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How the "Enemy Combatant" Label Is Being Used, Part 1
by Jesselyn Radack

On Monday, October 4, the Supreme Court declined to consider a petition filed by Ali Saleh Kahlah al-Marri. Al-Marri is perhaps the least well known of the three persons who have been held in the United States as "enemy combatants."

The decision was unsurprising — yet still disappointing. Al-Marri, who has been waiting for nearly three years, should not have to wait another day to get the justice that he was due all along.

As with "dirty bomb" suspect Jose Padilla, the Court basically is telling al-Marri to come back later. Last spring, in *Padilla v. Rumsfeld,* the Court ruled 5-4 that Padilla's challenge to his detention should have been filed in South Carolina. Now, the Court is, in effect, sending the same message to al-Marri.

The Court should not have interposed this unnecessary delay. The legal issue is precisely the same, wherever the case is filed. And, as I will argue below, the outcome of Padilla and al-Marri's challenges is clear from prior Court rulings.

Their incommunicado detentions, with no charges filed against them, and no initial access to attorneys, are — as they always were — plainly unconstitutional. Delaying these cases only extends unconstitutional and already lengthy detentions in military prisons.

Moreover, as I will explain, this is far from the only disturbing aspect of the al-Marri and Padilla cases. They also serve, as the public record reflects, to prove that the government is using the "enemy combatant" designation tactically — not in a consistent way, based on the facts and the law.

It's bad enough that the government invented a label that, in its view, allows both Geneva Convention safeguards and U.S. Constitutional rights to be stripped away. The government has compounded this error by failing to use the label in any principled way.

The facts of al-Marri's case

Before his arrest, al-Marri — a Qatari national — was attending graduate school at Bradley University in Illinois. Originally, the government held him on a "material witness" warrant. Then it charged him with making false statements. Less than a month before al-Marri's trial, the government dropped its charges against him, and declared him an "enemy combatant."

Few people know that the government sought to have al-Marri's criminal case dismissed without prejudice — that is, without losing the government's ability to choose later to re-indict him in a civilian criminal court. But that tactic failed.

After designating al-Marri an enemy combatant, the government held him incommunicado in a South Carolina military prison — where [Yasir] Hamdi (due under an agreement he signed last September to be released no later than next September 30, but still in custody) and Padilla are also being held.

Al-Marri's attorneys challenged his detention in Illinois. But the government argues that his habeas corpus petition should have been filed in South Carolina, where the government incarcerated him. As noted above, this is the same argument the government successfully made with respect to Jose Padilla — as reflected in the *Padilla v. Rumsfeld* decision.

The Court's view on the Padilla and al-Marri cases is already clear

Although Padilla and al-Marri's hearings in the Supreme Court on the merits of their cases have been delayed, it is quite clear what the Court will ultimately rule.

In the *Rasul v. Bush* case, the Court ruled, 6-3, that federal courts have the jurisdiction to consider challenges to the custody of foreigners; specifically, the noncitizen detainees at Guantanamo Bay, Cuba, have the right to file petitions for habeas corpus.

Justice Stevens, writing for the majority, pointed out the unique circumstances of the petitioners (2 Australians and 12 Kuwaitis):

> They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Because the courts of the United States have traditionally been open to nonresident aliens, the Court held that the federal courts have jurisdiction to determine the legality of the executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.

The *Rasul* majority found that nothing in any of the Court's cases "categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. courts." Thus, it was no surprise that in *Hamdi v. Rumsfeld,* a majority of the justices found

that due process demands that a citizen held on American soil as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker.

In a plurality opinion and a concurrence, the Court in *Hamdi* held that the administration could label Yaser Hamdi an "enemy combatant," but that Hamdi has the Due Process right to challenge the government's claimed justification for his detention before an impartial adjudicator.

Justice O'Connor explained that "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others." She elaborated:

> It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.... [D]ue process demands some system for a citizen detainee to refute his classification.

Together, the *Rasul* and *Hamdi* cases telegraph that when Padilla refiles his case in the proper court, he should receive the Due Process right to challenge before an unbiased arbitrator the government's rationale for his detention.

"At stake in this case is nothing less than the essence of a free society," Justice Stevens wrote in an impassioned dissent in *Padilla*. He compared unconstrained executive detention for the purpose of investigating and preventing subversive activity to the Star Chamber.

The executive detention of subversives, Justice Stevens wrote, may not be justified "by the naked interest in using unlawful procedures to extract information.... For if this nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny."

Although the government has made much of the distinction between citizens and noncitizens, the truth is that the U.S. Constitution's Bill of Rights speaks of persons — not citizens. Thus, al-Marri has Due Process rights just as surely as Padilla does.

As soon as there is a ruling then — either in South Carolina or, if the lower federal courts err, from the Supreme Court — Padilla and al-Marri's illegal detention must end. But as the days pass, their unconstitutional imprisonment continues. The Court should be ashamed not to have intervened, when it could have, to stop an ongoing constitutional violation of the most serious kind.

Short of being executed or tortured (options the current administration also seems to favor), being detained in a military prison with no end date, no charges filed, and no right to contact with the outside world, is perhaps the most Kafkaesque nightmare imaginable. But the Court has allowed that nightmare to continue, when it could have ended it.

Jesselyn Radack worked from 1995 to 2002 at the Department of Justice and served for three years as legal advisor to the Professional Responsibility Advisory Office. She resigned on the grounds that her ethics advice with respect to John Walker Lindh had been disregarded and that the government had not produced her memos to a court that had required them. Radack currently works with the ABA Task Force on Treatment of Enemy Combatants. This article originally appeared as a FindLaw's Writ legal commentary on October 11, 2004, and is reprinted with permission.

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