-of-war status is not the executive power, but the judicial power"(E/CN.4/2003/8, 16 December 2002

[9] While internal conflict has continued in parts of the country and US troops remain on the ground, the international armed conflict in Afghanistan ended during 2002 with the defeat of the Taleban and the

Right to fair trial

Safeguards for a fair trial contained under Article 14 of the ICCPR and other international treaties or instruments include the right of an accused person to be presumed innocent until proved guilty according to law; to be informed of the nature and cause of any charges; to have adequate facilities for the preparation his or her defence and to communicate with counsel; and not to be compelled to testify against himself or herself or to confess guilt. It has been firmly established that individuals accused of the most serious crimes, including war crimes and crimes against humanity, are entitled to due process safeguards under international law.

José Padilla and Al-Marri were arrested in the USA on suspicion of criminal offences and were subject to proceedings under the US justice system when the US government designated them "enemy combatants". Their removal from the US criminal justice system has denied them the due process safeguards available to all other criminal defendants in the USA and is contrary to the right to equality of treatment, recognized in Article 14 (1) of the ICCPR.[11]

It appears that, throughout their incommunicado detention, all three detainees have been subjected to repeated interrogation by US officials for intelligence and security purposes. While the government has stated that they are not being questioned for prosecutorial purposes, Amnesty International is concerned by the possible implications of such questioning, outside the presence of their attorneys and under what may amount to coercive conditions, in any future criminal proceedings. Any information obtained from them or others in violation of safeguards under international law must be excluded from such proceedings. Anyone suspected of a criminal offence has the right not to be questioned without his or her counsel being present and before being informed or his or her rights. It is also a fundamental right under US and international law that no-one shall be tried or convicted on the basis of evidence extracted under torture or as a result of ill-treatment or other coercive conditions.

installation of an interim government allied to the USA (see for example *Beyond the Law*, AI Index AMR 51/184/02).

[10] Previous Amnesty International reports on the Guantánamo and other detainees have dealt with this in more detail, see for example *USA:Beyond the Law*, op cit, and *USA: The Threat of a bad example*, AI Index AMR 51/114/2003.

[11] Article 14(1) of the ICCPR states *inter alia*: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

Amnesty International considers that the very existence of a "parallel" system by which individuals can be held under executive, rather than judicial, authority has a corrosive effect on the criminal justice system. Apart from denial of basic rights to those held in indefinite, extrajudicial military custody, one risk is that individuals in the criminal system may be effectively "coerced" into guilty pleas or incriminating others under the threat of removal to such custody.[12] Such a "parallel" system can only undermine public confidence in the criminal justice system and the rule of law.

The US Supreme Court's decision on the Hamdi and Padilla cases, following oral arguments on 28 April, is expected to be handed down within the next few months. In the meantime, Amnesty International calls on the US government to act now to fulfil its obligations under international law and, in particular:

- Take the necessary steps to ensure that the detainees are either charged with recognizably criminal offences and brought to trial within a reasonable time in proceedings that fully meet international norms, or else released.

- Provide Yaser Hamdi, José Padilla and Ali Saleh Kahlad al-Marri with immediate, confidential and continuing access to lawyers; permit visits with their families while they remain in detention; provide Ali Saleh Kahlad al-Marri with access to consular assistance if requested.

- Lift any restrictions preventing the detainees from reporting on their conditions of detention and other treatment;

- Ensure that information obtained without due process guarantees is not admitted as evidence in any subsequent criminal proceedings.

Further background on the cases is given below.

Yaser Esam Hamdi

"*The government has acknowledged, and the conditions of confinement confirm, that Hamdi is not being held as an ordinary prisoner of war. On the contrary, his prolonged solitary confinement amounts to punishment as a criminal serving an indeterminate sentence without a trial or due process*". (Brief for the petitioners in *Hamdi v Rumseld*, Feb 2004).

