

**FILED** LR

JUL - 8 2004

**UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA**

LARRY W. PROPES, CLERK  
CHARLESTON, SC

ALI SALEH KAHLAH AL-MARRI,  
and MARK A. BERMAN, ESQ.,  
as Next Friend,

Petitioner,

- vs -

C.T. HANFT, Commander, Naval  
Consolidated Brig, 1050 Remount  
Road, Charleston, South Carolina,

Respondents.

Docket No.

2 04 2257 26AJ

**PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner Ali Saleh Kahlah al-Marri, a civilian designated an "enemy combatant" by the President on June 23, 2003, is being held in military custody in Charleston, South Carolina without basis, without charge, without access to counsel, and without being afforded any process by which he might challenge his designation and detention, by color of the authority of the President, and in violation of the Constitution, laws, and treaties of the United States. Accordingly, this Court should issue a Writ of Habeas Corpus.

PARTIES

1. Petitioner Ali Saleh Kahlah al-Marri, a citizen of the State of Qatar who was lawfully resident in the State of Illinois at the time of his initial detention by the government, is presently detained incommunicado at the Naval Consolidated Brig,

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Charleston, South Carolina, and has been so detained since June 23, 2003.

2. Respondent C.T. Hanft, a commander in the United States Navy, is in command of the Naval Consolidated Brig, Charleston, South Carolina, and exercises immediate custody over Petitioner pursuant to orders issued by the President and the Secretary of Defense.

NEXT FRIEND

3. Lawrence S. Lustberg and Mark A. Berman (collectively, "Counsel") are partners in the law firm of Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C., One Riverfront Plaza, Newark, New Jersey. Counsel have represented Petitioner since on or about February 4, 2003.

4. On that date, Counsel met with Petitioner in the Special Housing Unit ("SHU") at the Metropolitan Correctional Center, in New York City ("MCC-NY"). At that time, Petitioner was the only defendant named in two criminal indictments pending in the Southern District of New York.

5. Counsel vigorously defended Petitioner in the Southern District of New York by successfully moving to consolidate, and then to dismiss, the Southern District of New York indictments, and by making other applications to the court regarding the conditions of Petitioner's confinement.

6. During Petitioner's confinement in New York, Counsel met with him on numerous occasions at MCC-NY. Counsel also met with

Petitioner numerous times in the courtroom, including once when court was not in session (as permitted by the court), or in the lockup attached to the courtroom, as well as several times in the Office of the United States Attorney for the Southern District of New York. Counsel spoke with Petitioner by telephone on a weekly basis after the court (upon Counsel's application) directed the guards at MCC-NY not to interfere with such telephone calls.

7. During the course of many conversations, Petitioner and Counsel discussed a wide variety of topics and, thereby, developed a substantial relationship. For example, Petitioner shared with Counsel his concerns regarding, among other matters, the welfare of his wife, children, and family members, as well as the discriminatory treatment to which he was subjected in prison.

8. Counsel also discussed with Petitioner the possibility that he might be designated an enemy combatant by President Bush. Specifically, on February 13, 2003, Counsel met with Petitioner's prior counsel, who voiced his concern that, if Petitioner did not agree to cooperate with the government, he might be designated an enemy combatant by the President, as had been the case with others.

9. Thereafter, Counsel and Petitioner discussed prior counsel's concern that the President might designate him an enemy combatant. Petitioner made clear that he intended to establish his innocence at trial.

10. On March 14, 2003, after meeting with Petitioner at MCC-NY, Counsel met with Assistant U.S. Attorney Michael G. McGovern,

the lead prosecutor in the Southern District of New York. At that time, Counsel raised with AUSA McGovern the possibility that Petitioner might be designated an enemy combatant. AUSA McGovern stated that he had never threatened such a designation, which was beyond the scope of his authority, but that the case was being closely monitored by other officials in the Bush Administration.

11. On March 27, 2003, Counsel met with Petitioner and shared with him the substance of this conversation with AUSA McGovern, and specifically discussed the possibility that the President might one day designate Petitioner an enemy combatant. Counsel told Petitioner that, should such contingency come to pass, Counsel would challenge Petitioner's detention by filing a petition for a writ of habeas corpus in his behalf. Petitioner responded that he wished and, indeed, expected Counsel to do so.

