

## **Beyond Guantánamo**

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To the public, Ali Saleh Kahlah al-Marri is a “test case”: the last remaining “enemy combatant” held inside the United States, a human guinea pig in one of the most important and contentious struggles over executive detention power in the post-9/11 era. To me Ali is a man who has endured more than seven years in one of the most brutal human experiments in human isolation ever conducted and has done so with his dignity and spirit intact.

As Ali’s lawyer for the past four years, I cannot claim impartiality. But witnessing the grueling and high-stakes litigation fought over the corpus of my client does give me a certain insight into his case and the implications—legal and human—of the virtually limitless claim of executive power that lies at its core.

I began representing Ali in late 2004, when I was a public interest fellow at the law firm Gibbons, P.C. Although I knew only the basic facts of Ali’s case, its significance was immediately apparent. Hundreds of individuals were being detained by the military as “enemy combatants” at Guantánamo. But Ali was one of only two people held as an “enemy combatant” who had been arrested in the United States. (Jose Padilla was the other). Ali’s case thus did not involve people seized in connection with the armed conflict in Afghanistan, as a number of Guantánamo cases did. Ali’s detention involved something very different: a deliberate effort to extend the so-called war on terror to Main Street America and to give the president the discretion to supplant the protections of the Constitution by re-labeling criminal suspects “combatants” and imprisoning them indefinitely without charge or judicial review.

Ali came to the United States in September 2001 with his wife and five children to pursue a masters degree at Bradley University in Peoria, Illinois, where he had previously studied as an undergraduate. That December, he was arrested at his home by FBI agents and taken to New York City, where he was detained as a “material witness” in connection with the investigation into the September 11 attacks. Two months later Ali was charged with credit card fraud. A second indictment was filed the following year, adding charges of false statements to the FBI and on a bank application. After the case in New York was dismissed, a third indictment was filed, this one in Illinois, where the alleged criminal activity had taken place. On Friday June 20, 2003, the district judge scheduled a hearing to decide a motion to dismiss the indictment filed by Ali’s attorneys, Lawrence Lustberg and Mark Berman, two experienced defense lawyers. Ali’s trial was less than a month away.

But the hearing and trial never took place. The following Monday morning, June 23, prosecutors came to court with a one-page order signed by President Bush demanding Ali’s immediate transfer to military custody. Ali was no longer a criminal suspect with constitutional rights: He was now an “enemy combatant” in the war on terror without any rights at all. Why? Because the president had said so. With no other choice, the trial judge dismissed the indictment, and Ali was taken to the Naval Consolidated Brig near Charleston, South Carolina, where he has been imprisoned ever since.

For the first sixteen months at the Navy brig, Ali was held *incommunicado*, and all requests to communicate with him by his lawyers, his family, and the International Committee for the Red Cross were ignored or refused. During this time, Ali was subjected to a brutal interrogation regime that bordered on, and sometimes amounted to, torture. Ali was never physically beaten: there was no rack and screw to leave physical marks. Instead, he was subjected to “touchless torture,” more

subtle but no less devastating in its effect. During a series of seemingly endless interrogation sessions, Ali was chained in a fetal position to the floor of a freezing cell, forced to stand in painful positions for hours at a time, and locked in a tiny, dark cell for weeks on end. Interrogators threatened to send him to Egypt and Syria where they said his wife would be raped in front of his eyes before he was executed. The goal, according to the Defense Intelligence Agency (DIA), which ran the interrogations, was to break the detainee down by creating a sense of total fear, hopelessness, and despair. Guantánamo had come to the United States.

In June 2004, the Supreme Court ruled that Yaser Hamdi, another “enemy combatant” detained at the Charleston Navy brig, was entitled to lawyer, and that indefinite detention for purposes of interrogation was illegal. Mr. Hamdi had originally been captured on a battlefield in Afghanistan before he was brought to the Navy brig (after a four-month period of detention in Guantánamo, where the United States realized he was an American citizen). Ali, by contrast, had been arrested at his home in Peoria, and had *already* met with his lawyers numerous times. In the eighteen months he was in the civilian system, he was declared an “enemy combatant.” Surely Ali was entitled an attorney as well. But the government continued to deny Ali access to his lawyers for almost four more months while it continued to interrogate him in its South Carolina torture chamber, acting as though the Supreme Court’s decision did not exist. And when the government finally allowed Ali to meet with his attorneys again that October, it demonstrated that it did not take that right seriously. DIA agents sat on both sides of Ali, who remained belly and ankle-chained to the floor, and took notes throughout the meeting, with his attorneys on the other wide of a glass partition.

