

Date: Monday, February 23, 2009  
 Location: NEW YORK, NY  
 Circulation (DMA): 1,069,837 (NA)  
 Type (Frequency): Magazine (4x/yr)  
 Price: \$5.00  
 Keyword: Center for Constitutional Rights

## THE HARD CASES

BY JANE MAYER

The last "enemy combatant" being detained in America is incarcerated at the U.S. Naval Consolidated Brig in Charleston, South Carolina—a tan, low-slung building situated amid acres of grassy swampland. The prisoner, known internally as EC#2, is an alleged Al Qaeda sleeper agent named Ali Saleh Khalil al-Mari. He has been held in isolation in the brig for more than five years, although he has never stood trial or been convicted of any crime. Under rules established by the Bush Administration, suspected terrorists such as Mari were denied the legal protections traditionally afforded by the Constitution. Unless the Obama Administration overhauls the nation's terrorism policies, Mari—who claims that he is innocent—will likely spend the rest of his life in prison.

On September 10, 2001, Mari, a citizen of Qatar, who is now forty-three, came to America with his family. He had a student visa, and his ostensible purpose was to study computer programming at a small university in Peoria, Illinois. That December, he was arrested as a material witness in an investigation of the September 11th attacks. However, when Mari was on the verge of standing trial, in June, 2003, President George W. Bush ordered the military to seize him and hold him indefinitely. The Bush Administration contended that America was in a full-fledged war against terrorists, and that the President could therefore invoke extraordinary executive powers to detain Mari until the end of hostilities, on the basis of still secret evidence. That day, Mari was put on a military jet to Charleston, and since then he has been living as the only prisoner in an eighty-bed high-security wing of the brig, with no visits from family, friends, or the media.

Jonathan Hafetz, a lawyer with the American Civil Liberties Union, who has taken the lead role in Mari's legal defense, says that the Bush Administration's decision to leave him in sustained iso-

lation was akin to stranding him on a desert island. "It's a Robinson Crusoe-like situation," he told me. In 2005, Hafetz challenged the constitutionality of Mari's imprisonment. A lower court affirmed the government's right to detain him indefinitely. After several appeals, the case is scheduled to be heard by the Supreme Court in April. Hafetz calls the Mari case a pivotal test of "the most far-reaching use of detention powers" ever asserted by an American President.

The Court's calendar requires the Obama Administration to file a reply to the challenge by March 23rd. Unless some kind of diversionary action is taken—such as sending Mari home to Qatar, or working out a plea agreement—the Court's schedule will likely force the Obama Administration to offer quick answers to a host of complicated questions about its approach to fighting terrorism. John Bellinger III, who served as the counsel to the State Department under President Bush, says of officials in the Obama Administration, "They will have to either put up or shut up. Do they maintain the Bush Administration position, and keep holding Mari as an enemy combatant? They have to come up with a legal theory."

Among the issues to be decided, Hafetz says, is "the question of who is a soldier, and who is a civilian. Is the fight against terrorism war, or is it not war? How far does the battlefield extend? In the past, they treated Peoria as a battlefield. Can an American be arrested in his own home and jailed indefinitely, on the say-so of the President?" Hafetz wants the Supreme Court to rule that indefinite executive detention is illegal, and he hopes that Obama will withdraw Bush's executive order labeling Mari an enemy combatant, and issue a new one classifying him as a civilian.

