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Justice Moves at Glacial Pace for `Enemy Combatant'

Unusual circumstances keep a terror suspect, arrested in Illinois in 2001, mired in legal limbo and held in a Navy brig hoping for day in court

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WASHINGTON -- With the recent transfer of terror suspect Jose Padilla to a Miami jail to await trial, the sole remaining "enemy combatant" in the U.S., Ali Saleh Kahlab al-Marri, still sits in the Charleston Naval Brig, awaiting the outcome of a slow legal battle over how to dispense justice when an alleged terrorist is a legal alien.

In the eyes of the government, al-Marri is an Al Qaeda sleeper agent sent to the U.S. heartland to help the terrorist network's operatives get settled for follow-up attacks after Sept. 11, 2001.

His lawyers say al-Marri, 40, is an innocent civilian who legally came to the U.S. with his family to obtain a master's degree in engineering at Peoria's Bradley University.

Arrested in West Peoria in December 2001, al-Marri, a Qatari national, was declared an enemy combatant by President Bush on June 23, 2003, and has been held since then in solitary confinement at the South Carolina Navy brig. Al-Marri was effectively out of reach of the U.S. legal system until the Supreme Court declared in June 2004 that enemy combatants have some legal rights.

"Enemy combatant" is the name the Bush administration has used to label some terrorism suspects. These "combatants" reside in a kind of legal limbo, lacking rights traditionally assigned to criminal defendants and prisoners of war. The three enemy combatants initially held in the U.S.--the rest are imprisoned at Guantanamo Bay, Cuba--have been in a strange legal limbo, in part because of their differing circumstances.

Al-Marri and Padilla were arrested on American soil, but unlike al-Marri, Padilla is a U.S. citizen. A third combatant, Yaser Hamdi, was a U.S. citizen but was picked up on a battlefield in Afghanistan.

In addition to seeking a day in court, al-Marri has sued for relief from allegedly harsh and abusive detention. His lawsuit says he has been subjected to prolonged isolation and denial of basic necessities including bedding, clothing and medical care. The government denies mistreating him.

Cautionary tale

Al-Marri's predicament, and the glacial pace of its resolution, is a cautionary tale for millions of non-citizen legal U.S. residents, according to Jonathan Hafetz, one of his attorneys.

"The government can say, `We think you're a bad guy. We're just going to hold you because we think you are,'" said Hafetz of the Liberty and National Security Project at the Brennan Center for Justice in New York.

A federal court in South Carolina ruled in July that as a non-citizen, al-Marri could not simply demand that the government charge him with a crime or release him. The ruling noted the decision "does not close the door to this court to [al-Marri]," but it did not spell out what al-Marri needed to do to challenge his enemy combatant status.

In December, the court said al-Marri was entitled to "receive notice of the factual basis for his classification [as an enemy combatant], and a fair opportunity to rebut the government's factual assertions by presenting more persuasive evidence before a neutral decisionmaker."

But his lawyers say that standard, borrowed from the Supreme Court's June 2004 decision, stacks the deck against al-Marri because some of the evidence against him is secret and unavailable. And the public portion of the government's evidence consists of a sworn statement from a federal agent who did not have firsthand knowledge of the assertions about al-Marri's alleged ties to Al Qaeda, Hafetz said. The allegations include phone calls al-Marri made and material on his laptop.

"All the government has submitted to say they can hold him for the rest of his life is the statement of a single government agent who has no direct knowledge," Hafetz said.

A Justice Department spokesman declined to comment on the case. But as in all enemy combatant cases, government lawyers in court papers call for giving the president a free hand in dealing with detainees. Their arguments in the al-Marri case lean heavily on the Supreme Court's June 2004 decision regarding Hamdi.

The justices ruled that Hamdi was entitled to a hearing to contest his enemy combatant status but that national security considerations justified compromises, including possibly the use of secondhand information not normally admissible in court.

Government lawyers argue that as a non-citizen U.S. resident, al-Marri cannot demand any more rights or protections than those contemplated for a citizen like Hamdi.

Different circumstances

But Hafetz said the Supreme Court's hearing framework seeks to avoid interference with military operations, a concern specific to the case of Hamdi, who was picked up on the Afghan battlefield. He said it should not apply to al-Marri, who was arrested in the U.S., where obstructing the military is not an issue.

The hearing envisioned for Hamdi never occurred. He was released and allowed to return home to Saudi Arabia in October 2004 after forfeiting his U.S. citizenship.

Padilla, likewise, has not faced a hearing on his enemy combatant status.

The one-time Chicago gang member was arrested at O'Hare International Airport in May 2002 and taken into federal custody. Bush later declared Padilla an enemy combatant, who was transferred to the brig in June 2002.

In a surprise development, Padilla in January was transferred from military control to the custody of the Justice Department in Miami to face terrorism-related charges unrelated to the allegations used to detain him as an enemy combatant.

Al-Marri, meanwhile, has not budged and, according to his lawyers, has not been interrogated in more than a year. Since being moved to the brig, he has not been permitted visits with family, including a wife and five children, who live in Saudi Arabia. A brother, Jarallah al-Marri, is detained at the Guantanamo Bay naval base.

Accusations against Ali al-Marri include that he made a series of telephone calls in late 2001 to a number in the United Arab Emirates used by suicide hijacker Mohammad Atta and others involved in the Sept. 11 attacks. The government says the phone number belonged to Mustafa Ahmed al-Hawsawi, an alleged Al Qaeda paymaster.

Al-Marri's lawyers say they want to know if any evidence against their client was collected through torture.

Al-Marri denies being a terrorist or committing any crimes.

A leading expert on military law faulted the government for delaying a resolution of enemy combatant claims.

"There's this sense that time has no value," said Eugene Fidell, president of the National Institute of Military Justice. "I think the government has to explain what its game plan is. The legal system is illusory for people in his position."

Fidell said federal judges need to be more assertive in establishing a clear process for handling cases of enemy combatants.

"In his [al-Marri's] case as in Padilla's, they were subject to the district court and then whisked out with no watchful eye over them," he said.