I first met Ali in early 2005. Over time, I would learn more about the horrors of Ali’s sixteen-month *incommunicado* detention in America’s new Guantánamo. But there remained more

immediate priorities. Although the government had stopped directly interrogating Ali, it continued to subject him to highly coercive—and unnecessarily cruel—conditions designed to break his spirit. Ali remained totally isolated. He was not allowed to talk to his family; letters to and from his wife and children took up to a year or more to arrive due to the government’s purported “security review,” and when they finally got there, the letters were barely intelligible because so much information had been redacted for no reason at all. Even the common greeting uttered daily by hundreds of millions of people throughout the Muslim world—“As-Salamu Alaykum” (or “Peace Be Upon You”)—was crossed out with a black marker.

Ali remained locked down in his tiny cell almost twenty-four hours a day, seven days a week, utterly alone. Occasionally he was allowed out into an empty yard for “recreation.” The government refused to allow Ali to see or share a meal with Mr. Padilla, the remaining “enemy combatant” at the Navy brig. (Yaser Hamdi, once considered too dangerous to speak to a lawyer, had been returned home a free man after the district court ordered the government to present its evidence at a hearing). He was denied books, magazines, or news, heightening his sense of isolation. The one book Ali was allowed—a copy of the Quran—was sometimes taken away or defiled as an interrogation tool.

It is difficult to imagine enduring this crushing isolation for more than a few days. But Ali had endured it for two years, and had done so, moreover, without knowing when, if ever, it would end. And it was taking its toll. Ali had started hallucinating and had become increasingly paranoid about his surroundings. When the roof was recovered with tar, Ali believed interrogators were secretly putting noxious fumes in his cell. He also started experiencing unexplained heart palpitations and had difficulty sleeping. Never one to complain, Ali nevertheless had the self-awareness to realize what was happening. “I think I’m losing my mind,” he told Andy Savage, the

Charleston defense attorney who has been my co-counsel for the last four years. “I don’t know how much longer I can go on.”

We were already challenging the legality of Ali’s detention through a habeas corpus petition. But we knew that challenge would take years for the courts to resolve, and Ali did not have years. So in August 2005 we filed a separate lawsuit in federal court demanding an improvement in his conditions of confinement. The suit provided the first glimpse into the mistreatment of detainees in the United States, right at the time that the abuses at Guantánamo were being exposed to the world.

Over the coming months, things started to improve, as the government sought to clean up its act before it had to defend Ali’s treatment in court. Ali was allowed some books and more time for recreation. He was given a newspaper, though it remained heavily redacted, leaving him only the sports page, obituary, and classified advertisements. “Am I supposed to be looking for a job?” he would joke. The government also started allowing Ali to practice his religion. It stopped, for example, lying to him about the direction of Mecca and the time of day so that he could pray properly. And whereas before guards had punished him for using his shirt to cover his head during prayer, now they permitted us to give him a *kofi* or prayer cap. Eventually, Ali was allowed talk to Andy and me on the phone, and to watch television. Although news programs were prohibited, brig staff let Ali watch the Jon Stewart and Steven Colbert shows since technically they did not count as news. And so Ali joined the long list of Americans who learn about the world events from Comedy Central. Yet, it still refused to allow him to read the *New York Times* or other newspaper, claiming that to do so would allow him learn about the progress of the war on terror.

The continued improvement in Ali’s conditions over time, however, has less to do with the government’s fear of judicial scrutiny more about inherent decency of military servicemen and

women who had been turned to the dark side by a corrupt cabal of high-level Bush administration officials bent on destroying the Constitution in the name of misguided, dangerous, and criminal theories of executive power. While brig staff believed Ali should be punished if he did something wrong, they understood that locking someone up alone for years in solitary confinement and never providing them with a trial was wrong. They tried to work with us, making accommodations where they could (although some critical things like family phone calls remained beyond their control). Once the brig staff was no longer required to implement brutal conditions to soften Ali up for interrogations, they had a chance to get to know him. Many staff members had grown to like Ali and to respect him for enduring so many years of harsh imprisonment without rancor or bitterness. Sometimes they went far beyond the call of duty, including the one official would sit with Ali at night during Ali's darkest hours, when he felt he was losing his sanity. Unlike those who made policy in Washington, America's servicemen and women had come to see Ali as a person, and not just a piece of paper.