12. On May 8, 2003, Petitioner and Counsel met at the U.S. Attorney's Office with then-Deputy U.S. Attorney David E. Kelley, who had requested an opportunity to speak with Petitioner personally before the government was required to respond to Petitioner's then-pending motion to dismiss the New York federal indictments on constitutional venue grounds. At that meeting, Mr. Kelley told Petitioner that one possible ramification of his insisting upon the dismissal of the New York federal indictments was that the already severe conditions of his confinement would be made even worse.

13. Counsel next met with Petitioner at MCC-NY on May 14, 2003, by which time the New York federal indictments had been dismissed, and Petitioner had been charged in a new criminal complaint in the Central District of Illinois. At that time, Counsel recounted to Petitioner Mr. Kelley's statement that the conditions of his confinement would become more severe, and reminded Petitioner that this could mean that the President might designate him an enemy combatant. Petitioner and Counsel again agreed that, in such event, Counsel would continue to act in Petitioner's behalf by pursuing all legal measures necessary to represent Petitioner's interests and to obtain his release.

14. Counsel continued to represent Petitioner after he was returned to, and re-indicted in, the Central District of Illinois, and has continued to represent him even after June 23, 2003, by filing a habeas petition in his behalf in the United States District Court for the Central District of Illinois, and litigating that petition to the United States Supreme Court.

15. Counsel last met with Petitioner on May 29, 2003, in the United States Marshal's lockup in the Federal Courthouse in Peoria. Since that time, however, the government has denied Petitioner access to counsel.

16. Even if Petitioner had not shared his express wishes with Counsel, which he did, Counsel's relationship with Petitioner was sufficiently close that Counsel is certain that Petitioner would

have expected Counsel to file the instant petition in his behalf both as counsel and as his next friend.

#### JURISDICTION

17. Petitioner brings this action under 28 U.S.C. § 2241 and invokes this Court's jurisdiction under 28 U.S.C. §§ 1331, 1651, 2201 and 2202, as well as Articles I and III of, and the Fifth and Sixth Amendments to, the Constitution of the United States.

#### VENUE

18. Venue is proper in the United States District Court for the District of South Carolina because Petitioner is confined at the Naval Consolidated Brig, in Charleston, South Carolina, which is under the command of Respondent. See Rumsfeld v. Padilla (No. 03-1027); al-Marri v. Rumsfeld, 360 F.3d 707, 708-09 (7th Cir. 2004).

#### STATEMENT OF FACTS

19. On September 10, 2001, Petitioner lawfully entered the United States, with his wife and five children, for the purpose of obtaining a master's degree from Bradley University in Illinois, the same institution from which he had earned a bachelor's degree in 1991.

20. On December 12, 2002, Petitioner was arrested by the Federal Bureau of Investigation ("FBI") in Peoria, Illinois, at the direction of the United States Attorney's Office for the Southern District of New York, as an alleged material witness in the

government's investigation of the terrorist attacks of September 11, 2001.

21. Thereafter, the government transported Petitioner from the Peoria County Jail to MCC-NY.

22. On February 6, 2002, the government charged Petitioner in a one-count indictment with possession of 15 or more unauthorized or counterfeit credit card numbers, with intent to defraud, in violation of 18 U.S.C. § 1029(a)(3). On February 8, 2002, Petitioner entered a plea of "not guilty" to this indictment and thereby asserted his innocence.

23. On January 22, 2003, Petitioner was charged in a second, six-count indictment with two counts of making a false statement to the FBI, in violation of 18 U.S.C. § 1001, three counts of making a false statement in a bank application, in violation of 18 U.S.C. § 1014, and one count of using a means of identification of another person for the purpose of influencing the action of a federally insured financial institution, in violation of 18 U.S.C. § 1028(a)(7). On January 24, 2003, Petitioner entered a plea of "not guilty" to this second indictment and thereby asserted his innocence.

24. On May 12, 2003, the United States District Court for the Southern District of New York granted a motion filed by Counsel in Petitioner's behalf to dismiss the indictments then pending in that district on venue grounds.

25. On or about May 20, 2003, Petitioner was removed from MCC-NY to the Peoria County Jail.

26. On May 22, 2003, a federal grand jury sitting in the Central District of Illinois returned a new indictment against Petitioner alleging the same seven counts as had been charged in the dismissed Southern District of New York indictments. On May 29, 2003, Petitioner entered a plea of "not guilty" to this indictment and thereby asserted his innocence to the charges. The court set a July 21, 2003 trial date.

