



Bernard Hibbitts, Publisher & Editor-in-Chief

10:35 AM Tuesday, Oct. 20, 2009

[NEWS](#) [COMMENTARY](#) [DOCUMENTS](#) [VIDEO](#) [TOPICS](#) [ABOUT JURIST](#) [HOME](#)

[NEWS](#) [FORUM](#) [HOTLINE](#) [DATELINE](#) [FORUM](#) [HOTLINE](#) [DATELINE](#)

HOTLINE BUZZ

[RSS](#) [FEED](#)

LATEST COMMENTS

Real-time comments on legal news by newsmakers, activists, legal experts and special guests...

- ▶ [Changes to Military Commission not enough to fix flawed system](#)
October 17, 2009
- ▶ [Guantanamo detainee al Mutairi release a welcome blow to government detention power](#)
October 15, 2009
- ▶ [Obama administration should endorse Goldstone report at UN Security Council](#)
October 12, 2009
- ▶ [click for more...](#)

Wednesday, March 18, 2009

Obama Administration's detention authority must incorporate law of non-international armed conflict

8:01 AM ET

Gabor Rona [International Legal Director, [Human Rights First](#)]: "Last Friday, the Obama administration for the first time articulated in court **its vision of authority** to detain persons who are now being held at Guantanamo. The government's brief in the In Re: Guantanamo Bay Detainee Litigation case in the District Court of the District of Columbia notes that this is only about Guantanamo - that detention policy going forward is the subject of a distinct process pursuant to an executive order of January 22, 2009. But the brief has significance beyond Guantanamo since it sets out a general view of detention authority for all persons suspected of association with the 9/11 plot, the Taliban or al Qaeda. There is much to be disappointed about for those who had the audacity to hope for a sea change from Bush administration policies. But before launching into criticism of the brief, let's take a look at what it has changed:

1. Bush view: The president, as Commander-in-Chief, has absolute and unfettered power to determine who may be detained, with or without criminal charge, trial or judicial review (The Supreme Court in 2008 clipped the wings of the Bush administration on this claim in the Boumediene case, which applies the constitutional right of habeas corpus review to Guantanamo detainees). The Bush administration also claimed authority to detain under the Authorization for the Use of Military Force ("AUMF"), [Pub. L. 107-40, 115 Stat. 224](#) (2001) [PDF file].

1. Obama view: The president's detention authority is conferred by Congress, in this case, per the AUMF.

2. Bush view: 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 *supported*, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against

HOTLINE SEARCH

Search JURIST's news comment archive...

Powered by 

CONTACT

E-mail your comments on this blog or anything else on JURIST to Hibbitts@pitt.edu

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.

2. Obama view: 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 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.

(Hint to save you eye strain: the word "substantially" does not appear in the Bush view).

3. Bush view: The detainees are "enemy combatants" in a "global war on terror."

3. Obama view: The term enemy combatant is being retired. Apparently, so is the term "war on terror."

4. Bush view: "We're right and will not budge."

4. Obama view: "We may yet further modify our position."

Also, let's not neglect what significant changes in detainee policy have been percolating since Inauguration Day 2009:

1. Guantanamo will close.

2. Military commission trials have been suspended and may or may not resume in a pre-existing or different form.

3. Bush administration visions of unfettered executive authority to determine how detainees will be treated/interrogated (and definitions of torture that exclude torture) have been rendered inoperative by an Obama executive order (although both Congress, in the **Detainee Treatment Act** and the Supreme Court, through the Hamdan decision, have also previously weighed in against the Bush administration on these issues).

4. No more "black sites" or secret detention. All detainees will henceforth be entitled to, and places of detention will be subject to, visits from the International Committee of the Red Cross.

5. The Obama administration has agreed to vacate an awful, fractured 4th Circuit decision in the al-Marri case that supported the Bush administration's view of authority to indefinitely detain as an "enemy

combatant," without charge or trial, a legal resident in the US who was never alleged to have directly participated in hostilities against the United States. (But the Obama administration has not renounced the power to detain such persons without charge under the AUMF).

In its brief filed Friday, the new administration hews closely to its predecessor's erroneous views on the scope and sources of detention authority; albeit with somewhat more sophisticated arguments than those we've heard before. For example, the brief cites **Hamdi v. Rumsfeld** for the proposition that detention authority is "informed by principles of the laws of war." The Hamdi court did address whether a person captured on a battlefield can be detained under the laws of war. Hamdi, however, was captured in an international armed conflict between two states - the US and Afghanistan - a type of conflict for which the Third and Fourth Geneva Conventions explicitly provide detention authority. It is true that the international phase of the conflict was over by the time Hamdi was decided, suggesting that the court meant to apply the laws of non-international armed conflict to Hamdi's detention. But the court never addressed the international/non-international armed conflict distinction, despite the fact that the Geneva Conventions articulate detention authority only for international armed conflict. There is, in fact, no such authority in the laws of war that apply in conflicts between a state and a non-state armed group (namely in **Common Article 3 of the Geneva Conventions** and their **Additional Protocol II**) even if that armed group is of transnational scope.

The reason for this distinction is sound. In state-to-state armed conflict, combatants have a privilege of belligerency, meaning they cannot be prosecuted under domestic criminal law for mere participation in hostilities, so their detention must be governed by other law, namely the international law of international armed conflict. Non-state fighters, however, are the hallmark of non-international armed conflict and they have no privilege of belligerency. They are mere criminals under applicable domestic law and so, there is no need for the laws of war to supply detention authority in such conflicts. If they are to be detained, whether or not for criminal trial, it must be pursuant to domestic law.

