

A GRAMMAR LESSON: OBAMA'S EXECUTIVE ORDER ON INDEFINITE DETENTION

I hate to be pedantic, but a number of people are misreading Obama's Executive Order on indefinite detention, with the result that they present the order as much less troublesome than it actually is. Here's one example, from Ken Gude:

There is now a clearly articulated standard for continued detention; gone is the so-called intelligence justification for detention. A detainee must be lawfully held under the laws of war, must have had that detention upheld by a federal court in a habeas proceeding, and [sic] considered a "significant threat to the security of the United States" to be ordered held by the PRB. And for the first time, the PRB is specifically ordered to consider the reliability of all information it receives.

Here's another one, from the WaPo:

The executive order recognizes the reality that some Guantanamo Bay detainees will remain in U.S. custody for many years, if not for life. The new system allows them the prospect of successfully arguing in the future that they should be released because they do not pose a threat.

Both of these reports suggest the standard for continued detention is whether or not the detainee, himself, poses a threat.

Here's the actual language of Obama's EO:

Sec. 2. Standard for Continued Detention. Continued law of war detention is warranted for a detainee subject to the periodic review in section 3 of this order if it is necessary to protect against a significant threat to the security of the United States.

The subject of the sentence is not “the detainee” but “continued law of war detention.” “Continued law of war detention” is also the subject of the clause that the Administration is cynically claiming is a great standard that will be measured in Periodic Review Boards. Thus, the standard is **not**—as Gude and the WaPo suggest—that the detainee **himself** is a significant threat to the US. Rather, the standard is whether or not his detention is necessary to protect against a significant threat.

You need to look no further than the Yemeni detainees—whom the detainee review board has determined are not themselves a threat, but whom we continue to detain because conditions in Yemen make it impossible to release them without exacerbating the threat to the US there—to understand the difference. Now, the Administration has been pretty squirrely about whether this EO applies to the Yemeni detainees. But the EO says it applies to those whom the interagency review “designated for continued law of war detention.” And the Gitmo Task Force determined the Yemenis were designated for “conditional” detention (authorized by the law of war), because,

Al-Qaeda was gaining strongholds in certain regions of the country, and the government of Yemen was facing a rebellion in other regions. Potential options for rehabilitation programs and other security measures were carefully considered throughout the course of the review, but conditions in Yemen remained a primary concern.

Taking into account the current intelligence regarding conditions in Yemen, and the individual backgrounds of each detainee, the review participants unanimously approved 36 of 97 Yemeni detainees for transfer subject to appropriate security measures. The decision to approve these detainees for transfer, however, did not require immediate implementation. Rather, by making each transfer decision contingent on the implementation of appropriate security measures, the review participants allowed for necessary flexibility in the timing of the transfers. Under these transfer decisions, detainees would be returned to Yemen only at a time, and only under conditions, deemed appropriate from a security perspective.

In short, these men are not themselves a threat, but conditions in Yemen make it impossible to release them in such a way as to make sure they don't become one.

Whether or not the Administration intends to give Periodic Review Boards to the Yemenis, this standard would permit their continued detention even if they themselves are no threat.

But the importance of the grammar of Obama's so-called standard extends beyond its implication for the Yemenis. By not tying the standard to the terms of the AUMF, to membership in al Qaeda, or to capture on the battlefield, the EO's standard for review would allow the continued detention of financiers of al Qaeda, people not picked up on a battlefield, men who were members of Hezb-e-Islami Gulbuddin but not al Qaeda, highly trained *mujahadeen* who may never have targeted the US, or people with a "history of associations with extremist activity" (all of whom were designated for indefinite detention by the task force). In other words, the EO defines itself not by the terms which the law of war would use to define

those appropriately detained, but by terms we've expanded to include other people we just consider scary.

And those people—the people we think are scary but who have not necessarily targeted the US militarily—would not be invited to prove that they had never targeted the US, but instead they would have to prove that the government basis for considering them scary had no merit. I can imagine an old *mujahadeen* talking about working with the US to oust the Russians from Afghanistan to show that he didn't oppose the US, only to have the government respond, "right, but that means you're so well trained that your release represents a significant threat to the US." The government could even argue (though I'm sure they won't in these exact words) that we can't release those that we mistakenly tortured (say, Mohamedou Ould Slahi) because doing so would reveal the methods we used, which would represent a significant threat to the US.

Finally, I find the vague standard disturbing for another reason. It's bad enough that the government has divorced indefinite detention from the AUMF that hypothetically justifies that detention. But it has also divorced the concept of indefinite detention from al Qaeda, from the war against al Qaeda, from terrorism itself, even from "national" (read—military) security.

The grammar of the EO is a clear admission on the government's part that it is willing to indefinitely detain a human being not for what **he** has done, but because of the big swirling boogeymen it believes to lurk out there.

And it's important that those who write about this make that distinction clear.