

In Terror Cases, Administration Sets Own Rules

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When Attorney General Alberto R. Gonzales announced last week that [Jose Padilla](#) would be transferred to the federal justice system from military detention, he said almost nothing about the standards the administration used in deciding whether to charge terrorism suspects like Mr. Padilla with crimes or to hold them in military facilities as enemy combatants.

"We take each individual, each case, case by case," Mr. Gonzales said.

The upshot of that approach, underscored by the decision in Mr. Padilla's case, is that no one outside the administration knows just how the determination is made whether to handle a terror suspect as an enemy combatant or as a common criminal, to hold him indefinitely without charges in a military facility or to charge him in court.

Indeed, citing the need to combat terrorism, the administration has argued, with varying degrees of success, that judges should have essentially no role in reviewing its decisions. The change in Mr. Padilla's status, just days before the government's legal papers were due in his appeal to the Supreme Court, suggested to many legal observers that the administration wanted to keep the court out of the case.

"The position of the executive branch," said Eric M. Freedman, a law professor at Hofstra University who has consulted with lawyers for several detainees, "is that it can be judge, jury and executioner."

The government says a secret and unilateral decision-making process is necessary because of the nature of the evidence it deals with. Officials described the approach as a practical one that weighs a mix of often-sensitive factors.

"Much thought goes into how and why various tools are used in these often complicated cases," Tasia Scolinos, a Justice Department spokeswoman, said on Friday. "The important thing is for someone not to come away thinking this whole process is arbitrary, which it is not."

Among the factors the government considers, Ms. Scolinos said, are "national security interests, the need to gather intelligence and the best and quickest way to obtain it, the concern about protecting intelligence sources and methods and ongoing information gathering, the ability to use information as evidence in a criminal proceeding, the circumstances of the manner in which the individual was detained, the applicable criminal charges, and classified-evidence issues."

Lawyers for people in terrorism investigations say a list of factors to be considered cannot substitute for bright-line standards announced in advance.

The courts have given the executive branch substantial but not total deference, often holding that the president has the authority to designate enemy combatants but allowing those detained to challenge the factual basis for the administration's determinations. Some courts have suggested that a detainee's citizenship, the place he was captured and whether he was fighting American troops should play a role in how aggressively the courts review enemy-combatant designations.

A look at the half-dozen most prominent terrorism detentions and prosecutions does little to illuminate the standards that have informed the government's decisions.

One American captured on the battlefield in Afghanistan was held in the United States as an enemy combatant. Another was prosecuted as a criminal. One foreigner seized in the United States as a suspected terrorist is being held as an enemy combatant without charges in a Navy brig in Charleston, S.C. Others have been prosecuted for their crimes.

In three high-profile terrorism cases, the government obtained convictions in federal court. [Zacarias Moussaoui](#), a French citizen, pleaded guilty to taking part in the conspiracy that led to the Sept. 11 attacks and faces the death penalty. Richard C. Reid, who is British, pleaded guilty to trying to blow up an airliner over the Atlantic with bombs in his shoes and is serving a life term. And John Walker Lindh, the California man who pleaded guilty to aiding the Taliban, is serving 20 years.

In three other cases, the administration designated terrorism suspects as enemy combatants who may be detained by the military indefinitely without charge. One, Yaser Esam Hamdi, an American citizen of Saudi descent, was released and sent to Saudi Arabia after the Supreme Court gave him the right to contest the government's claims. A second American, Mr. Padilla, was transferred to the custody of the Justice Department last week.

The only remaining enemy combatant known to be detained in the United States, Ali Saleh Kahlah al-Marri, traveled the same road as Mr. Padilla, but in the opposite direction. "Al-Marri is precisely the flipside of Padilla," said Lawrence S. Lustberg, one of Mr. Marri's lawyers.

After 16 months of criminal proceedings on fraud charges, and less than a month before Mr. Marri's trial was to start in July 2003, President Bush designated him an enemy combatant. Mr. Marri, a Qatari who had been working on a master's degree at Bradley University in Peoria, Ill., was immediately transferred into military custody and moved to the Navy brig in Charleston.

John Yoo, a former Justice Department official who is now a law professor at the University of California, Berkeley, said two issues tended to determine how the government proceeded.

"The main factors that will determine how you will be charged," Mr. Yoo said, "are, one, how strong your link to Al Qaeda is and, two, whether you have any actionable intelligence that will prevent an attack on the United States."

Jonathan M. Freiman, one of Mr. Padilla's lawyers, questioned that, saying the administration's decisions had often seemed to be reactions to actual and anticipated court decisions.

