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## Meet the New Padilla

The next 9/11 case to watch.

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Now that Zacarias Moussaoui is eligible for the death penalty and the Supreme Court has made it clear that Jose Padilla will face regular old federal charges, it's time to start following a new 9/11 case. Ali Saleh Kalah al-Marri is the only person whom the Bush administration has accused of being an enemy combatant who is still being held in the United States. Last week, his case took a turn that demonstrates what's gained from trying accused terrorists in federal court, rather than before a military tribunal.

Al-Marri, a Qatari national, came to the United States on Sept. 10, 2001, with his wife and children and enrolled in a master's program at Bradley University in Peoria, Ill. In December 2001, he was arrested as a material witness in the 9/11 investigation. In January and February 2002, he was charged with several counts of counterfeiting and making false statements to banks and to the FBI. His trial was scheduled for July 2003.

A month before that trial date, President Bush designated al-Marri as an enemy combatant and directed that he be turned over to the Department of Defense, which dumped him in the naval brig in Charleston, S.C. Which almost makes al-Marri Padilla's legal mirror image: Both men were arrested in the United States rather than captured anywhere near the battlefield in Afghanistan, as most of the Guantanamo detainees supposedly were. (Padilla is a U.S. citizen; al-Marri is not.) But while Padilla has been downgraded from enemy combatant to humdrum accused criminal, al-Marri has been upgraded from counterfeiter to al-Qaida sleeper agent. Why?

Until last week, it was awfully hard to tell. The government's enemy-combatant allegations against al-Marri are contained in the Rapp Declarations, documents signed by Jeffrey Rapp, director of the Pentagon's Joint Intelligence Task for Combating Terrorism. The declarations repeat almost verbatim the charges in the 2002 indictments—they accuse al-Marri of setting up fake bank accounts and fake e-mail accounts; of stealing credit cards; and of keeping on his computer programs used by hackers, speeches by Osama Bin Laden, and photographs of the World Trade Center. Prosecutors said they'd amassed additional evidence tying al-Marri more directly to the 9/11 plot. But that part of the Rapp Declarations was classified, so al-Marri wasn't allowed to see it.

Al-Marri's lawyers protested. The Rapp Declarations are "triple hearsay," they argued, law-speak for whisper down the lane. Rapp wasn't testifying against al-Marri. He was testifying to what other agents had told him that unnamed other witnesses had testified to. And to withhold much of the substance of these thirdhand allegations from al-Marri violated his constitutional rights, his lawyers claimed in the legal papers they filed. How was he supposed to dispute the evidence if he didn't know what it amounted to?

Legally speaking, this is an easy argument to win. The Supreme Court has long held that defendants have the right to hear the factual basis for the allegations against them. Magistrate Judge Robert C. Carr, appointed in 1975 during the Ford administration, called the government's bluff. "You need to make your choice, because this deals with a man's freedom," he told prosecutors at a teleconference with lawyers from both sides, held at the end of February. The judge's skepticism had swift effect. Prosecutors took another look at the classified parts of the Rapp Declarations and decided to make most of them public after all. When they declassified

"substantial portions" last Thursday, they cited "the public interest"-otherwise known as, "the judge said we had to."

The declassified allegations aren't revelatory. Most of them have already been made in relation to Padilla's case. They link al-Marri to the 9/11 plotters via Khalid Sheikh Mohammed, an al-Qaida member whom the CIA is holding in a secret prison. And while the government still refuses in the Rapp Declarations to "identify the specific sources" of the allegations, it seems clear that they're relying at least in part on KSM himself. Al-Marri's transfer from federal prison to brig is probably the result of what KSM told interrogators after al-Marri's 2002 indictment.

Which would mean it's also a safe bet that evidence against al-Marri was obtained through torture. A 2004 review by the CIA's inspector general found that Mohammed has been subjected to near-drowning while in custody (the term of art is "waterboarding"). As I discussed here, in a New York Times article last November, an unnamed government official explained that such interrogation methods were causing problems in the case against Padilla. Khalid Sheikh Mohammed and Abu Zubaydah, another al-Qaida man interrogated by the CIA, "could almost certainly not be used as witnesses, because that could expose classified information and could open up charges from defense lawyers that their earlier statements were a result of torture," the official said.

Nonetheless, the government is plowing ahead with its case against al-Marri, arguing that because he's a noncitizen, he doesn't have the right to the procedural protections that are normally available in federal court. Maybe prosecutors have other "specific sources" of evidence against him. But if not, should the basis for al-Marri's detention and eventual sentence be torture testimony, long shunned because it is notoriously unreliable?

This question seems to be at the heart of al-Marri's case. It is also central to the cases of the hundreds of foreign detainees who have been held for more than four years at Guantanamo Bay. It's a question that the federal courts-not a military tribunal specially constituted by the Bush administration-need to resolve. The courts should also address whether the government can designate a foreign detainee an enemy combatant, with the loss of rights that entails, if he has been arrested on U.S. soil rather than on or near a battlefield.

The government has taken lots of hits for bungling other 9/11 cases. And it's true that these cases sometimes raise tricky questions about how to handle evidence that, if disclosed, could pose a threat to national security. No wonder the Bush administration prefers to do its work before the few-rights-for-all military tribunals it has established. But federal courts have perfectly adequate procedures for dealing with sensitive and classified material. Judge Carr's strong words to al-Marri's prosecutors, and the release of evidence to which they led, exemplify why independent judges should make these calls. They need to keep doing so.

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