This shift would allow Mari either to be charged with crimes or to be released. The Obama Administration's strategy in the Mari case will almost certainly es-

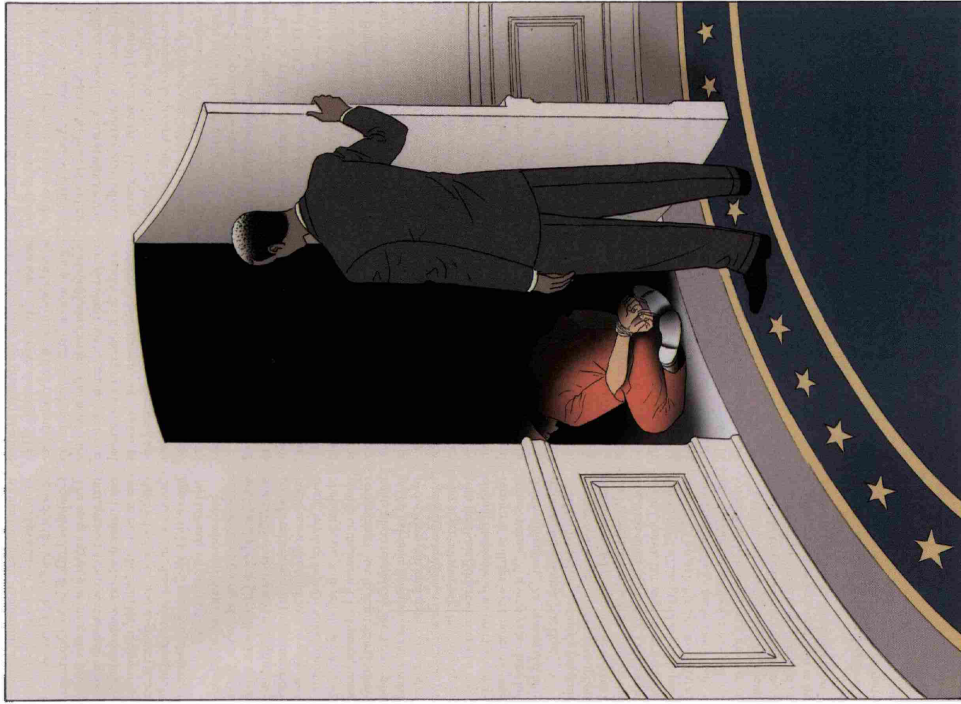
ablish legal principles that will have ramifications for future cases, as well as for the two hundred and forty or so similarly designated "unlawful enemy combatants" held in the military prison at Guantanamo Bay, Cuba. During the Bush years, the designation encompassed not just members of Al Qaeda and the Taliban but also anyone who associated with them, supported them, or supported organizations associated with them, even if unwittingly.

In 2004, a Bush Administration lawyer told a judge that, in theory, an enemy combatant could even be "a little old lady in Switzerland" whose charitable donations had been channelled, without her awareness, to Al Qaeda front groups.

If the Mari case reaches the Supreme Court, it will test the limits of such theories. The case is therefore being closely watched by civil libertarians on both the left and the right. The Center for Constitutional Rights, a liberal advocacy organization, and the Caro and Rutherford Institutes, which lean to the right, are among the many legal groups that have signed eighteen amicus briefs on Mari's behalf. Individual lawyers who have taken up his cause include Nicholas Katzenbach, the Attorney General in the Johnson Administration, and William Sessions, who was appointed director of the FBI by President Reagan. The editorial page of the *Times* has written repeatedly about the case, demanding that the Fourth Circuit Court of Appeals' affirmation of Mari's military detention be reversed: "People accused of bad deeds should be tried in court—not in sham proceedings. They should be put in jail—not secret detention."

No matter how Obama responds to the case, his decision is likely to arouse controversy. Hafetz says, "If President Obama is serious about restoring the rule of law in America, they can't defend what's been done to Mari. They would be completely buying into the Bush Administration's war on terror." This view is

Date: Monday, February 23, 2009  
 Location: NEW YORK, NY  
 Circulation (DMA): 1,069,837 (NA)  
 Type (Frequency): Magazine (4x/yr)  
 Price: \$5.00  
 Keyword: Center for Constitutional Rights



"We don't own the problem," Greg Craig, the White House counsel, says. "But we'll be held accountable for how we handle this."

widely held by Obama's political base. Yet the political risks of change are obvious. In 2004, Jeffrey Rapp, an analyst at the Defense Intelligence Agency, claimed in a sworn affidavit, without providing evidence, that Mari had met with Osama bin Laden in Afghanistan, and "offered to be an al Qaeda martyr." The government's theory is that Mari came to America in order to help carry out a second wave of terrorist attacks. "Al-Mari must be detained to prevent him from aiding al Qaeda in its efforts to attack the United States," Rapp said in his statements, which is the sole public document offering reasons for holding him.