But, in the end, improving Ali's conditions did not alter the unchanging reality: a jail is a jail is a jail. Ali continued to be deprived of his liberty, without a trial and without any idea of when, if ever his detention would end.

After more than five years of litigation, the courts still had not resolved his habeas petition or answered definitively the basic question at the heart of his case: whether he could be held in military custody, potentially for life, without criminal trial. In July 2008, the full U.S. Court of Appeals for the Fourth Circuit ruled in a 5-4 decision that the military could continue to hold Ali as an "enemy combatant" if the allegations against him were true. The court of appeals also ruled that Ali was entitled to more due process than he had previously been afforded in challenging those allegations and sent the case back to the district court for yet more proceedings. We appealed to the

Supreme Court, arguing that he was entitled to a full criminal trial if he was going to be detained, just like every other person arrested in the United States on suspicion of wrongdoing. Ali's appeal was supported by former top-level Justice Department and military officials, as well as a range of non-governed organizations and legal experts.

That November, while Ali's petition for Supreme Court review was pending, I visited Ali's family. I was joined by my co-counsel Andy and his wife and office manager Cheryl. Ali's family had moved to Saudi Arabia, except for his brother Jarallah, who was living in Qatar following his release from Guantánamo that July after more than six years of detention. We had talked to Ali's family many times in the past, and I had represented Jarallah in his habeas corpus case. But seeing them at their homes was entirely different. It put Ali's detention in a new light. Ali was not the merely the prisoner present before us in the cell but the human being who was absent from his home and family. Ali's family was not a disembodied voice checking in about the status of a family member; they were living flesh and blood human beings who were struggling to cope with the prolonged—and indefinite—absence of a loved one.

We saw where Ali's family lived, the bank where Ali had work, and the mosque where he had prayed. We saw the plot of land his brothers had put aside for him in their family village in the desert so that he could build a home besides theirs when he was freed. And we saw the pain of separation his wife, five children, mother, brothers, cousins, and other family members experienced daily. We learned that Ali's eldest son, Abdulhadi, had been with Ali when he was arrested in Peoria. He had not seen his father for seven years. Now sixteen, he survives on boyhood memories of his father. We saw Ali's youngest son, Abdul Rahman, who was an infant when Ali was arrested. Unlike his older brother, Abdul Rahman does not even have memories of his father. One of Ali's brothers, Naji, told us he did not believe Ali was still alive until he saw us.

Those reading this story may say that Ali's actions brought these hardships upon him and his family. Having spent hundreds of hours with Ali over the past four years, I cannot believe that he is who the government says he is: an al Qaeda agent who came to America to facilitate terrorist attacks. I have seen no such animosity or hatred, and the government has presented no evidence to support its accusations. But what I, or others, think about Ali is ultimately irrelevant. How we treat prisoners is about us, not them.

Depriving a person of his liberty is the severest punishment the government can impose, short of depriving a person of life. That deprivation is even worse when the detention it is indefinite, and the person does not know whether he will remain behind bars for another day, another year, or the rest of his natural life. America was founded on the idea that the government cannot deprive people of their freedom simply because it suspects them of wrongdoing, however grave, without first affording them a trial. Criminal trials provide the most rigorous safeguards our system has to offer. They do so not only to prevent the wrongful conviction of the innocent but also to give validity to government action in imposing the severest of all restraints.

After September 11, America imprisoned hundreds of men without charging them with any crime and trying them in a court of law. Instead, it called them "enemy combatants" and argued that their indefinite detention was not punishment but a simple wartime measure to prevent their "return to the battlefield" in a war of limitless scope and duration. But this was a lie: the men were being punished, and they punished far more severely than others who had been convicted of crimes. Ali's detention is built on that lie.

America's detention policies have destroyed countless lives and families. They have also harmed America's credibility throughout the world: only the most arrogant and deluded could think otherwise. Guantánamo has come to symbolize this new system. But, as Ali's case makes

clear, that system also includes the United States and serves as a warning that what happened in that off-shore prison could one day happen here too.

On December 5, 2008, nearly seven years to the date of Ali's initial arrest, the Supreme Court decided to hear his appeal, promising a definitive answer to the question of whether he could continue to be detained without trial. When we spoke to Ali by telephone that afternoon, he was grateful to learn that America's highest court would review his case and asked many questions about the process of Supreme Court review. But, after we hung up the phone, I knew reality of life as the last remaining "enemy combatant" in America would return. After more than 2,000 days alone in a military jail, Ali was still waiting for his fate to be determined.