27. On Friday, June 20, 2003, the court directed the parties to be prepared to proceed with a suppression hearing on July 2, 2003, in connection with pretrial motions that Counsel had filed in Petitioner's behalf.

28. On Monday morning, June 23, 2003, the government moved ex parte to dismiss the indictment based upon a redacted declaration, signed by Respondent Bush which: i) designated Petitioner an enemy combatant; ii) directed the Attorney General to surrender Petitioner to the custody of the Secretary of Defense; iii) directed the Secretary of Defense to detain Petitioner as an enemy combatant. The court granted the government's motion, ultimately, entering an order dismissing the indictment with prejudice.

29. Petitioner was then removed from the custody of the United States Marshal's Service at the Peoria County Jail, into the custody of the Department of Defense at the Naval Consolidated Brig in Charleston, South Carolina.

30. Petitioner has been denied access to counsel since on or about May 29, 2003, despite repeated requests by Counsel to meet with him, all of which were ignored by the government. The last such request was made by Counsel in Petitioner's behalf on June 29, 2004, a day after the Supreme Court issued its decision in Hamdi v. Rumsfeld, 542 U.S. \_\_\_, Slip Op. at 32 (2004) (holding that enemy combatant must be afforded access to counsel). The government has ignored that request, as well.

31. Petitioner is in fact a civilian, not a combatant. Indeed, he was treated as such by the government for over one year and a half prior to his designation as an enemy combatant by the President on June 23, 2003.

32. Since that date, Petitioner has been detained by the military without basis, without charge, without access to counsel, and without being afforded any process by which he can challenge his detention or his designation as an enemy combatant.

CLAIMS AS TO THE UNLAWFULNESS OF PETITIONER'S DETENTION

FIRST CLAIM

(Unlawful Detention)

33. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

34. Petitioner is a civilian, not a combatant, and disputes the factual allegations underlying the President's June 23, 2003 Order which designated him an "enemy combatant."

35. A civilian seized in the United States may not be detained by the military unless Congress has suspended the writ of habeas corpus, which it has not. See Ex Parte Milligan, 71 U.S. 2 (1866).

36. Therefore, the detention of Petitioner by the military is in violation of the Constitution and laws of the United States.

SECOND CLAIM

(Right To Counsel)

37. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

38. The Supreme Court has held that even an individual alleged by the government to have been captured on a foreign battlefield while bearing arms, and, thereafter, detained as an enemy combatant, has the right to counsel and to challenge his designation. See Hamdi v. Rumsfeld, 542 U.S. \_\_\_, Slip Op. at 32 (2004).

39. Neither the Constitution nor the laws of the United States allow the President or the military to detain an individual seized within the United States, and not on an active field of battle, without access to counsel, simply by designating such individual an enemy combatant.

40. Petitioner has the constitutional right to communicate freely with counsel, without government-imposed restrictions, and such communications are entitled to protection under the attorney-client privilege.

41. Therefore, the detention of Petitioner without unimpeded access to counsel is in violation of the Constitution and laws of the United States.

THIRD CLAIM

(Right To Be Charged)

42. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

43. Since June 23, 2003, Petitioner -- a civilian lawfully present in the United States at the time he was seized by the government -- has been detained by the military, upon Order of the President, without charge.

44. Absent suspension of the Writ of Habeas Corpus by Congress, the military may not detain an individual seized within the United States without charge.

45. Therefore, the detention of Petitioner without charge is in violation of the Constitution and laws of the United States.

FOURTH CLAIM

(Right To Process)

46. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

47. Since June 23, 2003, Petitioner has been detained by the military as an enemy combatant, upon Order of the President, at the Naval Consolidated Brig in Charleston, South Carolina.

48. Petitioner denies that he is an enemy combatant.

49. Petitioner has the right to receive "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's assertions before a neutral decisionmaker." Hamdi, 542 U.S. at \_\_, Slip Op. at 26.

50. Petitioner has not been afforded any process by which he might challenge his designation by the President as an enemy combatant designation, or his continued detention by the military on that basis.

51. Therefore, the detention of Petitioner without process is in violation of the Constitution and laws of the United States.

