

# “Enemy combatant” indicted to block Supreme Court review

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In a cynical bid to prevent the US Supreme Court from ruling on the Bush administration's practice of imprisoning US citizens and legal residents of the United States as "enemy combatants," without charges or trials, the Obama Justice Department has brought criminal charges against the last individual held in the US on this basis, Salehn Kahla al-Marri.

In a two-page indictment unsealed on Friday in Peoria, Illinois, federal prosecutors charged al-Marri with providing material resources and support to al Qaeda and with conspiring with others to do so. The brief indictment presented no evidence to support these allegations.

On the same day, Acting Solicitor General Edwin Kneedler filed a motion in the US Supreme Court urging it to drop al-Marri's case on the grounds that the criminal indictment rendered moot the challenge to the constitutionality of his earlier imprisonment without charges.

Al-Marri, a Qatari student, arrived in the US on September 10, 2001—the day before the 9/11 attacks—on a legal student visa to study for a master's degree in computer sciences. He was arrested in December 2001 at his home in Peoria, where he lived with his wife and five children.

He was subsequently held as an alleged material witness to the attacks, and then charged on unrelated counts of credit card fraud and making false statements. He insisted on his innocence and was prepared to confront the charges at trial.

However, in June 2003, on the eve an evidentiary hearing in which his attorneys were going to challenge evidence on the grounds that it had been extracted through torture, the Bush administration suddenly declared him an "enemy combatant" and transported him to a Navy Brig in South Carolina, where he has been held in solitary confinement ever since.

He was held incommunicado for over a year. While imprisoned at the brig, al-Marri was subjected to torture and other abuse and has been prevented from seeing his family for nearly six years. Al-Marri's lawyers have reported that this prolonged cruel and abusive punishment has left their client mentally unstable.

Al-Marri's lawyers have asked the Supreme Court to review a 5-to-4 decision by the US Court of Appeals for the 4th Circuit last July upholding the Bush administration's assertion of near-dictatorial powers of the president to detain anyone, including US citizens, without charges or trials merely by designating them as "enemy combatants."

This narrow decision overturned a ruling by a three-judge appeals court panel in June of last year. The earlier decision rejected the administration's claim to such sweeping powers and compared its position to that of military dictatorships and to the practices of King George III that precipitated the American Revolution.

The Obama administration's action in the al-Marri case is almost identical to that of the Bush administration in the case of Jose Padilla, the US citizen detained at Chicago's O'Hare International Airport in May 2002 upon returning on a flight from Pakistan. Padilla was publicly accused of being part of a "dirty bomb" attack and held, like al-Marri, as a material witness in the September 11 attacks. When his lawyer filed a motion challenging his detention, President Bush signed an executive order declaring him an enemy combatant. He was seized by the military and held without charge in the same Navy brig as al-Marri for three and a half years.

A challenge to Padilla's imprisonment was rejected by the same fourth circuit court of appeals, which held that in time of war, the US president as commander-in-chief has the power to throw anyone in prison without charges on his mere say-so that they are enemy combatants. The court ruled that these prisoners may be held until the end of hostilities without access to lawyers or court review.

In 2005, two days before the government was required to submit its brief to the Supreme Court in response to a challenge to this reactionary ruling, the Bush administration brought criminal charges similar to those now being leveled against al-Marri—conspiracy and providing material support to terrorism—while making no attempt whatsoever to substantiate its previous sensational allegations about a dirty bomb plot.

The Bush administration then—just as the Obama administration now—feared that the Supreme Court might find itself compelled to rule that the President of the United States does not have the power to effectively lock US citizens and legal residents in jail and throw away the key without ever publicly charging them or allowing them to confront their accusers in a court of law.

In both cases—al-Marri and Padilla—the government has bowed to the Constitution in the individual instances by bringing them before a court only in order to preserve the right it has arrogated to itself to carry out the same extra-constitutional imprisonment of others in the future.

In response to the government's action last week, al-Marri's attorney, Jonathan Hafetz of the ACLU National Security Project,

welcomed the indictment against his client, declaring, "This case is now finally where it belongs: in a legitimate court." He went on, however, to condemn the Obama Justice Department's attempt to prevent any challenge in the Supreme Court to the extraordinary powers asserted under the Bush administration.

"Despite this indictment, the Obama administration has yet to renounce the government's asserted authority to imprison legal residents and US citizens without charge or trial," Hafetz said. "We will continue to pursue Mr. al-Marri's case before the Supreme Court to make sure that no American citizen or lawful resident will ever again be subjected to such treatment. It is important that the Court hears Mr. al-Marri's case and rejects, once and for all, the notion that any president has the sweeping authority to deprive individuals living in the United States of their most basic constitutional rights by designating them 'enemy combatants.'"

Hafetz argued that the Supreme Court should rule on the claim of presidential power to detain people without charges "so it will not happen in the future."

Many legal observers expect that the right-wing majority on the Supreme Court will take the same position in relation to al-Marri's case as they did to Padilla's—that the government's filing of criminal charges rendered the challenge to its previous trampling on the most basic constitutional rights a moot point.

Only three justices—Stephen Breyer, Ruth Bader Ginsburg and David Souter—argued that the high court should have heard the Padilla case, despite Padilla's transfer to civilian custody. They insisted that the case "raises a question of profound importance to the nation."

Jonathan Freiman, a lawyer who represented Padilla, condemned the Justice Department's action in the al-Marri case as "a calculated political move to avoid taking a position" in front of the Supreme Court.

"What the Bush administration did with Padilla, the Obama administration is trying to do with al-Marri," Freiman told the Associated Press. "Transferring al-Marri out of the brig is the right thing to do. Moving to dismiss the case is not."

The Obama Justice Department's position in the al-Marri case is of a piece with a series of similar actions in which the administration has gone into court to uphold the Bush administration's policies against constitutional challenges.

The administration went into federal court in February to defend the position of the Bush administration in response to a suit filed by four individuals held for six years without charges at the US prison camp at Bagram air base in Afghanistan. Like its predecessor, the Obama administration argued that the detainees had no right to challenge their imprisonment in US courts.

Twice last month, Justice Department lawyers used the same "state secrets" argument as the Bush administration in seeking the dismissal of lawsuits. The use of the state secrets privilege is aimed at killing a case before evidence can even be heard on the grounds that its disclosure would endanger national security. The first case involved the CIA's "extraordinary rendition" program of seizing suspects and transporting them to foreign countries to be tortured. The second concerned the National Security Agency's illegal domestic wiretapping operation.

A federal appeals court in San Francisco Friday rejected this argument in the second case, which involves the illegal bugging of two US attorneys and an Islamic charity in Oregon. The 9th US Circuit Court of Appeals ruled that lawyers in the case could be granted access to secret documents under secure conditions.

In this case, as in others, the invocation of the state secrets privilege is spurious. Evidence of illegal wiretapping was exposed by the government itself with its inadvertent release of a document proving NSA spying on the charity and its lawyers.

The ruling means that the Obama administration may be compelled to defend Bush's criminal domestic spying operation in a court of law. Before that happens, however, the Justice Department will appeal the appellate decision, perhaps all the way to the Supreme Court.

Moreover, the Obama administration appears set to stonewall the court on any release of evidence. As the AP reported, "Government lawyers signaled they would continue fighting to keep the information secret, setting up a new showdown between the courts and the White House over national security."

It is becoming more evident with each passing day that the Obama administration, far from inaugurating some sweeping change from the criminal policies of the previous administration, is determined to retain intact the extra-constitutional and quasi-police-state powers assumed by the Bush White House.

The author also recommends:

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[17 July 2008]

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[13 July 2008]



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