



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

fff@fff.org www.fff.org

The Nobodies Known as Former Enemy Combatants

by Andy Worthington

Changing the names of things was a ploy that was used by the Bush administration in an attempt to justify some of its least palatable activities. In response to the 9/11 attacks, for instance, the nation was not involved in a limited pursuit of a group of criminals responsible for the attacks, but instead embarked on an open-ended “war on terror.”

In keeping with this “new paradigm,” prisoners seized in this “war” were referred to as “detainees” and held neither as criminal suspects nor as prisoners of war, protected by the Geneva Conventions, but as illegal “enemy combatants,” without any rights whatsoever. Later, when the administration sought new ways in which to interrogate some of these men, the techniques it endorsed were not referred to as torture — even though many of them clearly were — but were instead described as “enhanced interrogation techniques.”

The Obama administration has clearly learned a trick or two from its predecessors. In its response to a court request for clarification of the meaning of the term “enemy combatant,” for use in the Guantánamo prisoners’ habeas corpus reviews (which were triggered by a momentous [Supreme Court](#) decision last June), the new government has responded to the challenge with a cunning sleight of hand. In a [press release](#), the Department of Justice announced that it had dropped the use of the term “enemy combatant” and that it had adjusted its definition of those who can be detained so that, instead of holding people who were “part of, or supporting, Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners,” individuals who supported al-Qaeda or the Taliban “are detainable only if the support was substantial.”

As benign-sounding propaganda, in contrast to the Bush administration’s arrogant version, which almost always manifested a tangible disdain for Congress and the judiciary, this announcement has the alluring veneer of the “change” that Barack Obama promised throughout his election campaign, but in practical terms nothing has actually changed. The prisoners are now nobodies, with no label whatsoever to define their peculiar extra-legal existence, and the entire

rationale for holding them without charge or trial — and the egregious errors made along the way — remain unaddressed.

In its filing with the District Court ([PDF](#)), delivered in response to a deadline of March 13, the government made clear that it was largely business as usual. In its opening salvo, the Justice Department claimed that the laws of war, which “include a series of prohibitions and obligations ... developed over time” and which “have periodically been codified in treaties such as the Geneva Conventions,” or have otherwise “become customary international law,” are nonetheless “less well-codified with respect to our current, novel type of armed conflict against armed groups such as al-Qaeda and the Taliban.”

With this “current, novel type of armed conflict” standing in as a more palatable version of the Bush administration’s “war on terror,” the Justice Department proceeded to defend the President’s authority, under the terms of the [Authorization for Use of Military Force](#), which was passed by Congress within days of the attacks, “to detain persons who he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible” for the attacks, as well as “persons whose relationship to al-Qaeda or the Taliban would, in appropriately analogous circumstances in a traditional international armed conflict, render them detainable.”

This statement raises a second flag of alarm, as this horrendously open-ended piece of legislation may have been appropriate at the time, but it was used by the Bush administration as the foundation stone on which all its subsequent forays into illegal and unconstitutional actions were based (including, it should be noted, holding these “detained persons” without charge or trial at Guantánamo for seven years), and it is disconcerting to realize that a conversation we should be having — which involves responding to the question, “Is it justifiable, seven years and seven months after the 9/11 attacks, to claim that we are still involved in an open-ended and ill-defined ‘war?’” — has, instead, been swept aside.

Further disturbing signs that little, if anything has changed can be found in the government’s explanation of who, it asserted, can be held as the “nobodies formerly known as enemy combatants” in the “current, novel type of armed conflict.” In spite of claiming that these men must have “substantially supported” the Taliban, al-Qaeda, or other associated groups, the Justice Department specifically stated that it has the authority to detain not only “those who were part of al-Qaeda and Taliban forces” but also other “members of enemy forces,” even if “they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations,” and adds,

Evidence relevant to a determination that an individual joined with or became part of al-Qaeda or Taliban forces might range from formal membership, such as through an oath of loyalty, to more functional evidence, such as training with al-Qaeda (as reflected in some cases by staying

at al-Qaeda or Taliban safehouses that are regularly used to house militant recruits) or taking positions with enemy forces.

This, of course, renders the word “substantial” worthless, as it allows the government to detain someone who never even “attempted to commit any act of depredation or entered the theatre or zone of active military operations” and may only have stayed in a house associated with those who did engage in militancy, which, to my mind, is not “substantial” support at all. Furthermore, the government asserts that “it is of no moment that someone who was part of an enemy armed group when war commenced may have tried to flee the battle or conceal himself as a civilian in places like Pakistan,” which effectively condemns anyone who may have traveled to Afghanistan before the 9/11 attacks to take the Taliban’s side against the Northern Alliance in Afghanistan’s long-running inter-Muslim civil war (a conflict which had nothing to do with the United States or its allies) into a terrorist if they happened to be present in Afghanistan when the 9/11 attacks occurred.

In this, the government’s thinking was clearly in line with Judge Richard Leon, the District Court judge whose rulings on the habeas corpus cases of ten Guantánamo prisoners in the last few months resulted in decisions that six of the men ([five Algerian-born Bosnians](#), and [Mohammed El-Gharani](#), a former juvenile) were to be released, but that four could continue to be held. In the case of one of the four, the Yemeni [Muaz al-Alawi](#), Judge Leon ruled that the government had established that he “was part of or supporting Taliban or al-Qaeda forces,” because he “stayed at guest houses associated with the Taliban and al-Qaeda ... received military training at two separate camps closely associated with al-Qaeda and the Taliban and supported Taliban fighting forces on two different fronts in the Taliban’s war against the Northern Alliance.”