FIFTH CLAIM

(Interrogation)

52. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

53. Upon information and belief, Petitioner was designated an enemy combatant so that the government could interrogate him and Petitioner has in fact been interrogated by the government for over one year while incarcerated incommunicado at the Naval Consolidated Brig in Charleston, South Carolina.

54. The United States Supreme Court has indicated that indefinite detention for the purpose of interrogation is unlawful. See Hamdi, 542 U.S. at \_\_, Slip Op. at 13.

55. Therefore, the indefinite detention and interrogation of Petitioner is in violation of the Constitution and laws of the United States.

PRAYER FOR RELIEF

**WHEREFORE**, Petitioner prays that the Court enter an Order:

1) declaring that Petitioner is being held in violation of the Constitution, laws, and treaties of the United States;

2) directing Respondent to allow Petitioner to meet and confer freely with Counsel, and to allow Counsel to transmit to Petitioner all documents related to their representation of him;

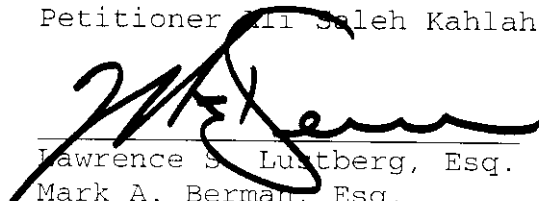
3) directing Respondent to cease all interrogation of Petitioner while this litigation is pending;

4) directing Respondent to charge Petitioner with a criminal offense or to release him;

5) directing Respondent to: i) release Petitioner from custody; or ii) schedule a hearing at which Respondent is compelled to present evidence establishing that Petitioner is, in fact, an enemy combatant, and at which Petitioner is afforded an opportunity to challenge such designation with the assistance of counsel; and

6) such other relief as the Court may deem just.

Respectfully submitted in behalf of  
Petitioner ~~Ali~~ Saleh Kahlah al-Marri,



Lawrence S. Lustberg, Esq.  
Mark A. Berman, Esq.

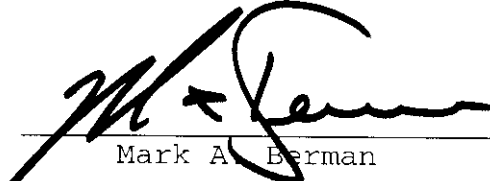
**GIBBONS, DEL DEO, DOLAN,  
GRIFFINGER & VECCHIONE**  
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Dated: July 7, 2004

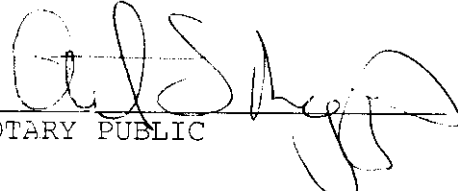
VERIFICATION

COUNTY OF ESSEX            )  
  ) ss.  
STATE OF NEW JERSEY    )

I, MARK A. BERMAN, ESQ., counsel and next friend to Petitioner Ali Saleh Kahlah al-Marri, and an attorney in good standing of the State of New Jersey and the State of New York, hereby affirm under penalty of perjury that, to the best of counsel's knowledge, the facts set forth in this Petition are true and correct.

  
\_\_\_\_\_  
Mark A. Berman

Affirmed to before me this  
7th day of July, 2004

  
\_\_\_\_\_  
NOTARY PUBLIC

**ARTHUR L. BRIGGS**  
**NOTARY PUBLIC OF NEW JERSEY**  
**QUALIFIED IN PASSAIC COUNTY**  
**MY COMMISSION EXPIRES NOV. 14, 2005**

CERTIFICATION OF SERVICE

I, MARK A. BERMAN, ESQ., hereby certify that, on July 7, 2004, I caused two (2) copies of Petitioner Ali Saleh Kahlah al-Marri's Petition for Writ of Habeas Corpus to be served by certified mail, return receipt requested, upon the following:

J. Strom Thurmond Jr., Esq.  
United States Attorney  
1441 Main Street, Suite 500  
Columbia, South Carolina 29201

John D. Ashcroft, Esq.  
Attorney General of the United States  
5111 Main Justice Building  
10th Street & Constitution Avenue, NW  
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Commander C.T. Hanft, USN  
Naval Consolidated Brig  
1050 Remount Road  
Charleston, South Carolina 29406

  
\_\_\_\_\_  
Mark A. Berman, Esq.

Dated: July 7, 2004