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NEWS ANALYSIS

## **Sidestepping Courts in the War on Terrorism**

U.S. seeks leverage by moving detainees or changing their status before scheduled hearings. Critics call it legal dodge ball.

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WASHINGTON -- The timing of the government's indictment last week of terror suspect Jose Padilla, after holding him more than three years without charges, seemed hardly coincidental.

The Supreme Court was being asked to review the Padilla matter, which has sparked a national debate over the treatment of terrorism suspects who are U.S. citizens. By filing criminal charges against him, the Justice Department was reducing the chance that the high court would rule against the government in his case.

It's an increasingly common strategy in the Bush administration's legal war on terrorism: avoiding review by the federal courts whenever possible.

As the government has tried to maximize its power to track down, question and incarcerate suspects here and abroad, it has come to view the courts as a sort of new domestic threat that often affords prisoners more rights than officials feel they legally deserve. Barely a year ago, the Supreme Court gave terrorism suspects broad rights to challenge the government in court.

In the wake of that and other rulings, authorities have moved repeatedly to avoid judicial review by changing the status of prisoners, shipping them overseas or making adjustments in the conditions of their confinement -- sometimes days before suspects were to appear in court.

The administration is also considered likely to support legislation, already passed by the Senate that would greatly limit the rights of detainees and undo much of the 2004 high court ruling for future cases.

Critics say that these and other tactics amount to a kind of legal dodge ball with the Constitution.

"It is really about holding the reins," said William Banks, a national security expert at Syracuse University Law School. "They simply don't want the courts to push them around."

"Every time a court has been on the verge of granting a detainee a fair shake, the government has taken the ball and gone home," said Joshua Dratel, a lawyer who has represented a number of defendants in terrorism cases -- including some held at the military prison at Guantanamo Bay, Cuba. "This is part of a pernicious pattern. They have been trying to subvert the process."

Administration officials deny there is any strategy to dodge the courts. But they also say they have a duty to protect the country and that they are taking all necessary steps to fulfill that pledge in what is largely uncharted legal territory.

Given the high stakes, the government would be wrong not to consider all its options, some observers said.

"I don't think there is anything wrong with that. That is just being responsible," said Andrew McCarthy, a former federal prosecutor who was involved in a number of terrorism cases.

Bryan Sierra, a spokesman for the Justice Department, said officials were limited in what they could say about pending cases -- including Padilla's -- but added that the paramount consideration has always been the nation's security. "At every point in Mr. Padilla's detention, the tools used have been subject to some form of judicial review," Sierra said.

But defense lawyers, human-rights groups and some legal experts say such a system also allows the government to play a kind of war game with the rights of defendants and the legal process.

The plight of Ali Saleh Kahlah Al-Marri is a case in point, they say. Officials have said they believe that Al-Marri, a native of Qatar who entered the country on Sept. 10, 2001, was a "sleeper cell operative" working to settle foreign terrorists in the U.S.

Two years ago, the Justice Department was moving against him in federal court in Illinois on charges of fraud and making false statements to authorities. Then the government decided he was too dangerous to be handled by the civilian courts, and he was moved to a military brig in South Carolina and designated an enemy combatant by President Bush.

The abrupt transfer deprived Al-Marri of the protections of the U.S. judicial system.

His lawyers have said they believe that government officials took the action concerned that they were going to lose the criminal case. The move occurred on the eve of a hearing to suppress crucial evidence against him that his lawyers argued had been illegally obtained.

The administration also has fought hard against providing basic legal protections to detainees on the premise that they are being held outside the normal justice system. But officials have made concessions when it appeared their actions were about to be challenged in court. Defense lawyers say the government's goal is to avoid adverse rulings.

Officials afforded another enemy combatant, Yaser Esam Hamdi, access to a lawyer only after the Supreme Court was asked to take up his case. The court ultimately held last year that Hamdi was owed a hearing to make a case about his detention. He never got it. The administration instead deported him to Saudi Arabia, where his family lives, even though he once had been deemed a major threat who was captured on an Afghanistan battlefield.

Elsewhere, the government appears to have released detainees to avoid possible hearings that could air evidence of alleged unsavory tactics by captors. Earlier this year, the U.S. agreed to free an Australian man, Mamdouh Habib, who had been detained at Guantanamo Bay since 2002 on suspicion of being an Al Qaeda agent.

Some U.S. officials reportedly have said that Habib was released to ensure that a court would not closely examine evidence that he had been tortured in Egypt during interrogations.

The congressional effort to trim the rights of detainees could exacerbate such problems, some legal experts said. A smaller role for the courts, they said, could open up the possibility of additional abuses, such as prolonged detentions and coercive interrogations.

"When the government illustrates, over and over again, this contempt for the judiciary, it breeds its own lawlessness," said Joseph Margulies, an attorney with the nonprofit MacArthur Justice Center at the University of Chicago Law School. Margulies has represented several detainees and helped win the Supreme Court ruling last year establishing their rights to a hearing. "The government should not be afraid to take cases to court," he said.

Padilla's journey through the justice system began when he was picked up by the FBI at Chicago's O'Hare International Airport in May 2002 and held on a material witness warrant. A month later, he was removed from the court system when Bush designated him an enemy combatant. He was placed in solitary confinement in a Navy brig in South Carolina, identified by top administration officials as a would-be "dirty bomber" plotting to plant an explosive device that would spread radioactive material. But he was never charged.

In September, a federal appeals court upheld his detention. Padilla's lawyers filed a request with the Supreme Court to review the case, demanding that he be charged or set free. A deadline had been set for this week for the government to respond to Padilla's petition.

Officials at the Justice Department said that because they have decided to pursue criminal charges against Padilla, the Supreme Court should have no reason to get involved at this juncture. "We believe that the petition is moot," U.S. Atty. Gen. Alberto R. Gonzales said last week in announcing the indictment.

The terror-related charges against Padilla bear little resemblance to the government's original accusations against him.

Justice officials offered no assurances that Padilla would not be thrown back into military custody if the criminal case did not go well. Padilla's lawyers plan to press the high court to take the case.

"There is no guarantee that the government won't do this again," said Jennifer Martinez, a Stanford law professor who is assisting Padilla's defense.