

U.S. CITIZENS WITH ALLEGED LINKS TO AL QAEDA

JOSÉ PADILLA

José Padilla, a Brooklyn-born U.S. citizen, was arrested on May 8, 2002, at Chicago's O'Hare airport, on arrival from Pakistan. Administration spokesmen said the arrest was based on information obtained from the interrogation of Abu Zubaydah, a senior al Qaeda leader in U.S. custody.

The administration asserts that Padilla had contact with al Qaeda in Pakistan and may have been part of a plot to bomb an unspecified target in the United States. Padilla was held for one month as a material witness, in connection with this alleged plot to create and detonate a conventional explosive containing radioactive materials in an urban area — a “dirty bomb.” In June 2002 he was transferred to military custody based on a presidential determination that he was an “enemy combatant.”¹

Padilla's transfer to military custody, and his designation as an “enemy combatant,” came promptly after Judge Michael Mukasey, of the United States District Court for the Southern District of New York, indicated Padilla would either have to be charged or released, thus ending his indefinite detention as a material witness. The administration invoked the designation “enemy combatant” to limit the role of courts in assessing the basis for Padilla's detention.

In June 2002, Padilla's lawyers filed a petition for habeas corpus, asserting their client's right to meet with his legal representatives. Although Padilla had met with his public defenders when held as a material witness, since his transfer to military custody, he has been denied access to his attorneys. In their petition, his lawyers also challenged the factual basis to Padilla's designation as an “enemy combatant” and urged the court to examine the facts leading to that designation.

At issue is the power of the Executive Branch to identify an American citizen as an agent of an enemy and on that basis to strip that citizen of his or her liberty and other rights under U.S. law. In such cases, the executive has argued that the federal courts must defer to the President's determination as to who is an “enemy combatant.”

On December 4, 2002, Judge Mukasey issued a 102-page opinion in the Padilla case.² He affirmed Padilla's right to consult with his attorneys. Yet the government continues to resist the court's order. On January 9, 2003, the government filed a motion for reconsideration, insisting that allowing Padilla to talk with his lawyers could “set back his interrogation by months, if not derail the process permanently....[by interfering with] the military's efforts to develop a relationship of trust and dependency that is essential to

¹ The June 9, 2002 Order designating Padilla as an “enemy combatant” is available at <http://news.findlaw.com/hdocs/docs/terrorism/padillabush60902det.pdf> (accessed March 7, 2003).

² The entire opinion, *José Padilla v. George Bush, et al.*, and certain other documents relating to the case, are available at <http://news.findlaw.com/legalnews/us/terrorism/cases/index.html> (accessed January 27, 2003). Some other materials on the case, not available on the findlaw site, can be accessed through the National Institution of Military Justice website, available at <http://www.nimj.com>.

effective interrogation.”³ A response was filed on January 13, and oral argument was held two days later. Though no ruling has yet issued, at least one news report speculates that Judge Mukasey may be losing patience with the government’s refusal to cooperate with his order.⁴

Judge Mukasey supported the government’s assertion that the law does not bar Padilla’s confinement. At issue in this ruling is a federal statute, 18 U.S.C. § 4001(a), which provides that “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”⁵

While rejecting the government’s view that this statute is not applicable to “enemy combatant” detentions, the court concluded that Senate Joint Resolution 23 (“Authorization for Use of Military Force”) signed by President Bush on September 18, 2002, provides an adequate authorizing act of Congress. The Joint Resolution authorizes the President to “use all necessary and appropriate force against those...organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001...in order to prevent any future acts of international terrorism against the United States by such...organizations or persons.”⁶

It is unclear whether Congress intended this resolution to give consent to the arrest and indefinite detention of U.S. citizens, particularly citizens arrested within the United States. This issue is likely to be addressed on appeal in the Padilla case.

Judge Mukasey also gave broad deference to the government’s factual determinations. He held that it was outside the court’s purview to decide “*de novo* whether Padilla is associated with al Qaeda and whether he should therefore be detained as an unlawful combatant.” Rather, the court’s responsibility:

runs only to deciding two things: (i) whether the controlling political authority – in this case the President – was in fact exercising a power vouchsafed to him by the Constitution and the laws; that determination in turn is to be made only by examining whether there is some evidence to support his conclusion that Padilla was, like the [World War II] German

³ Benjamin Weiser, “Lawyers Renew Plea to Meet Terror Suspect in Navy Brig,” *New York Times*, January 14, 2003.

