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Enemy Combatant, Rest in Peace?

By [Scott Horton](#)

Among George W. Bush's controversial legal maneuvers was a repackaging of the notion of "enemy combatant." If the President determined a person was an "[enemy combatant](#)," the Bush Justice lawyers reasoned, he could be seized and imprisoned indefinitely with no right to a lawyer, to be confronted with charges or to present his case to a court. The President's determination was the beginning and the end, and the rule first adopted at [Runnymede in 1215](#), under which a person could only be deprived of his freedom by operation of law, was thus declared quaint and obsolete. During the campaign, Barack Obama pledged to overturn this abuse. Has he? The Obama Administration announced today that it was no longer using the Bush Administration's concept of "enemy combatant." [Said Attorney General Eric Holder](#):

As we work towards developing a new policy to govern detainees, it is essential that we operate in a manner that strengthens our national security, is consistent with our values, and is governed by law. The change we've made today meets each of those standards and will make our nation stronger.

But the Obama Administration's position is much less than meets the eye. It continues to reserve broad discretion for the President to hold combatants outside of the protections afforded by the criminal justice system. Here's the key paragraph from the [brief](#) that the Obama Justice Department filed today:

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or Al Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

Deborah Pearlstein furnishes a [good summary](#) of the differences between the new Obama and the old Bush positions:

(1) The President's authority to hold the detainees flows not from some inherent constitutional authority, but by the statute passed by Congress in the wake of September 11, 2001—the Authorization for the Use of Military Force (AUMF). The first sentence of the definition above is essentially verbatim a recitation of that statute. (2) The meaning (and limits) of the AUMF is, as the administration brief explains repeatedly, "necessarily informed by principles of the laws of war." That is, international law matters in interpreting the scope of this domestic law. It is possible that the Bush Administration said as much on occasion (can anyone cite an example?). But its reading of international law generally (and international humanitarian law in particular) was so idiosyncratic that it was hard to take such statements seriously. (3) As the DOJ's press release statement notes, the brief doesn't use the term "enemy combatant" so it's no longer meaningful/ relevant to the legal discussion. (4) As the brief also says, its statement of the standard here may be subject to further refinement following the completion of its ongoing task force review of detention policy and standards.

These are subtle distinctions, but they do reflect a reversion to more traditional legal interpretations. They are also sure to disappoint civil libertarians, who were looking for a far more aggressive rollback of the Bush standards. Here's [Michael Ratner of the Center for Constitutional Rights](#):

Again, as with Bush the Obama administration is applying the laws of international armed conflict (the laws of war) to the Taliban, Al Qaeda and associated forces when those laws have no application to those entities in the current situation. Again as the Bushies did they are conflating the right to use force against terrorists with a claim that they can be held forever without trial. The laws of war contain no such authority. Again, they are claiming the right to capture and detain people anywhere in the world—the world is still a battlefield according to Obama. So, the “global war on terror” continues.

The Justice Department's posture is much less than I was hoping for, but the legal turf it stakes out strikes me as potentially palatable. I am still skeptical. These concepts might be wielded in an abusive way, as the Bush “enemy combatant” concept clearly was. It will be important to monitor the Obama Administration's interagency review process and see how these new concepts are actually applied to the detainees. Give the positively abysmal track-record of the Justice Department, a heavy measure of skepticism is well justified.

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