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The Government's Opportunistic Use of the "Enemy Combatant" Label: How This Category Is Being Used as a Prosecution Tactic

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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 Hamdi (due under an agreement he signed last month to be released no later than 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 non-citizen 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 (two Australians and twelve 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 decisionmaker.

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 non-citizens, 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.

The Government's Opportunistic, Tactical Use of the "Enemy Combatant" Label

As Padilla and al-Marri 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 re-designating him as an enemy combatant and trying him before a military tribunal.

Fourth, there is U.S. citizen Lyman 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 have discussed above.

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 Lyman Faris to cooperate with the FBI in the Brooklyn Bridge case - as, according to the 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 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.