⁴ At one point, Judge Mukasey reportedly exclaimed, “I gather from the papers that have been submitted...that the government has no intention of allowing that [*i.e.*, meetings with Padilla] to happen, at least not voluntarily.” Benjamin Weiser, “Judge Is Angered by U.S. Stance In Case of ‘Dirty Bomb’ Suspect,” *New York Times*, January 16, 2003.

⁵ The text of the statute is available at http://caselaw.lp.findlaw.com/scripts/ts_search.pl?title=18&sec=4001 (accessed January 27, 2003).

⁶ P.L. No. 107-40, § 2(a)(2001), available at <http://jurist.law.pitt.edu/terrorism/sjres23.htm> (accessed January 27, 2003). Section 4001(a), passed in 1971 “amid mounting public pressure during the Vietnam War...represented a legislative response to the outrage over the executive interment of Japanese Americans during World War II, detentions carried out pursuant only to a presidential order.” Stephen I. Vladeck, “A Small Problem of Precedent: 18 U.S.C. § 4001(a) and the Detention of U.S. Citizen ‘Enemy Combatants,’” 112 *Yale Law Journal* 961, January 2003.

saboteurs in *Quirin*, engaged in a mission against the United States on behalf of an enemy with whom the United States is at war, and (ii) whether that evidence has not been entirely mooted by subsequent events.⁷

This “some evidence” standard Judge Mukasey refers to is lower than “probable cause” (*i.e.*, “more likely than not”), the normal burden in a *civil* lawsuit, and substantially less stringent than the “beyond a reasonable doubt” standard required in *criminal* cases.

Moreover, the invocation of *Quirin*⁸ is misleading. *Quirin* was a World War II case in which the Supreme Court upheld the conviction by military commission of eight German soldiers (at least one, a U.S. citizen) who landed from submarines onto shore in New York and Florida, with the intent to commit sabotage in the United States. In *Quirin*, there was *no factual dispute whatsoever* regarding either the “combatant” status of the German defendants or their preparations to commit sabotage within the United States. By contrast, the central issue in the Padilla case is the factual determination of his “enemy combatant” status. Moreover, there was never a claim in the *Quirin* case that the defendants were not entitled to a trial, and the *Quirin* defendants were tried by a military commission. Yet in the Padilla case, the government argues that it has discretion to detain Padilla indefinitely without charge.

On February 7, 2003, at the court’s direction, Padilla’s lawyers filed a Memorandum of Law contesting the appropriateness of the “some evidence” standard.⁹ The Memorandum highlights the fact that “[t]here has never been a case, in nearly a century of federal jurisdiction, in which the government has asked a court to find ‘some evidence’ based on a record in which the claimant had no right to participate.” The Memorandum urged the court to employ a standard of review requiring the government to demonstrate Padilla’s “enemy combatant” status by “clear and convincing evidence,” a standard somewhere between “probable cause” and “beyond a reasonable doubt.”¹⁰

⁷ *José Padilla v. George Bush, et al.*

⁸ *Ex Parte Quirin*, 317 U.S. 1 (1942), available at

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=317&invol=1> (accessed February 12, 2003). Due to the rushed pace of the proceedings (less than nine weeks from landing to execution of six of the saboteurs), the *Quirin* case has received much criticism from commentators. It is often mentioned together with another much criticized World War II Supreme Court case, *Korematsu v. United States*, 323 U.S. 214 (1944), which upheld President Roosevelt’s authority to order the internment of tens of thousands of citizens and non-citizens of Japanese extraction. *Korematsu* is available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=323&invol=214> (accessed February 12, 2003). A good analysis of the *Quirin* case is Louis Fisher, “Military Tribunals: The *Quirin* Precedent,” *Congressional Research Service Report for Congress*, RL31340, March 26, 2002, available at <http://www.au.af.mil/au/awc/awcgate/crs/rl31340.pdf> (accessed February 13, 2003).

⁹ The Memorandum of Law is available through the website of the National Institute of Military Justice, <http://www.nimj.com> (accessed February 11, 2003).

