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How the “Enemy Combatant” Label Is Being Used, Part 2

by Jesselyn Radack

As Jose Padilla and Ali Saleh Kahlah al-Marril languish in military prison, it’s worth reflecting on why the administration chose to deem them — and not others — enemy combatants in the first place. It seems there’s no rhyme or reason to the designation — which the government seems to apply, withdraw, and threaten at its whim.

Here are some of the prisoners who were ultimately processed through the civilian criminal justice system:

First, there is “American Taliban” John Walker Lindh. Lindh was originally placed in the military system, and the government will return him there if he violates his plea agreement, but his plea agreement is within the civilian criminal justice system. Though Lindh was vilified by the government, who claimed he was a traitor trained in al-Qaeda camps, it did not deem him an “enemy combatant.”

Second, there is British national and “shoe bomber” Richard Reid. Despite the heinousness of Reid’s attempted crime, the massive number of potential victims, and Reid’s apparent intent to attack the United States and France by murdering its citizens, Reid was not deemed an “enemy combatant.”

Third, there is French national Zacarias Moussaoui, the alleged “20th hijacker.” Moussaoui was processed and indicted in the civilian criminal justice system despite an admitted al-Qaeda allegiance, and allegations of participation in the September 11 conspiracy. Only now is the government considering redesignating him as an enemy combatant and trying him before a military tribunal.

Fourth, there is U.S. citizen Iyman Faris, who has admitted involvement in an al-Qaeda conspiracy to destroy the Brooklyn Bridge. Despite an admitted link to U.S. enemy al-Qaeda, Faris was not deemed an “enemy combatant.”

Here are the prisoners who have been deemed “enemy combatants”:

First, there is U.S. citizen Jose Padilla — who, like al-Marri, was originally arrested on a “material witness” warrant and imprisoned in a federal civilian jail.

Second, there is U.S. citizen Yaser Hamdi. After claiming that Hamdi was a tremendous threat to national security, detaining him in a military prison for nearly three years, and litigating his case all the way up to the Supreme Court, the government has now agreed to his release if he will, among other restrictions, renounce his American citizenship and reside in Saudi Arabia, where he grew up — even though Saudi Arabia is a hotbed of al-Qaeda activity.

Third, there is Qatari citizen al-Marri — whom I discussed last month.

There is simply no principled way to justify the government’s use of the “enemy combatant” label.

It’s not about allegedly fighting against the United States: both convicted felon Lindh, and “enemy combatant” Hamdi were captured at the same time, in the same place, “in a zone of active combat in a foreign theater of conflict” — Afghanistan.

And it’s not about citizenship: “non-enemy combatants” Lindh and Faris, and “enemy combatants” Padilla and Hamdi, are all U.S. citizens.

It can’t be about the severity of the threat posed: Who could pose a greater threat than criminal defendant Zacarias Moussaoui and convicted felon Richard Reid? Moussaoui plotted and achieved mass murder, and Reid was one observant flight attendant away from doing the same.

Meanwhile, while enemy combatant Jose Padilla, too, allegedly was involved in plotting a massacre, fellow enemy combatant Yaser Hamdi seems to be entirely harmless — after all, the government is about to return him to the Middle East, where our troops remain in Iraq. Calling our most harmless suspects “enemy combatants,” and stripping them of rights more dangerous persons still enjoy, is insanity — or worse, the cool, clear, deliberate designs of the Executive.

How can we explain the government’s inconsistent “enemy combatant” label?

So what *is* the “enemy combatant” label about? I submit it’s about tactics — and that is wrong.

It seems that the government is using the label to avoid having to charge the detainee and try him in civilian federal court — because it lacks sufficient evidence to do so. When it has strong evidence, it’s happy to test that evidence in open court. But when it is predominantly acting not on evidence, but on suspicion, the government keeps the detention private — indefinitely, incommunicado, in solitary confinement, and in a military brig, without charges, counsel, or judicial review.

Ironically, then, it seems that the least provably culpable *do* get the worst treatment. Indeed, among the least culpable may be some who are entirely innocent — as Hamdi seems to have been. And the most plainly guilty receive the protections of the criminal justice system, including the presumption of innocence, the right to counsel, and the opportunity to be tried in open court.

The government also seems to be using the threat of the “enemy combatant” label to coerce plea agreements. This was expressly done in the case of John Walker Lindh, as the agreement itself demonstrates. In addition, this threat — whether express or implicit — motivated Iyman Faris to cooperate with the FBI in the Brooklyn Bridge case — as, according to the *Washington Post’s* coverage, government officials themselves admitted.

Apparently, the threat of the “enemy combatant” label and its consequences also played a large role in the Buffalo, New York, “Lackawanna Six” case. There, the defendants, like al-Marri, were accused of belonging to a terrorist sleeper cell. And, understandably, they feared getting the “enemy combatant” label.

As reported by the *Washington Post*, a Lackawanna Six defense attorney explained, “We had to worry about the defendants being whisked out of the courtroom and declared enemy combatants.” Even U.S. Attorney Michael Battle admitted that all sides knew the government held that hammer.

If the government acted at its whim in giving out, say, traffic tickets, that would be one thing — it would be wrong, but perhaps excusable. But here, the stakes are immense.

Yet the outcry, among many in the American public, has not been heard. Indeed, many would be more outraged by an unfair traffic ticket than they are at the government’s unfair and Gulag-like detentions.

This simply isn’t a partisan issue. The kind of Soviet-style detentions that gave Ronald Reagan reason to use the term “Evil Empire” are now being used in the United States today. It’s not only liberal ideals that are being betrayed here. As reflected by Justice Scalia’s trenchant remark regarding Hamdi, “the very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.”

When the government moves detainees like pawns between the civilian and military systems, the legitimacy of both is undermined. When our government locks away people incommunicado, indefinitely, in a military brig, without charging them, it invites comparison to some of the world’s most abusive regimes, now and in the past.

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.