From the point of view of an impartial observer, of course, the problem with Judge Leon’s ruling was that none of these allegations related to “hostilities against the U.S. or its coalition partners,” but he also endorsed the government’s additional claim that, “rather than leave his Taliban unit in the aftermath of September 11, 2001,” al-Alawi “stayed with it until after the United States initiated Operation Enduring Freedom on October 7, 2001; fleeing to Khowst and then to Pakistan only after his unit was subjected to two-to-three U.S. bombing runs.”

In other words, Judge Leon ruled that Muaz al-Alawi could continue to be held because, despite traveling to Afghanistan to fight other Muslims before September 11, 2001, “contend[ing] that he had no association with al-Qaeda,” and stating that “his support for and association with the Taliban was minimal and not directed at U.S. or coalition forces,” he was still in Afghanistan when that conflict morphed into a different war following the U.S.-led invasion in October 2001. As Leon admitted in his ruling, “Although there is no evidence of petitioner actually using arms against U.S. or coalition forces, the Government does *not* need to prove such facts in order for petitioner to be classified as an enemy combatant under the definition adopted by the Court.” In the new world of Obama’s Justice Department, all that needs changing are the words “enemy

combatants” — to “nobodies formerly known as enemy combatants” — and the conclusion is the same.

Therefore, the Obama administration’s cosmetic tinkering with its predecessor’s supposed justification for holding prisoners at Guantánamo is bitterly disappointing, as it appears, at heart, to endorse the lawless policies introduced by the Bush administration, and also to perpetuate some of its most damaging errors. In spite of claims by the Justice Department that its position “draws on the international laws of war to inform the statutory authority conferred by Congress,” the Obama administration has, in reality, wholeheartedly endorsed the Authorization for Use of Military Force (the founding document of the “war on terror”), has failed to demonstrate that it has any willingness to pour scorn on the Bush administration’s claims that prisoners can be held without being either criminal suspects or prisoners of war, has endorsed its predecessor’s decision to equate the Taliban with al-Qaeda, even though there was never any justification for doing so, has overlooked the fact that the majority of the prisoners were bought for bounties ([PDF](#)) and were [never screened](#) according to the Geneva Conventions, has ignored the fact that the evidence against them (whether of “substantial” support or not) was often extracted through [the use of torture, coercion or bribery](#), and has also defended the Bush administration’s self-proclaimed right to detain demonstrably peripheral figures in the Afghan conflict as “terror suspects.”

An additional demonstration of the absurdity of the Obama administration’s position involves another case reviewed by Judge Leon, that of [Ghaleb Nasser al-Bihani](#), a Yemeni who had served as a cook for the Taliban and an affiliated group of Arab recruits. In a verdict that also fits with the new administration’s disturbingly loose definition of “substantial support,” Judge Leon ruled that “faithfully serving in an al-Qaeda-affiliated fighting unit that is directly supporting the Taliban by helping prepare the meals of its entire fighting force is more than sufficient to meet this Court’s definition of ‘support,’” and added, “After all, as Napoleon was fond of pointing out, ‘An army marches on its stomach.’”

To gauge how wrong this is, we need only compare al-Bihani’s case to that of another Yemeni prisoner, Salim Hamdan. Last August, Hamdan, a driver for Osama bin Laden, was [tried at Guantánamo](#) in the military commissions conceived by Vice President [Dick Cheney](#) and his close advisers (including, in particular, his legal counsel David Addington), [sentenced](#) and [sent home](#) in November to serve the last few weeks of a five-month sentence delivered by a military jury. As I wrote when Judge Leon made his ruling about al-Bihani, “Hamdan is now a free man, whereas al-Bihani, a man who never met Osama bin Laden, let alone driving him around, has just been told, by a judge in a U.S. federal court, that the government is entitled to hold him forever because he cooked dinner for the Taliban.”

I added, “If President Obama is genuinely concerned with justice, he needs to act fast to tackle this squalid state of affairs, which does nothing to undo the previous administration’s

disdain for and mockery of the laws on which the United States was founded.” That was just seven weeks ago, but now, despite his [fine pronouncements](#) in August 2007, when he declared, “We will again set an example to the world that the law is not subject to the whims of stubborn rulers, and that justice is not arbitrary,” it seems that Barack Obama doesn’t care, and that his sympathies are far more in line with the arbitrary justice instigated by those “stubborn rulers” — George W. Bush, Dick Cheney, David Addington and Donald Rumsfeld — than they are with the military judge and the military jurors involved in Salim Hamdan’s case, who, effectively, set a seven-year limit on the detention of minor players in the “war on terror” by giving Hamdan a short sentence, despite convicting him of “providing material support for terrorism.”

In analyses over the years, intelligence officials have stated that [no more than 50](#) of the prisoners at Guantánamo had any meaningful connection with al-Qaeda, the Taliban or other terrorist groups. By that rationale, the Obama administration should be working flat-out to release the other 190 prisoners as soon as possible. Under its own definition of “significant support” for these organizations, however, the administration has, instead, raised the possibility that, after seven years’ imprisonment in conditions that ought to be a source of shame to any civilized society, a large number of these prisoners — these “nobodies formerly known as enemy combatants” — still have a long way to go before they can hope to see the end of their ordeal.

Andy Worthington is the author of [The Guantánamo Files: The Stories of the 774 Detainees in America’s Illegal Prison](#) (published by Pluto Press). Visit his website at: www.andyworthington.co.uk.

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