



## 'Sort Of Like A Medieval Kingship'

Attorney urges constitutional test of 9/11 incarceration policies

Jonathan M. Freiman, a partner at New Haven's Wiggin and Dana, has been active in legal battles involving the constitutional rights of people arrested in the wake of the Sept. 11 attacks.

He worked with the court-appointed lawyers assigned to Jose Padilla, who in 2001 was arrested at Chicago's O'Hare airport and held by federal authorities without being charged with a crime. He also authored *amicus curiae* briefs excoriating the Bush Administration's claimed need to hold people suspected to have terrorist links without charging them.

Fast-forward to late February when a similar case made headlines. A graduate student in computer studies from Qatar, Salehn Kahla al-Marri, came to the U.S. on Sept. 10, 2001, and after the attacks was held as a material witness, and later as an "enemy combatant." Since June 2003, he has been in a Navy brig in South Carolina. The constitutionality of his incarceration was in line for U.S. Supreme Court review. To Freiman's dismay, first the Bush, and then the Obama administration have attempted to avoid high court review of both the Padilla and al-Marri cases.

Freiman, whose practice includes a diversified appellate and trial caseload, spoke with Senior Writer Thomas Scheffey about issues arising from the cases, and the just-released Bush Administration memos justifying claims to post-9/11 extraordinary powers.

**LAW TRIBUNE:** How did Jose Padilla come to you as a client?

**JONATHAN FREIMAN:** We had started a project at Yale in 2002 committed to enforcing international human rights in United States courts. After 9/11, there was a

fear that there would be a reaction in the U.S. that would lead to human rights being violated. We reached out to the court-appointed attorneys for Padilla. He was in a correctional facility as a material witness, [then] seized by military officials and placed in a military prison in South Carolina. There was a *habeas corpus* action filed immediately after that in the district court, and I was filing *amicus* briefs on behalf of a range of [liberal, conservative and libertarian] organizations... The court-appointed lawyers asked me to join in directly representing Padilla, and I continue to do so to this day.

### LAW TRIBUNE:

Salehn Kahla al-Marri is in much the same situation, as the last "enemy combatant" held without charges in the U.S.

**FREIMAN:** Padilla was getting very close to a trial, and the government unsealed an indictment in Florida that contained everything the government was saying he did ... that justified his detention. Originally, it was said he was going to detonate a radiological



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**Attorney Jonathan M. Freiman is concerned that the Obama Administration also doesn't want the Supreme Court to hear the cases of men arrested as 'enemy combatants' and held in prison without being charged.**

device, a statement that the deputy attorney general later described as "loose talk." They gave up that theory, and only charged him with things that occurred 10 or 12 years earlier having nothing to do with the U.S., like plans to create problems in Kosovo.

They then said they were going to transfer him out of the military brig, and they asked the Supreme Court to not hear the

*habeas* petition, on the grounds it was moot as for Padilla, and also because there were no longer citizens being detained without charges.

As they did with Padilla, they've just unsealed criminal indictments against al-Marri. More importantly, the Obama administration, just like the Bush administration, is telling the [U.S. Supreme] court not to decide this issue.

**LAW TRIBUNE:** And you would like the court to be able to rule this unconstitutional, and not allowed uncharged incarceration to linger as a legal option.

**FREIMAN:** [In a Padilla decision], U.S. Supreme Court Justice Stevens wrote for a four-member minority that what is at stake is "nothing less than the essence of a free society"...People in this country, citizens or otherwise, can't be thrown into jail on the say-so of the government, without having any charges pressed against them. That's what's at issue here.

**LAW TRIBUNE:** The Founding Fathers were quite familiar with the French *lettres de cachet* that incarcerated people without charge. Those practices helped inspire our Bill of Rights, didn't they?

**FREIMAN:** Indeed. I think history is

very much on our side. I think we see this in the memos from the Bush Administration that were [recently] released. What happened was, in the wake of 9/11, a theory was adopted that the president's military power trumped everything. These memos establish the legal structure for a police state in the United States. This was the construction of unbridled executive power, sort of like a medieval kingship....These memos show that, in our national crisis, our leaders lost faith in our democracy, they lost faith in our Constitution. They retreated behind this wall of sheer military power [and] we're poorer as a nation because of it. ■