[12] This is alleged to have already happened in the case of the "Lackawanna Six", six young men arrested in New York State who pled guilty to terrorism charges and accepted prison terms of nine years in 2003. Statements from their lawyers suggested their clients' fear of being removed from the criminal justice system had been a factor in the guilty pleas. The Chairman of the American Bar Association's Task Force on enemy combatants said: "The defendants believed that if they didn't plead guilty, they'd end up in a black hole forever. There's little difference between beating someone over the head and making a threat like that". (Washington Post, 29 July 2003)

According to the limited information provided by the US government in response to the *habeas corpus* petition brought on behalf of Yaser al-Hamdi, Hamdi entered Afghanistan during the summer of 2001 and surrendered to the Northern Alliance forces, along with a Taliban unit, in late 2001. He was transferred to the Northern Alliance-controlled Sheberghan prison and then to a US detention facility in Kandahar before being sent to Guant<namo Bay, Cuba, where he was held for four months. However in April 2002, authorities discovered a birth certificate confirming his claim to be a US citizen, born in Louisiana to Saudi Arabian parents. That same month he was flown to the USA where he has been held in military detention as an "enemy combatant" ever since. He is currently held in the Naval Consolidated Brig (military prison) in Charleston, South Carolina.

In June 2002, Yaser Hamdi's father, Esam Fouad Hamdi, filed a *habeas corpus* petition as "next friend" which alleged that his son was held in violation of his constitutional rights as a US citizen. The same month a district court appointed a public defender to represent Hamdi and ordered unmonitored access to him; however this was put on hold by the court of appeal pending further, limited, judicial inquiry into the legality of Hamdi's detention.

In August 2002, a federal district court ruled that a two-page declaration submitted by the government to support Yaser Hamdi's detention provided an insufficient factual basis for any meaningful judicial review. This was a declaration by Michael H. Mobbs, a Department of Defense Advisor, which gave information only to the effect that Hamdi was detained in Afghanistan and was affiliated with a Taliban military unit and received weapons training. However, the government appealed and on 8 January 2003, the US Court of Appeals for the Fourth Circuit reversed the lower court's decision.

In its ruling, a three-judge panel of the Fourth Circuit held that it was "undisputed that Hamdi was captured in an active zone of conflict" and supported the US administration's argument that, under the President's war powers, Hamdi could be held indefinitely and without the usual legal rights due to a US citizen. Although the court said that US citizens retained the right to *habeas corpus* in such circumstances, it found that the government was entitled to detain Yaser Hamdi on the basis of the very limited information provided in the Mobbs Declaration.[13] The court also upheld the right of the US government to deny Hamdi access to an attorney.

Hamdi's lawyer argued that this decision not only "embraced an unchecked executive power to indefinitely detain American citizens suspected of being affiliated with enemies, but it also abandoned procedural safeguards designed to promote truth and fairness."

[13] The Fourth Circuit's ruling, while deterring to the government's wartime powers, chose not to consider the status of the conflict in Afghanistan, or whether there was, by now, any cessation of the "hostilities" on which the government's argument was based – stating that this, too, was a matter for the executive alone to decide. The court also held that the Geneva Conventions, to which the US is a State Party, did not confer any rights that Hamdi could pursue in a habeas action as the Conventions were not self-executing (ie would need enabling legislation to enforce them through individual petition to the US courts).

In July 2003, the Fourth Circuit Court of Appeals rejected an appeal for the full court to reconsider the decision. Judge Motz, dissenting, said that the original panel decision has marked "the first time in our history that a federal court has approved the elimination of protections afforded a citizen by the Constitution solely on the basis of the Executive's designation of that citizen as an "enemy combatant", without testing the accuracy of that designation".[14]

The case is now before the US Supreme Court.

Yaser Hamdi was only given access to his lawyer "subject to appropriate security restrictions" after two years of incommunicado detention. In making this announcement on 2 December 2003, the Pentagon stressed that it was allowing Hamdi access to counsel "as a matter of discretion and military policy; such access is not required by domestic or international law and should not be treated as a precedent."

After more that two years of representing a client he had never seen, Hamdi's lawyer finally met him on 3 February 2004, stating afterwards "I'm sure I made an impression on a client who has been looking down a lightless tunnel for two and a half years, not knowing anyone is doing anything for him." Under guidelines drafted by Pentagon lawyers, military observers attended and recorded the meeting and the lawyer was not allowed to question him about the conditions of his confinement. Subsequent visits reportedly take place in private and are limited to issues relating to his legal case.

During the oral arguments on the Hamdi case in the US Supreme Court on 28 April 2004, Justice Stevens asked Yaser Hamdi's lawyer, Frank Dunham, whether he contested any of "the facts" in the Mobbs' declaration. Frank Dunham responded that he had only been able to talk to his client recently, and that anyway the government had told him that all their lawyer/client communications were classified: "Everything he has told me they tell me is classified, so I'm not allowed to convey it to the court this morning. The best I can say is in an overall general way there is a substantial dispute." The lawyer was unable to provide any details.

