“AND IT DOES NOT EMPLOY THE PHRASE ‘ENEMY COMBATANT'”

In DOJ’s press release on Obama’s rejection today of the term "enemy combatant," that sentence appears at the end of the first paragraph:

> In a filing today with the federal District Court for the District of Columbia, the Department of Justice submitted a new standard for the government’s authority to hold detainees at the Guantanamo Bay Detention Facility. The definition does not rely on the President’s authority as Commander-in-Chief independent of Congress’s specific authorization. It draws on the international laws of war to inform the statutory authority conferred by Congress. It provides that individuals who supported al Qaeda or the Taliban are detainable only if the support was substantial. **And it does not employ the phrase "enemy combatant."** [my emphasis]

That’s it. Part of the lede. They’re not using the same phrase Bush used.

Whoop.

Dee.

Doo.

They are, mind you, situating their authority to detain people solidly in the AUMF (rather than Article II) and admitting SCOTUS kicked Bush’s ass on these issues on multiple occasions.

> The United States bases its detention authority as to such persons on the Authorization for the Use of Military Force (“AUMF”), Pub. L. 107-40, 115

> Stat. 224 (2001). The detention authority conferred by the AUMF is necessarily informed by principles of the laws of war. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality). The laws of war include a series of prohibitions and obligations, which have developed over time and have periodically been codified in treaties such as the Geneva Conventions or become customary international law. See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 603-04 (2006).

But from this purported "refinement" of its stance toward detainees, it proceeds to reassert the role of the executive in judging which detainees to hold.

> **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. [my emphasis]

The President has the authority … the President determines … the President has the authority.

You see, it's still the same unitary power, stripped of the baggage of Bush's vocabulary. And even as they abandon Bush's vocabulary, they progressively expand the reach of that authority to include just about all those whom Bush already determined were enemy combatants, no

matter how nebulous that person's ties to al Qaeda.

First to those who were part of al Qaeda but did not commit any crimes against the US:

> Because the use of force includes the power of detention, Hamdi, 542 U.S. at 518, the United States has the authority to detain those who were part of al-Qaida and Taliban forces. Indeed, long-standing U.S. jurisprudence, as well as law-of-war principles, recognize that members of enemy forces can be detained 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." Ex parte Quirin, 317 U.S. at 38; Khalid v. Bush, 355 F. Supp. 2d 311, 320 (D.D.C. 2005), rev'd on other grounds sub nom., Boumediene v. Bush, 128 S. Ct. 2229 (2008); see also Geneva Convention (III) Relative to the Treatment of Prisoners of War of Aug. 12, 1949, art. 4, 6 U.S.T.S. 3316 (contemplating detention of members of state armed forces and militias without making a distinction as to whether they have engaged in combat). Accordingly, under the AUMF as informed by law-of-war principles, it is enough that an individual was part of al-Qaida or Taliban forces, the principal organizations that fall within the AUMF's authorization of force.

And then—using language with the distinct odor of "enemy combatant"—to those who can be construed to have played a role in al Qaeda's activitities, up to and including opposing the Northern Alliance forces that al Qaeda was fighting in 2001 before the US invaded Afghanistan, or swearing an oath (which is, after all, why Padilla and John Walker Lindh are in jail now):

> Moreover, because the armed groups that

> the President is authorized to detain under the AUMF neither abide by the laws of war nor issue membership cards or uniforms, **any determination of whether an individual is part of these forces may depend on a formal or functional analysis of the individual's role**. Evidence relevant to a determination that an individual joined with or became part of al-Qaida or Taliban forces might range from formal membership, such as through an oath of loyalty, to more functional evidence, such as training with al-Qaida (as reflected in some cases by staying at al-Qaida or Taliban safehouses that are regularly used to house militant recruits) or taking positions with enemy forces. In each case, given the nature of the irregular forces, and the practice of their participants or members to try to conceal their affiliations, judgments about the detainability of a particular individual will necessarily turn on the totality of the circumstances. [my empahsis]

Then the definition expands to include other organizations:

> Nor does the AUMF limit the "organizations" it covers to just al-Qaida or the Taliban. In Afghanistan, many different private armed groups trained and fought alongside al-Qaida and the Taliban. In order "to prevent any future acts of international terrorism against the United States," AUMF, § 2(a), the United States has authority to detain individuals who, in analogous circumstances in a traditional international armed conflict between the armed forces of opposing governments, would be detainable under principles of co-belligerency.

Then the definition expands to include other battlefields (which gets you solidly into American-based groups):

> Finally, the AUMF is not limited to persons captured on the battlefields of Afghanistan. Such a limitation "would contradict Congress's clear intention, and unduly hinder both the President's ability to protect our country from future acts of terrorism and his ability to gather vital intelligence regarding the capability, operations, and intentions of this elusive and cunning adversary." Khalid, 355 F. Supp. 2d at 320; see also Ex parte Quirin, 317 U.S. at 37-38. Under a functional analysis, individuals who provide substantial support to al-Qaida forces in other parts of the world may properly be deemed part of al-Qaida itself. Such activities may also constitute the type of substantial support that, in analogous circumstances in a traditional international armed conflict, is sufficient to justify detention. Cf. Boumediene v. Bush, 579 F. Supp. 2d 191, 198 (D.D.C. 2008) (upholding lawfulness of detaining a facilitator who planned to send recruits to fight in Afghanistan, based on "credible and reliable evidence linking Mr. Bensayah to al-Qaida and, more specifically, to a senior al-Qaida facilitator" and "credible and reliable evidence demonstrating Mr. Bensayah's skills and abilities to travel between and among countries using false passports in multiple names").

And finally, as MD points out, the Obama Administration carefully carves out the entire world save Gitmo in which the President's authority still reigns using Bush's discredited language.

> This position is limited to the authority upon which the Government is relying to detain the persons now being held at Guantanamo Bay. It is not, at this point, meant to define the contours of authority for military operations generally, or detention in other contexts.

Now, to be fair, the filing also reserves the right to make new determinations of what these terms all mean.

> Through this filing, the Government has met the Court's March 13, 2009 deadline to offer a refinement of its position concerning its authority to detain petitioners. The Court should be aware, however, that the Executive Branch has, at the President's direction, undertaken several forward-looking initiatives that may result in further refinements. Although the Government recognizes that litigation will proceed in light of today's submission, it nevertheless commits to apprising the Court of any relevant results of this ongoing process.

But it still reserves for the President the power to make these determinations, and it carves out every single category under which any politically charged detainee has already been held, not to mention the entire world outside of one military base on Cuba.

In short, it's a big, fat, cynical game. A word game, like any other parlor game, giving a tired old concept a verbal facelift. Without, however, changing the concept itself.

The Obama Administration suggests in this filing it is just trying to meet its March 13 deadline. My first and best response to that is the same I used to have—as a professor—when students obviously turned in shoddy work just to meet my

hardass deadlines: to tell the lazy student to start doing her work.

"You haven’t completed the terms of the assignment. No matter whether you got this handed in by the designated deadline or not, you have not done your work. So take this back and do the work assigned in the first place. And don’t turn in this shoddy word game as serious work again."

Thus far, this is just Bush’s policies under new name. And they’re not even clever enough word games to fool most of the people—particularly the international community—these word games were designed to fool.