In early February, former Vice-President Dick Cheney increased the pressure on Obama, by warning that a catastrophic nuclear or biological terrorist attack on America would occur unless Obama kept the Bush policies in place. In an unusually contentious interview for an erstwhile high official, Cheney told *Politico* that the Obama Administration was "more concerned about reading the rights to an Al Qaeda terrorist than they are with protecting the United States." Two days after Cheney's remarks were published, the White House was visited by families of victims killed in the September 11th attacks and in the bombing of the U.S.S. Cole, in 2000. Some of those families have organized an advocacy group, Military Families United, which claims sixty thousand members, and which has circulated a petition demanding that Congress reject all efforts by the Obama Administration to relocate any detained terrorist suspects to its members' districts.

Amid such competing viewpoints, a compromise idea has also emerged, which the Obama Administration is weighing. A number of national-security lawyers in

written with Jack L. Goldsmith, a conservative Harvard Law School professor who does not believe that it is the President's prerogative to lock "enemy combatants" up indefinitely, yet they fear that neither the criminal courts nor the military system is suited for the handling of transnational terrorists, whom they do not consider to be ordinary criminals or conventional soldiers. Instead, they suggest that Obama should work with Congress to write new laws, possibly creating a "national-security court," which could order certain suspects to be held without a trial.

One proponent of this idea is Neal Katyal, whom Obama recently named to the powerful post of Principal Deputy Solicitor General, in the Justice Department. Katyal is best known for his victory as lead counsel in *Hamdan v. Rumsfeld* (2006). In his first appearance before the Supreme Court, he persuaded a majority of the Justices to declare that the Guantanamo military-commission system was illegal, arguing that Congress had not authorized the commissions. Katyal's new job is to represent the government before the Supreme Court. Given the sensitivity of this role, Katyal declined to comment for this story. But in October he posted an article on a Web site affiliated with Georgetown Law, in which he argued, "What is needed is a serious plan to prosecute everyone we can in regular courts, and a separate system to deal with the very small handful of cases in which patently dangerous people cannot be tried." This new system, he wrote, would give the government the "ability to temporarily detain a dangerous individual," including in situations where "a criminal trial has failed." There are hundreds of legal variations that could be considered, he said. In 2007, Katyal published a related essay, cor-

without charges as unlawful enemy combatants. (In fact, the Bush Administration had explicitly granted the President this authority, in a bill passed after the attacks.) In the *Global*, Obama went on, "The detention of American citizens without access to judicial, fair procedure, or pursuant to national, fair procedure, enemy combatants is unconstitutional." In his inaugural Address, Obama further underscored his differences with Bush in this area, saying, "As for our common defense, we reject the false choice between our safety and our ideals." A top legal adviser to Obama told me that the President also believes that legal residents in America, like Mari, are entitled to due process.

Former Bush Administration officials who were involved in its anti-terror program suggest that Obama may find it harder than expected to translate idealistic rhetoric into action. "Governing is different from campaigning," says Belanger, who predicts that Obama and his officials will soon discover that "they can't just set the clocks back eight years and try every terror suspect captured abroad in the federal courts." Balinger now says that the treatment of Mari was a "failed experiment." John Ashcroft, who was Attorney General when Mari was designated an enemy combatant, makes no such apologies. Interviewed just before the inauguration, he defended what he described as a "sound decision" to "maximize the national interest" and predicted that, in the end, President Obama's approach to handling terror suspects would closely mirror his own. "How will he be different? The main difference is going to be that he spells his name 'O-b-a-m-a,' not 'B-u-s-h.'"