So now we see why the administration offered only that detention authority is "*informed* by principles of the laws of war" and could not say that it was "*provided* by the laws of war." It then went on to suggest that the laws of war applicable to "our current, novel type of armed conflict against armed groups such as al-Qaida and the Taliban" are "less-well codified" than the rules of international armed conflict. Not so oddly, given its intention to manufacture detention authority from a branch of law in which it does not exist, the brief does not dare mention this type of armed conflict by name: non-international armed conflict. Likewise, the brief does not admit that detention authority in such conflicts derives from domestic law. Instead, and probably because the AUMF is silent on the matter of detention, the brief claims that "(p)inciples derived from law-of-war rules governing international armed conflicts, therefore, must inform the interpretation of the detention authority Congress has authorized for the current armed conflict." This is wrong. There is no need to analogize from international armed conflict rules to get to

detention authority in non-international armed conflict. Rather, it is necessary to look to domestic law.

The claim that non-international armed conflict detention authority must be grounded in domestic law, rather than be presumed to exist as per international law, is not a mere technical distinction without a difference. The principle of legality and prohibition of arbitrary detention are reflected in the **International Covenant on Civil and Political Rights**, to which the US is a party. Article 9.1 says "(n)o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." The grounds and procedures for detention are well established in the law of international armed conflict and are absent from the law of non-international armed conflict. Therefore, compliance with Article 9.1 requires that those grounds and procedures be established in domestic law.

The brief notes that "(p)etitioners have sought to restrict the United States' authority to detain armed groups by urging that all such forces must be treated as civilians, and that, as a consequence, the United States can detain only those 'directly participating in hostilities.'" The government is correct that this argument should be rejected since "direct participation" determines who may be targeted, not who may be detained and because "law-of-war principles do not limit the United States' detention authority to this limited category of individuals." Indeed, in international armed conflict, the Geneva Conventions explicitly provide detention authority over civilians who constitute a serious security threat, but may not have participated in hostilities. By making this argument, petitioners have provided the government with an easy target. But just because the petitioners are wrong, it doesn't mean the government is right to suggest that detention authority in non-international armed conflict should be presumed by analogy to international armed conflict rules.

President Obama recently said that henceforth, US detention policies and practices will be consistent with our international legal obligations. Our courts are obligated to require no less. The District Court of the District of Columbia should reject the government's recently stated vision of detention authority. Good law is also good policy. And they would both be served with the following framework for detention policy going forward:

1. For persons detained from within or brought to the US, it is difficult to imagine that anyone who fits the Obama administration's criteria for detention without charge or trial (virtually identical to the Bush administration's definition of enemy combatant) cannot be convicted of material support for terrorism, at the least. Those who can be prosecuted should be prosecuted in the normal course of the American federal criminal justice system. Those who will not be prosecuted should be repatriated or released to a third country, where they may or may not be subject to further proceedings, with the caveat that they not be transferred to any country where they face a substantial risk of torture or abuse. Yes, there may be a few individuals falling through the cracks because the material support law did not have extraterritorial reach at

the time of their detention (it does now), and there are no other crimes with which to charge them either because there is no evidence to support additional charges, or the evidence is tainted because it was obtained through coercion. First, we don't know that anyone fitting that description exists. Second, if someone does fall into that category, is that reason to construct an entirely new architecture of questionable legality?

2. Persons detained abroad in either non-international armed conflict or non-armed conflict circumstances are subject to, and entitled to the protections of, that country's domestic laws. For instance, Afghanistan has been the site of a non-international armed conflict since 2002, when the Karzai government came into power. The US may, as a proxy for the Afghan government, detain people there only pursuant to Afghan law which meets international human rights law standards. To do otherwise is to violate its own international human rights treaty obligations.

3. Persons detained in international armed conflict at home or abroad may be detained under the authority of the 3d and 4th Geneva Conventions.

So much time and energy has been spent ruminating over how complicated it all is, how unique the circumstances are and how inadequate the laws are. Many of the resulting recommendations are designed to solve non-existent problems or they merely exacerbate existing ones. Equal time devoted to understanding the content and complementary application of international humanitarian law, human rights law and domestic law would pay great dividends in the service of both national security and liberty interests."

Opinions expressed in JURIST's Hotline are the sole responsibility of their authors and do not necessarily reflect the views of JURIST's editors, staff, or the University of Pittsburgh.

[Link](#) | e-mail post  | [post comment](#) | how to [subscribe](#) | © [JURIST](#)

Comments:

[NEWS](#) [FORUM](#) [HOTLINE](#) [DATELINE](#) [FORUM](#) [HOTLINE](#) [DATELINE](#)

[NEWS](#) [COMMENTARY](#) [DOCUMENTS](#) [VIDEO](#) [TOPICS](#) [ABOUT JURIST](#) [HOME](#)

© JURIST Legal News and Research Services, Inc., 2008. JURIST is a 501(c)(3) non-profit organization. E-mail inquiries, changes, news tips, URLs, corrections, etc. to JURIST@pitt.edu. This site is not an official site of the University of Pittsburgh. The University of Pittsburgh is not responsible for its content. Nothing on this site is intended as legal advice. If you have a legal problem, please consult an attorney. JURIST news tickers powered by Yahoo! News.



[BF](#) [MAPS/TATS](#) 