¹⁰ The Memorandum argues for the “clear and convincing” standard by analogy to the Bail Reform Act, 18 U.S.C. § 3142, which permits (in paragraph (f)) pre-trial detention of criminal defendants who may pose a danger to the community only when the government shows “that no condition or combination of conditions will reasonably assure the safety of any other person and the community...by clear and convincing evidence.” The Bail Reform Act can be found at http://caselaw.lp.findlaw.com/scripts/ts_search.pl?title=18&sec=3142 (accessed February 11, 2003). The

YASSER HAMDI

Yaser Hamdi was among hundreds of men taken into U.S. custody in the course of the war in Afghanistan. He had been turned over to U.S. forces in Afghanistan after surrendering to Northern Alliance forces headed by warlord and alleged war criminal Abdul Rashid Dostum.¹¹ Once captured, he was transferred to the Guantanamo Naval Base. When U.S. authorities realized that Hamdi was a U.S. citizen, born in Louisiana, he was transferred to a U.S. military base in Virginia, where he continues to be held incommunicado. In April 2002, Hamdi was designated an “enemy combatant.”

In May 2002, a petition for habeas corpus was filed by a public defender, acting on Hamdi’s behalf. Federal District Court Judge Robert Doumar denied this petition on the grounds that the public defender had no standing to act on behalf of Hamdi. A second filing was made on June 11, 2002, on behalf of Hamdi’s father. This time the petition succeeded, and the court ordered the government to allow the public defender to meet with the detainee in private, as requested.

The government successfully appealed Judge Doumar’s order, and the Fourth Circuit Court of Appeals remanded the case to the District Court to reconsider whether it had jurisdiction to order a writ of habeas corpus on behalf of an “enemy combatant.” On July 25, 2002, the government filed a motion to dismiss the habeas petition. The administration argued that the court had very limited, if any, authority to review core military decisions, such as those involved in the apprehension and detention of “enemy combatants.”

On August 16, 2002, Judge Doumar issued an opinion rejecting the government’s arguments. He ordered the government to produce the underlying factual evidence supporting its determination that Hamdi was an “unlawful enemy combatant,” for the court’s *in camera* review. He also required the “screening criteria utilized to determine the status of Hamdi” and details of those who had made the determination.¹²

Judge Doumar criticized the inadequacy of a two-page affidavit — the “Mobbs declaration” — that the government submitted to him to justify the designation of Hamdi

Act was upheld by the Supreme Court in *United States v. Salerno*, 481 U.S. 739 (1987), available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=481&page=739> (accessed February 11, 2003).

¹¹ See, e.g., Barak Dehghanpishen, John Barry and Roy Gutman, “The Death Convoy of Afghanistan,” *Newsweek*, August 26, 2002, describing the gruesome “death by container” inflicted by Dostum’s forces in November 2001 on hundreds of unarmed surrendered Taliban soldiers. The soldiers were locked into sealed shipping containers and left to suffocate. See also Michael Griffin, “A Gruesome Record,” *Guardian*, November 16, 2001, describing the capture of Kabul in 1992 by mujahadin forces including “Dostum’s mounted militia...who...fell upon the civilian population, leaving many dead in their wake.”

¹² Order in the case of *Hamdi, et al., v. Rumsfeld, et al.* (E.D. Va., August 16, 2002).

as an “enemy combatant.” Declaring that he would not be a “rubber stamp” for the government, he ruled that the Mobbs declaration’s assertion that Hamdi was “affiliated with a Taliban military unit and received weapons training” did not suffice to justify Hamdi’s detention. Judge Doumar questioned the conclusory statements in the Mobbs declaration. He expressed concern that while the government asserted that Hamdi was:

“affiliated with a Taliban military unit and received weapons training”... [t]he declaration makes no effort to explain what “affiliated” means nor under what criteria this “affiliation” justified Hamdi’s classification as an enemy combatant. The declaration is silent as to what level of “affiliation” is necessary to warrant enemy combatant status....It does not say where or by whom he received weapons training or the nature and extent thereof. Indeed, a close inspection of the declaration reveals that [it] never claims that Hamdi was fighting for the Taliban. Without access to the screening criteria actually used by the government in its classification decision, this Court is unable to determine whether the government has paid adequate consideration to due process rights to which Hamdi is entitled under his present detention.¹³

On August 19, 2002, the government appealed the decision. On January 8, 2003, the Fourth Circuit Court of Appeals issued its judgment, vacating Judge Doumar’s decision and upholding the government’s position.¹⁴ One important aspect of the court’s decision was its strong rejection of Judge Doumar’s view that the District Court had an obligation to test the legal adequacy of the government’s unsupported two-page declaration that Hamdi was “affiliated” with the Taliban. (By labeling Hamdi an “enemy combatant,” the government asserted that it has the authority to deny him the right as a U.S. citizen, to challenge the basis for his detention, with the assistance of counsel. Consistent with that position, the government has resisted his lawyers’ efforts to persuade the court to look into the circumstances of his capture.)