So far, the Obama Administration has declined to state a position on the Mari case. It's already becoming apparent, though, that Ashcroft was mistaken in his broader point. Obama, in his first week in office, issued three executive orders, undoing many of the most controversial elements of the Bush Administration's detention and interrogation programs. Most notably, Obama declared that the Administration hoped to close Guantanamo within a year. A little noticed memorandum issued at the time of the orders was dedicated to Mari. It called for a Cabinet-level inter-agency task force, led by

Attorney General Eric Holder, to review Mari's case, with an eye toward finding alternative ways to deal with him. The same officials will review the status of the enemy combatants held in Guantanamo. The Obama Administration has indicated that it hopes to return the majority of the detainees to other countries, or to try them in civilian and military courts. The looming question, however, is whether there is a category of terror suspect whose status precludes such options. It's unclear whether some home countries can provide fair trials or secure prisoners. More important, the high standard of evidence required in U.S. courts—guilt must be proved "beyond a reasonable doubt"—might result in dangerous individuals being set free.

Qatar has made known its interest in having Mari come home. But the Obama Administration has to decide whether he poses a recidivism risk—an assessment that has to be made, in part, on the basis of statements elicited through torture. (Khalid Sheikh Mohammed, the self-described mastermind of the 9/11 plot, was waterboarded by the C.I.A., and reportedly said that Mari was a fellow-terrorist.) As such, Mari may exemplify what Greg Craig, Obama's White House counsel, calls "the toughest question" facing the Bush administration as it tries to bring the Bush program within the rule of law: what to do with the so-called "third category" of detainees—suspects who may be difficult to convict under the American standards of justice, but who may pose a palpable threat if released.

Depending upon how many such "hard cases" exist, Craig says, the Administration will decide whether new laws, including possibly those enabling some sort of preventive detention, are necessary. Although the detainees from the Bush era pose the most immediate problem, he said, it's possible that the new Administration may also want to handle future prisoners outside the existing criminal- and military-court system. "A good deal of policy research remains," he said. "The door was not left open by accident. Obama wants the freedom to hear the recommendations of the most experienced and smartest people, on how to protect the American people while still respecting the rules of the road on lib-

erty." He suggested that the Administration would prefer not to go in that direction. "It's possible but hard to imagine Barack Obama as the first President of the United States to introduce a preventive-detention law," Craig said. "Our presumption is that there is no need to create a whole new system. Our system is very capable." Then again, the idea is not being ruled out, which may be surprising to some constituents, given Obama's past support for civil liberties and Craig's own record—in the early nineties, he served as the chairman of the board of the International Human Rights Law Group, an advocacy organization now known as Global Rights.

Obama's legal team is aware that every step it takes will be seen as an indication of core convictions. Craig, who will coordinate the revamping of the Bush Administration's legal policies on terrorism, said, "One way we've looked at this is that we own the solution. We don't own the problem—it was created by the previous Administration. But we'll be held accountable for how we handle this."

The Obama Administration has already inflamed some members of the human-rights community. On February 9th, the Justice Department adopted a case filed by the American Civil Liberties Union. The government attempted to squelch a lawsuit initiated by a group of terrorist suspects—one of whom had allegedly been tortured in Morocco after being transferred there by the C.I.A.—on the ground that it would open up state secrets. Scott Horton, a law professor at Columbia University, characterized the new Justice Department's position as betrayal of the "promises of transparency and accountability" made by Obama during the campaign.