"The government continues to be more focused on protecting its strategies than allowing them to be subjected to legal review," Mr. Freiman said.

In the indictment unsealed Tuesday, Mr. Padilla was not charged with some of the most serious accusations against him, including plotting to explode a radioactive device, because the evidence needed to prove the case had been obtained through harsh questioning of two senior members of Al Qaeda, current and former government officials have said. The statements might not have been admissible in court and could have exposed classified information, the officials said.

The Moussaoui case was also complicated by his lawyers' demands that they be given access to potentially exculpatory evidence that the government said had to be kept secret for reasons of national security.

The mere possibility of being named an enemy combatant, coupled with the difficulty of divining the standards the administration uses in choosing whom to call one, can affect the decisions of defendants in criminal plea negotiations.

"In the case of John Walker Lindh," said his lawyer, James J. Brosnahan, "there was a suggestion that even if we got an acquittal that he could be declared an unlawful combatant, that he could be a Padilla."

Indeed, the plea agreement Mr. Lindh signed contains an unusual provision. "For the rest of the defendant's natural life," it says, "should the government determine that the defendant has engaged in" one of more than a score of crimes of terrorism, "the United States may immediately invoke any right it has at that time to capture and detain the defendant as an unlawful enemy combatant."

Mr. Freiman said he, too, had been told that the government reserved the right to detain Mr. Padilla again should he be acquitted.

Arguably, it may sometimes be preferable for a defendant to be held as an enemy combatant rather than being prosecuted. Mr. Lindh's case, for instance, is at least superficially similar to that of Mr. Hamdi, another American captured in Afghanistan. But Mr. Hamdi is free after three years of confinement, though he had to relinquish his American citizenship. Mr. Lindh is in the early part of his 20-year sentence.

The government has not offered an explanation for the disparate treatment of the cases.

Mr. Marri's detention, on the other hand, is potentially lifelong. Though he has not been convicted of a crime, said Jonathan Hafetz, one of his lawyers, the conditions in the Charleston brig are as bad or worse than those in the toughest high-security prisons.

"He has been in solitary confinement for two and a half years," Mr. Hafetz said of Mr. Marri. "He hasn't spoken to or seen his wife and five children since he was designated an enemy combatant" in June 2003. "There's no news, no books, nothing."

This year, the same South Carolina federal judge heard challenges from Mr. Padilla and Mr. Marri. In July, the judge, Henry F. Floyd, ruled that the administration was authorized to detain Mr. Marri. Four months earlier, the judge had reached the opposite conclusion in Mr. Padilla's case.

The difference, he said, was that Mr. Padilla was an American citizen.

The United States Court of Appeals for the Fourth Circuit, in Richmond, Va., reversed the ruling in the Padilla case. The administration's decision last week to charge Mr. Padilla and try to moot his appeal of the Fourth Circuit's decision to the Supreme Court may have been driven by its desire to maintain a helpful precedent in the circuit where it brings many of its terrorism cases.

"They are seeking to keep their options open," said David D. Cole, a law professor at Georgetown, "by avoiding Supreme Court review in the Padilla case. It lets them keep standing the Fourth Circuit decision."

In Mr. Hamdi's Supreme Court case last year, the four justices who joined Justice [Sandra Day O'Connor's](#) controlling opinion used a narrow definition of "enemy combatant," saying, at least for purposes of that case, that it meant someone "carrying a weapon against American troops on a foreign battlefield."

The government has proposed a much broader definition.

"The term 'enemy combatant,' " according to a Defense Department order last year, includes anyone "part of or supporting Taliban or Al Qaeda forces or associated forces."

In a hearing in December in a case brought by detainees imprisoned in the naval facility in Guantánamo Bay, Cuba, a judge questioned a Justice Department official about the limits of that definition. The official, Brian D. Boyle, said the hostilities in question were global and might continue for generations.

The judge, Joyce Hens Green of the Federal District Court in Washington, asked a series of hypothetical questions about who might be detained as an enemy combatant under the government's definition.

What about "a little old lady in Switzerland who writes checks to what she thinks is a charitable organization that helps orphans in Afghanistan but really is a front to finance Al Qaeda activities?" she asked.

And what about a resident of Dublin "who teaches English to the son of a person the C.I.A. knows to be a member of Al Qaeda?"

And "what about a Wall Street Journal reporter, working in Afghanistan, who knows the exact location of [Osama bin Laden](#) but does not reveal it to the United States government in order to protect her source?"

Mr. Boyle said the military had the power to detain all three people as enemy combatants.

In January, Judge Green allowed the detainees' court challenges to their confinement to proceed. Another judge on her court reached the opposite conclusion, and an appeal from the two decisions is pending.