

**No end to the Padilla case: US Supreme Court refers the “enemy combatant” back to lower instance**

**Replies and Comments:**

**Sven Peterke**

For comments:  
[speterke@hotmail.com](mailto:speterke@hotmail.com)  
00492343227956

**On the web**

<http://www.ifhv.de/>

**Focus**

**Judge Stevens  
Excerpts of the  
“dissenting opinion”:**

„At stake in this case is nothing less than the essence of a free society. (...) Access to counsel for purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process. Executive detention of subversive citizens (...) may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by naked interest in using unlawful procedures to extract information. Incommunicado detention for months is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence.”

Out of the three cases, which were decided by the Supreme Court on 28 June 2004 and whose core issues relate to whether the American president could, without specific legal basis, declare that persons suspected of terrorism are “enemy combatants” and, thereby, prevent them from having access to US courts as well as to a lawyer, the Padilla case showed best that the construction of the concept of “enemy combatant” leads to denial of justice. Padilla, a US citizen, was arrested in June 2002 at Chicago airport under suspicion of planning to detonate a “dirty bomb” in Washington DC. He was first detained as a “material witness” in a prison in New York. Just before his lawyers could submit a call for the examination of his detention, he was given over to Minister of Defence Rumsfeld as “enemy combatant” on the basis of the presidential decree and brought to a military prison in South Carolina. Padilla has stayed there for almost two years in isolation –without access to his lawyer and without being charged. In December 2003 a New York court declared this type of deprivation of freedom unlawful and ordered that Padilla be released from the military prison. In order to block that, the US government appealed to the Supreme Court. Many had hoped for an endorsement of the decision of the New York court. The manner in which the US government withdrew persons suspected of terrorism from the protection offered by the national and international legal orders by declaring them “enemy combatants” could have been stigmatised by a clear recognition of the elementary guarantees of the rule of law for American citizens suspected of terrorism.

Instead, the Supreme Court remanded the case with the justification that the court of lower instance was not competent on the local level and that Rumsfeld was the wrong defendant. Two judges of the Supreme Court were of the opinion that the court could still have examined the matter. And Judge Stevens castigated the “slavish application” of the conditions of admissibility, arguing among others that what was at stake in the case was “nothing less than the essence of a free society”. The decision indeed seems to lack courage. Probably the political pressure was too high – maybe the expectations and hopes were too. Now a court in South Carolina will not only have to decide upon the fate of Padilla but also ponder about what the highest court stated (or not) in the two other decisions relating to “enemy combatants”. So Padilla stays in a military prison. The question remains what the concept “rule of law” means today in the US.

**Responsibility**

BOFAXEs are published by the Institute for International Law of Peace and Humanitarian Law of the Ruhr-University Bochum: IFHV, NA 02/33 Ruhr-Universität Bochum, 44780 Bochum. Tel: 00.49234/3227366, Fax: 00.49234/3214208.

BOFAXEs are supported by the German Red Cross. **The writer is solely responsible for the content.**