The first step in cases such as Mari's, Craig suggests, will be to evaluate the "dangerousness" of each detainee, and to scrutinize all documents passed on by the previous Administration. "We need the facts," he said. "And we need fresh eyes." For years, John Ashcroft has justified the military detention of Mari as a safety precaution. "Sometimes the criminal courts are not up to it," he told me. But, as the new team reviews Mari's story, it will likely find ample grounds to reassess the notion that the courts

Monday, February 23, 2009
NEW YORK, NY
1,069,837 (NA)
Magazine # 41
38.98, 40.41, 52.
Center for Constitutional Rights

Monday, February 23, 2009
NEW YORK, NY
1,069,837 (NA)
Magazine # 41
38.98, 40.41, 52.
Center for Constitutional Rights

can't handle terror suspects, and that such suspects can't be safely housed in the United States without incident.

In a recent interview, David Kelley, a former U.S. Attorney for the Southern District of New York, who supervised the early stages of the Marii case, revealed that he had warned his bosses in the Justice Department that they were making a mistake by sidestepping the criminal courts. Kelley co-chaired the Justice Department's nationwide investigation into the 9/11 attacks, and headed the investigations into the 2000 attack on the U.S.S. Cole, in Yemen, and the 1998 bombings of the U.S. Embassies in Kenya and Tanzania; he also led the prosecution of Ramzi Yousef, in the 1993 World Trade Center bombing. In 2003, he successfully prosecuted John Walker Lindh, the American accused of aiding the Taliban. In the interview, Kelley said he believed that the government had a strong case against Marii: he had been charged with theft and lying, fraud, bank fraud, identity theft, and being a federal agent. He thought that Marii could be convicted in a matter of a few months, and sentenced to years in prison. Kelley, who is now a partner at Cahill Gordon, in Manhattan, was disappointed when, on the basis of a one-page executive order, Marii was suddenly sent to the brig. "My view is, we haven't really exhausted the potential for using the criminal-justice system," he said.

James Benjamin, a former federal prosecutor in the Southern District of New York, is now a partner at the law firm Akln Gump. In 2008, he co-wrote a review of the Marii case, characterizing the switch to military detention as counterproductive. "Definitely, the criminal-justice system can handle someone like Marii," he told me. "They caught him under the criminal-justice system. And, based on what we know, they were poised to convict him. What happened to Marii before he was moved 'proves the system was up to it.' Mary Lederman, a former Georgetown Law professor, whom Obama has appointed to be a deputy in the Justice Department's Office of Legal Counsel, argues that the Bush Administration's claims to be acting out of necessity were "nonsense." In an essay published before he joined the Administration, Lederman wrote, "Even if everything the government alleges about al-Mari's ties to al-

tember 11th hijackers. Phone records apparently offered further evidence of a tie between Marii and Hawasawi.

Law-enforcement authorities pieced together this picture bit by bit. In September, according to the Post, local police stopped Marii while he was driving, checked his license, and discovered an outstanding warrant for drunken driving, dating back to his earlier student days, as well as the briefcase filled with cash. The police notified the F.B.I. Several weeks later, his lawyers say, a cell-phone salesman, noting discrepancies in Marii's identification documents, also called the bureau. In October and December, 2001, F.B.I. agents interviewed Marii; they say that he offered to let them search his laptop computer, his minivan, and his small rental apartment.

Later, Marii's lawyers argued that the agents had failed to obtain a warrant, and that the information from the search could therefore not be admitted into evidence. According to Rapp's statement, Marii's computer was filled with information on deadly poisons, including a step-by-step guide to making hydrogen cyanide—a toxic substance that can be used in poison-gas attacks. Marii, in claiming his innocence, has had no chance to see the evidence against him. Asked recently why he was researching such chemicals, Marii, through his lawyers, gave his first public answer: He was "doing research for a family member in the petrochemical industry to be used for industrial purposes. The research involved visiting Web sites that contained hundreds of nonpoisonous chemicals (not just cyanide). And even cyanide has numerous industrial uses."