In its opinion,¹⁵ the Fourth Circuit acknowledges the “Bill of Rights’ historic guarantees” and the recognition by “our forebears...that the power to detain could easily become destructive if exerted without check or control by an unrestrained executive free to imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure” (internal quotes omitted).¹⁶

¹³ Ibid.

¹⁴ The Fourth Circuit begins its analysis by rejecting in short order the relevance of 18 U.S.C. § 4001 (a), on substantially the same grounds as Judge Mukasey in the *Padilla* ruling.

¹⁵ The opinion, *Hamdi, et al. v. Rumsfeld, et al.* (4th Cir., January 8, 2003) is available at the National Institute of Military Justice website, <http://www.nimj.com> (accessed January 27, 2003). Other documents relating to the *Hamdi* case can be found at <http://news.findlaw.com/legalnews/us/terrorism/cases/> (accessed January 27, 2003). See also Neil A. Lewis, “Threats and Responses: The Courts; Detention Upheld in Combatant Case,” *New York Times*, January 9, 2003.

¹⁶ *Hamdi, et al. v. Rumsfeld, et al.* (4th Cir., January 8, 2003), available at the National Institute of Military Justice website, <http://www.nimj.com> (accessed January 27, 2003).

But in practice, the court rejects the need for any meaningful review of the basis of Hamdi's continued detention. Indeed, the court goes even further than the administration's own lawyers, who had conceded that in considering a habeas corpus petition on behalf of a citizen, a court was probably entitled to require the government to provide "some evidence" to support its conclusion that a detained citizen was an "enemy combatant."¹⁷

Under the *Hamdi* ruling the government only has to show that the detainee was in the zone of combat. The Fourth Circuit holds that any U.S. citizen (and, of course, any other individual regardless of citizenship) who is "captured in a zone of active combat operations in a foreign country" loses standing to challenge the factual determinations underlying his seizure and purportedly justifying his continuing detention. Logically, however, even if Hamdi was detained near the battlefield, that fact alone does not prove that Hamdi was a combatant, let alone whether he was an unlawful enemy combatant. (The fact that Hamdi surrendered to General Dostum's Northern Alliance forces, and was not captured in combat by U.S. forces, raises further questions about the facts of his case.) While the court expresses support for the principle that "[t]he detention of United States citizens must be subject to judicial review," its view of the scope of that review is so constricted as to be practically meaningless.

In overturning Judge Doumar's decision, the Fourth Circuit points to what it characterizes as the "signal flaw" in the District Court's reasoning: "We are not here dealing with a defendant who has been indicted on criminal charges in the exercise of the executive's law enforcement powers. We are dealing with the executive's assertion of its power to detain under the war powers of Article II [of the Constitution]." The Fourth Circuit acknowledges that, "[a]s an American citizen, Hamdi would be entitled to the due process protections normally found in the criminal justice system, including the right to meet with counsel, if he had been charged with a crime." But the court insists, "Hamdi has not been charged with any crime. He is being held as an enemy combatant pursuant to the well-established laws and customs of war."

The court's opinion relies in part on *Ex Parte Quirin*,¹⁸ in which the Supreme Court

stated in no uncertain terms that detentions "ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger" should not "be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted."¹⁹

¹⁷ This is the standard that Judge Mukasey appears to be considering in the *Padilla* case, as described above.

¹⁸ 317 U.S. 1 (1942).

¹⁹ *Hamdi, et al. v. Rumsfeld, et al.* (4th Cir., January 8, 2003) (quoting *Ex Parte Quirin*), available at the National Institute of Military Justice website, <http://www.nimj.com> (accessed January 27, 2003).

But in citing the *Quirin* decision, the Circuit Court omits the word “trial.” What the *Quirin* court affirmed was the “detention *and trial*” of the Nazi saboteurs (emphasis added). The detainees in *Quirin* were given a full military trial under then-applicable law.

