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Why the U.S. Under Obama Is Still a Dictatorship **by Andy Worthington**

Two weeks ago, when the Obama administration announced that it was bringing to an end [the disturbing isolation](#) endured by Ali al-Marri, a U.S. resident who has been held without charge or trial for seven years and two months — and who, most worryingly, has spent the last five years and nine months as an “enemy combatant” in solitary confinement in the Naval Consolidated Brig in Charleston, South Carolina — it was clear that one of the Bush administration’s most arrogant and un-American policies was coming to an end.

President Obama clearly regarded al-Marri’s imprisonment as significant, as he [issued a presidential memorandum](#) on his second day in office ordering the Justice Department to review the Qatari national’s case, and the announcement that al-Marri was to be moved out of his seemingly endless legal limbo and [into the federal court system](#) demonstrated that, in this specific case at least, the president was sticking to his word.

However, what worried al-Marri’s lawyers — and those, like myself, who have been following his case closely — was that the president’s decision would also bring to an end al-Marri’s pending Supreme Court challenge, in which the nation’s most powerful judges were scheduled to review whether or not the president — any president, not just a member of the Bush family — had the right to designate as an “enemy combatant” any person accused of terrorism arrested on American soil, whether a citizen or a resident, and to imprison them indefinitely without charge or trial.

This was not merely an academic exercise. When al-Marri’s case was reviewed by the Fourth Circuit Court of Appeals last July, a majority of the judges decided that the president was indeed entitled to [subject people arrested on American soil to arbitrary imprisonment](#), despite the complaints of the dissenting judges, led by Judge Diana Gribbon Motz, who argued that, if the ruling were allowed to stand, it “would effectively undermine all of the freedoms guaranteed by the Constitution.”

The Fourth Circuit majority also ignored the complaints of al-Marri’s lawyers, even though they were clearly more aware of the restraints on executive power that had been enforced by

Congress in the wake of the 9/11 attacks than most of the judges. In a brief to the court, the lawyers pointed out that the president lacked the legal authority to designate and hold al-Marri as an “enemy combatant” for two particular reasons: firstly, because the Constitution “prohibits the military imprisonment of civilians arrested in the United States and outside an active battlefield,” and secondly, because, although a district court had previously held that the president was authorized to detain al-Marri under the Authorization for Use of Military Force (the September 2001 law authorizing the President to use “all necessary and appropriate force” against those involved in any way with the 9/11 attacks), Congress explicitly prohibited “the indefinite detention without charge of suspected alien terrorists in the United States” in the Patriot Act, which followed five weeks later.

When the Obama administration announced its decision to move al-Marri to the federal court system, Justice Department officials also asked the Supreme Court to dismiss the pending case as “moot,” and on Friday the justices agreed, although, to their great credit, they also made a point of vacating the horrendous decision made by the Fourth Circuit Appeals Court last summer.

As a result, you may be thinking that the president no longer has the power to hold Americans without charge or trial as “enemy combatants,” but if this is the case then you may be — and should be — dismayed to learn that a previous ruling to this effect still stands, which was not addressed by the Supreme Court, and which has not been addressed by the Obama administration either.

In February 2005, in the case of Jose Padilla, an American citizen who was also held in prolonged solitary confinement as an “enemy combatant,” District Court Judge Henry F. Floyd [ruled against the government](#), and ordered Padilla’s release. Noting that the power to suspend the writ of habeas corpus “belongs solely to Congress” under the Constitution, Judge Floyd declared, “Since Congress has not acted to suspend the writ, and neither the President nor this Court have the authority to do so,” Padilla had to be released. “It is true,” he added, “that there may be times during which it is necessary to give the Executive Branch greater power than at other times. Such a granting of power, however, is in the province of the legislature and no one else — not the Court and not the President.... Simply stated, this is a law enforcement matter, not a military matter.” Echoing the decision taken by President Obama’s Justice Department in the case of Ali al-Marri, Judge Floyd added that the government could avoid releasing Padilla if it filed criminal charges against him, or acted to hold him as “a material witness.”

However, Judge Floyd’s ruling only stood for seven months. On September 9, 2005, three Fourth Circuit judges — J. Michael Luttig, M. Blane Michael, and William B. Traxler Jr. — overturned it ([PDF](#)), based on their belief (contested by Padilla’s lawyers, and also, as noted above, by al-Marri’s) that Congress had granted these sweeping and otherwise unconstitutional powers to the president as part of his wartime prerogative under the Authorization for Use of Military Force.

As with al-Marri, this ruling was never tested in the Supreme Court. Just before a review was scheduled to begin, the Bush administration got cold feet, and moved Padilla into the federal court system, where, in August 2007, [he was convicted](#) of providing material support for terrorism in a lopsided trial — in which all mention of his long years of torture in solitary confinement were excluded by the judge —and, in January 2008, [received a sentence](#) of 17 years and 3 months.

In many ways, of course, history is repeating itself with al-Marri, even though the man at the top has changed, but what is most worrying is that the Padilla ruling still stands. Without the Supreme Court being given the opportunity to rule decisively on this question, what is needed is a clear repudiation of the policy by the Obama administration.

Instead, the Justice Department explained, in a brief filed with the Supreme Court last Wednesday, that, while the government “did not defend its power to detain Mr. Marri at present” (as Glenn Greenwald described it for [Salon.com](#)), “it left open the possibility that he or others might be subject to military detention as enemy combatants in the future.” In the Justice Department’s exact words, “Any future detention — were that hypothetical possibility ever to occur — would require new consideration under then-existing circumstances and procedure.”

It’s one thing, I suppose, to keep your options open, but quite another to defend the indefensible. Instead of fudging, in anticipation of future emergencies, President Obama and Attorney General Holder need to spell out clearly that no president will ever again treat suspected terrorists, either Americans or foreigners, arrested on American soil as “enemy combatants.” Otherwise, Barack Obama’s fine words, in August 2007, when [he declared](#), “We will again set an example to the world that the law is not subject to the whims of stubborn rulers, and that justice is not arbitrary,” will be meaningless, and Judge Rogers’ opinion — that the very constitutional foundations of the Republic had been fatally undermined — will be as applicable to the Obama administration as it was to that of George W. Bush.

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This article was originally published in March 2009.