The laptop also reportedly contained lectures by bin Laden, and unsent e-mails to an address that Rapp said was connected to Khalid Sheikh Mohammed. Some of Marii's e-mails were encoded. Upon discovering this information in his laptop, the F.B.I. arrested Marii as a material witness to its investigation of the attacks. Soon after, he was charged with credit-card fraud and with failing to tell the F.B.I. about his 2000 visit to America and his phone calls to Hawasawi.

On the morning of June 23, 2003, only days before Marii's defense team was to make its arguments about suppressing the laptop and other evidence, one of his lawyers received a phone call informing him that a U.S. Attorney would be making an unexpected appearance at the courthouse

that day. President Bush, the lawyers soon learned, had signed an executive order directing the military to seize Marii. "We should have seen it for what it was—the foreshadowing of an Administration that was going to forsake the Constitution in the war on terror," Lawrence Lusberg, one of the earliest defense lawyers on what has come to be the Marii team, said. "From then on, we didn't see Marii or hear from him again until late 2004. He just went into the abyss."

Before agreeing to transfer Marii to the brig, however, the presiding judge in the case ruled that the White House would be barred from charging Marii again with the same crimes, in legal judgment with prejudice, to protect Marii's right not to be placed in "double jeopardy." As a result, if the Obama Administration decides to charge him in the criminal system now, it has to bring a different set of charges, unless Marii's lawyers offer a deal. Benjamin, the former prosecutor, insists that "there is a whole bag of tools for many other states that the government could explore, including material support of terrorism, conspiracy, charges, and mail-and-wire-fraud charges." But, he suggests, by taking Marii outside the regular criminal system "there's no doubt they made all kinds of problems for themselves."

Andrew McCarthy, a former federal terrorism prosecutor who writes for National Review, defends Marii's transfer to the brig. "Sure, the criminal-justice system, neutralized him, at least for a time," he says. "But there's always the chance the court will release a defendant on bail."

Moreover, he argues that open criminal trials run many risks, including the accidental, or oblique, disclosure of classified information. It's also unclear how to handle witnesses who may themselves be terrorists: they may demand immunity before they will talk. Or, it may be that their testimony was obtained by unsavory means, which could scuttle a conviction.

In the Marii case, however, it does not appear that a fear of losing led Bush to transfer him to the Navy brig. Kelley, for example, thought that the case, the government had, was "solid." Instead, it appears that the real motive was frustration on the part of the Justice Department at being unable to make Marii confess. Kelley was told

to push him hard, which he did, but Marii kept professing his innocence. As Ashcroft wrote in his 2006 book about fighting terrorism, "Never Again," "Al-Mari rejected numerous offers to improve his lot by cooperating with the F.B.I. investigators and providing information. He insisted on becoming a 'hard case.'" Mark Bennam, an early member of Marii's defense team, asserts that there were virtually no legal impediments to the use of physical and psychological force to break "unlawful enemy combatants." Suspects considered especially "high value" were subjected to extreme sensory deprivation and other harsh tactics, which were modeled on Soviet and Chinese torture programs that had been studied and copied by the C.I.A.

Inside the Charleston brig, documents show, officials were ordered to follow the same rules as those at Guantanamo. Lusberg, however, says, "I've been to Guantanamo. Marii was far more isolated. He had no contact with any other detainees. Most days, he had no human contact at all."

For the first six months, Marii was kept in an eight-foot-by-ten-foot cell with one blacked-out window, no social interaction, and nothing to do or read.

An internal report, declassified in 2005, showed that during this period the Department of Defense followed the removal of the mattress, pillow, and Koran of a detainee in the brig. Marii was also

to push him hard, which he did, but Marii kept professing his innocence. As Ashcroft wrote in his 2006 book about fighting terrorism, "Never Again," "Al-Mari rejected numerous offers to improve his lot by cooperating with the F.B.I. investigators and providing information. He insisted on becoming a 'hard case.'" Mark Bennam, an early member of Marii's defense team, asserts that there were virtually no legal impediments to the use of physical and psychological force to break "unlawful enemy combatants." Suspects considered especially "high value" were subjected to extreme sensory deprivation and other harsh tactics, which were modeled on Soviet and Chinese torture programs that had been studied and copied by the C.I.A.