In describing the facts of *Quirin*, the Circuit Court presents the FBI’s version of the arrests of the saboteurs, as crack police work: “All of [the saboteurs] were apprehended by FBI agents, who subsequently learned of their mission to destroy war industries and facilities in the United States.” Yet in the *Quirin* case there was no factual dispute about who the saboteurs were, what they had done, and what they had been planning, all of which were conceded by the defendants themselves. By contrast, in the *Hamdi* case, the right to a proceeding for the reliable determination of the facts is precisely what is at issue.

The court goes out of its way to reject the “sweeping proposition...that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government’s say-so.” However it then asserts that Hamdi is not just any American citizen, but rather “an American citizen captured and detained by American allied forces in a foreign theater of war during active hostilities and determined by the United States military to have been indeed allied with enemy forces.”²⁰

The court’s analysis is based on the September 18, 2001 Congressional Resolution authorizing the President to use all necessary force against those he determines planned, authorized, committed or aided the September 11 attacks, or who harbored such organizations or persons. On this basis, the court finds the President has properly exercised his constitutional war powers, as Commander in Chief, and that “these powers include the authority to detain those captured in armed struggle.”²¹

Though the government asserts that Hamdi has confirmed his belligerent activities under interrogation, Hamdi himself has not been allowed to provide his own story directly in any legal forum, and the lawyer representing Hamdi in the proceeding has never been allowed to speak with him.²² If the government shows that Hamdi was physically in the war zone, the Fourth Circuit concluded, nothing more is required.

Because it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, we hold that the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the

²⁰ Ibid.

²¹ Ibid.

²² Hamdi’s lawyer, Frank Dunham, insists that “Nobody knows what his version of the facts might be.” Nat Hentoff, “Liberty’s Court of Last Resort,” *Village Voice Online*, January 24, 2003, available at <http://www.villagevoice.com/issues/0305/hentoff.php> (accessed January 27, 2003).

war powers entrusted to him by the United States Constitution. No further factual inquiry is necessary or proper.²³

With an eye on the Padilla proceeding pending in New York, the Fourth Circuit does limit its reasoning in one respect:

Any broad or categorical holdings on enemy combatant designations would be especially inappropriate. We have no occasion, for example, to address the designation as an enemy combatant of an American citizen captured on American soil or the role that counsel might play in such a proceeding.²⁴

Accordingly, the Court of Appeals stops short of expressly addressing questions as to the definition of the zone of combat operations, or the duration of the conflict. Yet it does comment: “The executive branch is...in the best position to appraise the status of a conflict, and the cessation of hostilities would seem no less a matter of political competence than the initiation of them.”²⁵

In the war against terrorism, President Bush has stated that the enemy is global,²⁶ the entire world is the battlefield, and the war will continue until “international terrorism” has been defeated. Using this frame of reference, if the *Hamdi* decision stands, there will be little room for the courts to review the basis for detentions made pursuant to this universal and near permanent state of war. If the executive chooses to call someone an “enemy combatant,” the Fourth Circuit’s approach is that the courts should be “satisfied that the Constitution does not entitle him to a searching review of the factual determinations underlying his seizure....”²⁷

Hamdi’s lawyer has said that he will seek review of this decision by the U.S. Supreme Court.²⁸

²³ *Hamdi, et al. v. Rumsfeld, et al.* (4th Cir., January 8, 2003), available at the National Institute of Military Justice website, <http://www.nimj.com> (accessed January 27, 2003).

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *See, e.g.*, David E. Sanger and Felicity Barringer, “President Readies U.S. for Prospect of Imminent War,” *New York Times*, March 7, 2003: “Mr. Bush...said Sept. 11 ‘should say to the American people that we’re now a battlefield.’” Earlier in its January 3 opinion, the Fourth Circuit quotes its own previous ruling in the same proceeding, noting that the “political branches are best positioned to comprehend this *global* war in its full context” (quoting *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (emphasis added)).

²⁷ *Hamdi, et al., v. Rumsfeld, et al.* (4th Cir., January 8, 2003), available at the National Institute of Military Justice website, <http://www.nimj.com> (accessed January 27, 2003).

²⁸ Henry Weinstein, “ABA Opposes Bush ‘Enemy Combatants’ Policy,” *Los Angeles Times*, February 11, 2003.