José Padilla

José Padilla, a US citizen born in New York, was arrested at Chicago airport by civilian authorities on 8 May 2002 on alleged suspicion of conspiracy to detonate a radioactive "dirty bomb" in a US city. He was originally held in New York in the custody of the Justice Department as a "material witness" in a grand jury probe and given access to an attorney.

However, on 9 June 2002, two days before a court hearing on his case and without his lawyer being informed, he was abruptly transferred to the custody of the Department of Defence and taken to military custody in Charleston, South Carolina. This transfer outside of the criminal justice system was made on the basis of a one-page order signed by President Bush which designated Padilla to be an "enemy combatant", closely associated with *al-*

[14] Hamdi v Rumsfeld, US Court of Appeals for the Fourth Circuit, 9 July 2003. Denial of petition for rehearing *en banc*.

Qa'ida, whose detention was said to be necessary to prevent him from aiding an attack on the United States. Further limited information, based on unnamed sources, was provided in a five-page declaration by special adviser Michael H Mobbs.

Padilla's lawyer challenged the legal basis for his detention and also sought access to him. In December 2002 a district court upheld the president's authority to detain "enemy combatants", even if they were US citizens, with only limited judicial review. However, the court ruled that Padilla was entitled to consult with, and be visited by, his lawyer in order to have some opportunity to present facts to rebut the government's evidence. The government appealed the latter decision on the ground that granting Padilla access to an attorney would undermine the "trust and dependency" on the military that is "essential to effective interrogation".[15]

Following further legal challenges to his detention as an "enemy combatant", the US Court of Appeals for the Second Circuit ruled on 18 December 2003 that the US government had no inherent constitutional authority to detain Padilla, concluding that the President must seek clear congressional authority to detain American citizens on US soil outside a zone of combat. The court said that "under any scenario, Padilla will be entitled to the constitutional protections extended to other citizens".

The court further ordered that he should be released within 30 days unless transferred to civilian custody where he could be charged with a criminal offence and granted access to all constitutional protections afforded to other citizens. José Padilla remains in detention pending the US government's appeal of this ruling. His case was heard before the Supreme Court on 28 April 2004.

Despite the December 2002 district court ruling that José Padilla was entitled to consult with, and be visited by, his lawyer, it was not until 11 February 2004 that the US Department of Defence changed its policy, announcing that he would be granted access to his lawyer "subject to appropriate security restrictions" and all conversations would be monitored by Pentagon officials. The first three-hour meeting with his lawyers took place in March 2004. His attorney has stated that she was unable to discuss his legal case in detail in the presence of monitors and simply advised him of the proceedings undertaken on his behalf.

Ali Saleh Kahlah al-Marri – Transferred from the criminal justice system

Ali Saleh Kahlad al-Marri is a foreign student from Qatar and the first non-US citizen to be held in the US as an "enemy combatant". Al-Marri legally entered the USA on 10 September 2001 with his wife and children, reportedly in order to obtain his master's degree following earlier studies in the USA. On 12 December 2001 he was arrested and held as a material witness in the investigation into the September 11 attacks on the Pentagon and World Trade

[15] Respondents' Motion for Reconsideration in Part, Padilla v Rumsfeld, US District Court for Southern District of New York

Center. In January and February 2002 he was indicted on charges relating to credit card fraud and making false statements to the FBI, charges to which he pled not guilty.

On 23 June 2003, less than a month before al-Marri was scheduled to be tried, President Bush announced in a one-page order that he had designated al-Marri an 'enemy combatant' and he was transferred from the control of the Department of Justice to incommunicado solitary confinement in the Naval Consolidated Brig in Charleston, South Carolina.

Al-Marri's lawyer filed a *habeus corpus* petition on his behalf in which Al-Marri challenged the legality of his detention as an "enemy combatant" and sought access to counsel, access to Qatari consular offices and access to representatives of the ICRC as well as conditions of confinement not harmful to his mental or physical wellbeing. The petition was filed in federal district court in Peoria, Illinois, where Al-Marri had been due to stand trial. In August 2003 the Illinois court ruled that the proper venue for hearing the petition was South Carolina, the district where he was being held. An appeal in the case was still pending in April 2004. Although the ICRC is believed to have visited Al-Marri since the district court's decision, Al-Marri had still not had access to his lawyer at the end of April 2004.