Inside the Charleston brig, documents show, officials were ordered to follow the same rules as those at Guantanamo. Lusberg, however, says, "I've been to Guantanamo. Marii was far more isolated. He had no contact with any other detainees. Most days, he had no human contact at all."

For the first six months, Marii was kept in an eight-foot-by-ten-foot cell with one blacked-out window, no social interaction, and nothing to do or read.

An internal report, declassified in 2005, showed that during this period the Department of Defense followed the removal of the mattress, pillow, and Koran of a detainee in the brig. Marii was also

Monday, February 23, 2009
NEW YORK, NY
1,069,837 (NA)
Mag. (Frequency):
38,98,40,41,52
Center for Constitutional Rights

Date:
Location:
Circulation (DMA):
Mag. (Frequency):
38,98,40,41,52
Center for Constitutional Rights

deprived of visits from the Red Cross, in violation of international laws. He was denied hot food, and consistently felt cold; he was given no socks, and his bed had only a stiff "anti-sucide" blanket—one that cannot be made into a noose. Andrew Savage, the local counsel for Mari in Charleston, says, "It was a psychological effort to devalue him. He was going crazy. He thought the smells from the nearby paper mill were poisoning him." At other points, Mari started feeling "tingles" all over, and began hallucinating that microphones had been installed in his cell. "He was getting delusional," Savage said.

When unidentified interrogators finally showed up at the brig, Mari told them that he needed three things: a blanket, shoes, and socks. If he was given those, he said, he would talk to them in another six months. "He said, 'You deprive me? I'll deprive you,'" Savage said. Instead, "the interrogators got rougher." Mari was chained in a fetal position on the floor. When he started to chant prayers rather than listen to the interrogators' questions, Savage said, they tried to silence him by snapping duct tape around his wrists. When he kept humming, they tried to gag him. But as they started to tape a sock in his mouth he began to choke, causing the agents to panic and stop. The episode was documented by closed-circuit surveillance cameras, and Pentagon officials have confirmed.

A spokesperson for Lieutenant Gen-

the right to see him. He was obviously suffering the effects of long-term isolation. He seemed paranoid, scattered, distracted, and disturbed. He was showing signs of mental illness," Berman recalls. "He was much thinner. Mentally, he'd been through a lot. He was a little off-kilter."

As the debate over indefinite detention intensifies, Mari's example may prove cautionary to those who think that it can be designed in a humane way. Savage, the Charleston lawyer, now speaks to Mari by phone every few days, and visits him in person every other week. He believes that nothing has been tougher on his client than the uncertainty of not knowing if he would ever be released. "He would have preferred beatings," Savage said. "He'd say, 'Andy, it's worse than beating.' He wanted to be sent to Egypt to be reconditioned. He'd say, 'I torture me—but end it!'"

By the spring of 2005, Savage feared that Mari was, as he put it, "slipping away." Previously successful correspondence between Mari and his attorneys shows that he was thinking about getting a divorce; as he later explained to Savage, he thought that his wife should marry his brother rather than be abandoned in his absence. "I felt something will happen to me," Mari wrote in February, 2005. "I want to make sure everything is documented." Two months later, he wrote, "My body is tired & I don't know how long I can take it anymore." In the spring of 2007, Mari gave Savage power of attorney, as if preparing to die.

