

A change in name only

Obama administration ends use of “enemy combatant” designation

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16 March 2009

On Friday, the Obama administration filed court papers that continue to argue for all of the Bush administration's essential policies in relationship to current and future "detainees"—including their indefinite detention without charge or judicial review. The administration is dropping the designation "enemy combatant," as it moves to provide these anti-democratic measures with a somewhat altered legal basis.

The filing, in Federal District Court in Washington DC, was part of the Obama administration's effort to keep the Guantánamo prison camp open and its inmates out of the courts. The administration faced a Friday deadline to explain to federal judges its position on habeas corpus filings relating to the cases of about 200 prisoners.

The administration departs from the Bush administration only in the latter's claim that the president, based solely on the war powers vested in his office as commander-in-chief, has the power to indefinitely hold detainees. The Obama administration still claims the right to hold the prisoners, but will henceforth base it upon Congressional legislation and resolutions, particularly the 2001 Authorization for the Use of Military Force that was passed after the September 11th terrorist attacks.

The filing also makes the dubious claim that the power to seize and indefinitely detain inmates has a legal basis in the international laws of war, which allow a nation to hold enemy soldiers until hostilities cease.

Importantly, the filing asserts that the president has the right to continue to seize individuals it deems to be members or "substantial" supporters of Al-Qaeda or the

Taliban. It does not define what is meant by "substantial," but suggests that the executive branch alone will determine what constitutes membership in, or support of, these organizations. *The New York Times* called this definition "not significantly different from the one used by the Bush administration."

The administration asserts its right to interpret ambiguously even its own vague description of those to be seized. According to the Justice Department, "the particular facts and circumstances justifying detention will vary from case to case." US Attorney General Eric Holder indicated that the legal status of the inmates will remain in limbo, referring in a statement to "developing a new policy to govern detainees."

The filing recognizes no geographical limit to where it may seize suspected members or supporters of Al Qaeda. "Individuals who provide substantial support to al-Qaida forces in other parts of the world may properly be deemed part of al-Qaida itself," according to the Justice Department.

The primary aim of Obama's legal maneuver is to maintain the Bush administration's central policies in the "war on terror," while refurbishing the image of the US internationally—by disassociating the Obama administration from the emotionally charged term "enemy combatant." The administration is also seeking to head off court cases involving the Guantánamo inmates and protect Bush administration officials from prosecution. Some of these officials, such as Secretary of Defense Robert Gates, continue to work for Obama.

It is not the Justice Department's intention to offer new recourse for Guantánamo inmates to challenge their detention in either domestic or international courts. However, it remains to be seen how US courts

will interpret the Obama administration's claims in relationship to the habeas corpus cases underway, as well as its attempt to root the detentions in international law.

There remain about 240 inmates at Guantánamo, who have been held in barbaric conditions and subjected to "harsh interrogations"—i.e., torture—for years without any fair judicial proceeding to review their cases. A majority of these prisoners likely have no connection to Al-Qaeda; their "crime" was to have been Islamic foreign nationals found in Afghanistan at the time of the American attack in 2001. At best only a handful have even the remotest connection to the September 11th terrorist attacks in the US.

The court filing conflicts with one of Obama's oft-repeated campaign promises—his pledge to close the Guantánamo Bay prison camp. Last month the administration issued a Pentagon report that claimed Guantánamo Bay meets the minimum requirements for humane-treatment of prisoners stipulated by the Geneva conventions. While the administration is still rhetorically committed to closing "Gitmo," the *Times* concludes "as long as Guantánamo remains open, the new administration will aggressively defend its ability to hold some detainees there."

As for the inmates themselves, the Obama administration has said it will allow some to be released—if receiving countries can be found. Some of the remaining prisoners may be tried in court. But there is a third section of the Guantánamo prison population that Obama claims are too dangerous for either release or trial. These individuals may remain imprisoned indefinitely or face a military tribunal.

The legal filing drew criticism from human rights organizations and legal experts. "The government may have eliminated the term enemy combatant but it is still claiming the authority to detain people far beyond the traditional norms of humanitarian law," said Devon Chaffee, an attorney for Human Rights First.

An American Civil Liberties Union attorney, Hina Shamsi, pointed out that the new policies "in key elements [...] are a continuation of the Bush administration." In a statement, the Center for Constitution Rights said, "this is really case of old wine in a new bottle."

The Bush administration coined the term "enemy combatant" as a means of closing off to prisoners taken

in the "war on terror" any legal right to challenge their imprisonment. With the term, the military denied inmates rights afforded by the US courts, the judicial systems of their native lands, and any protection afforded by international law, such as the Geneva Conventions. The Obama administration's position does nothing to alter this ethereal legal status.

This was emphasized by a former Bush administration official, Steven A. Engel, who worked on legal issues related to the detainees in the Bush Justice Department's Office of Legal Counsel. "This seems fundamentally consistent with the positions of the prior administration," he told the *Times*. "The important point is that they recognize that we can detain members of the enemy."

Since coming into office, Obama has defended virtually every aspect of the Bush administration's "war on terror." The US continues its occupation of Iraq, which has resulted in more than 1.3 million deaths and created five million refugees. At the same time, he has accelerated the military intervention in Afghanistan and Pakistan.

Obama is determined to defend the Bush administration's rollback of democratic rights and basic legal principles. On Thursday, the Justice Department asked an appeals court to throw out a lawsuit by four British citizens who were tortured at Guantánamo.

On March 6th, the Obama administration presented legal arguments in defense of John Yoo, a Bush administration official who authored legal memoranda justifying torture and indefinite detention without trial.

On February 27th, the administration intervened to block the US Supreme Court from ruling on the legality of the Bush administration's imprisonment of citizens and legal residents as enemy combatants, by filing criminal charges against the last individual held in the US on that basis, Salehn Kahla al-Marri.



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