Given the reputation that military prisons have developed after the abuse scandal at Guantanamo and Abu Ghraib, the lawyers for Mari were surprised to discover that they had allies in the Navy brig who shared their concerns over Mari's treatment. Unlike the staff at Abu Ghraib, the brig staff had been trained for the job. Their mission, as they saw it, was to run a safe, professional, and humane prison, regardless of who was held there. It was the political appointees in Washington, at the Pentagon and the Department of Justice, who wanted Mari to be kept in prolonged isolation. In 2005, Savage discovered that the head of security at the brig, Air Force Major Chris Ferry, would stay all night with Mari. He'd go down to the brig and sit with him, and tell him to hold on. Chris was there at three

in the morning, on the darkest nights." Geoff Morrell, a Pentagon spokesperson, would not allow Ferry to interview Mari for this story, saying, "Given that President Obama has ordered a review of the al-Mari case, we feel it would be best to complete that work before publicly discussing any further the specific aspects of his detention or interrogation." Morrell added, "The Department of Defense treats all detainees humanely, and this is particularly true in the case of al-Mari, for whom we have taken extraordinary measures to insure his physical and mental well-being."

In 2005, Mari's lawyers filed suit against the Department of Defense, alleging that conditions at the brig were causing a "mental health emergency" for Mari. Savage said, "Later, we found the biggest lobbyists for improved conditions were... the staff of the brig. The command, my sense is that they saw things becoming too pressured psychologically. They're good G.I. Joes—they value and follow orders. But they're humane." Documents released in response to a Freedom of Information request by the Alan K. Lowenstein International Human Rights Clinic, at Yale Law School, show that unnamed officers in the brig warned that enemy combatants being held there at the time were close to losing their sanity. "I fear the rubber hand is near the breaking point," one internal e-mail said. Other e-mails show that unnamed brig staff officers fought to occupy their minds, from a deck of cards to a soccer ball. Their concern wasn't entirely altruistic. In his dispute, Mari had increasingly become "non-compliant," covering the closed-circuit cameras in his cell with spitballs, refusing to eat, and throwing cups of his urine at guards.

After Savage filed suit, Mari's conditions started to improve, and so did his behavior. Mari was gradually given reading material and exercise equipment. A year after his father died, in 2007, an imam was sent to the brig to read him. More recently, he was granted the right to make two phone calls a year to his family. (Last month, however, he was denied a visit from his eldest son.) Savage is now allowed to bring him Muslim religious texts, which he spends most of his time poring over, and kosher food from a deli in Charleston,

can on the Senate Intelligence Committee, wanted that he could not "think of any city or town across this country that will be thrilled to have Khalid Sheikh Mohammed or Abu Zubaydah living down the street."

But in Charleston, where the only enemy combatant in America really does live down the street, the picture is more reassuring. In December, Mari, wearing goggles, earmuffs, a belly chain, and shackles, was led out of his cell block. No one told him where he was going, but the guards said that he had a visitor.



The destination, it turned out, was the visitors' center, where the commander of the brig, John Pucciarelli, who was transferring out of the facility the next day, had two things to tell him. According to Savage, Pucciarelli said that he was sorry that he had been unable to do more for Mari, but he had treated him as well as he could. He also said that there was a gift waiting for Mari, back in the dayroom. When Mari returned, he found a thirty-two-inch-screen television.

Andrew Savage was delighted. Although he had been skeptical about Mari, he has become convinced that the poses no danger. "I don't fear him, not personally and not for the United States," Savage said. "Is he putting me on? Scamming me? Putting it over on me? I really don't think so. I'm not naive. I've defunded multi-murderers, child murderers, child molesters, and all sorts of violent criminals. But I really don't think Ali's a terrorist."

Michael McGovern, a former Assistant U.S. Attorney for the Southern District of New York, who indicted Mari, scoffs at Savage's notion that he is harmless. "I find that statement pretty remarkable, given that the evidence showed that he was communicating directly with the masterminds of the 9/11 attacks."

Before the Bush Administration's experiments with executive detention, the way to settle such disputes was in the courtroom. Depending on how Obama decides to move ahead, that situation may prevail again. If so, he will have history and tradition on his side. As Hafetz puts it, "In the more than two hundred and thirty years since this country's founding, we have not found a better way to find the truth than through a criminal trial." ♦