

The New York Times[®]
Reprints

This copy is for your personal, noncommercial use only. You can order presentation-ready copies for distribution to your colleagues, clients or customers [here](#) or use the "Reprints" tool that appears next to any article. Visit www.nytreprints.com for samples and additional information. [Order a reprint of this article now.](#)

PRINTER-FRIENDLY FORMAT
SPONSORED BY



March 28, 2010

Obama Team Is Divided on Anti-Terror Tactics

By **CHARLIE SAVAGE**

WASHINGTON — Senior lawyers in the Obama administration are deeply divided over some of the counterterrorism powers they inherited from former President [George W. Bush](#), according to interviews and a review of legal briefs.

The rift has been most pronounced between top lawyers in the State Department and the Pentagon, though it has also involved conflicts among career Justice Department lawyers and political appointees throughout the national security agencies.

The discussions, which shaped classified court briefs filed this month, have centered on how broadly to define the types of terrorism suspects who may be detained without trials as wartime prisoners. The outcome of the yearlong debate could reverberate through national security policies, ranging from the number of people the United States ultimately detains to decisions about who may be lawfully selected for killing using drones.

“Beyond the technical legal issues, this debate is about the fundamental question of whom we are at war with,” said Noah Feldman, a Harvard law professor who specializes in war-power issues. “The two problems most plaguing Obama in the war on terrorism are trials for terrorists and taking the fight beyond Afghanistan to places like Pakistan and Yemen. This issue of whom we are at war with defines both of them.”

In the years after the 9/11 attacks, Mr. Bush claimed virtually unlimited power as commander in chief to detain those he deemed a threat — a view so boundless that his Justice Department once told a court that it was within the president’s lawful discretion to imprison as an enemy combatant even a “little old lady in Switzerland” who had unwittingly donated to [Al Qaeda](#).

But [President Obama](#) and his team, which criticized such claims as an overreach, have sought to demonstrate that the executive branch can wage war while also respecting limits imposed on

presidential power by what they see as the rule of law.

In March 2009, the Obama legal team adopted a new position about who was detainable in the war on terrorism — one that showed greater deference to the international laws of war, including the [Geneva Conventions](#), than Mr. Bush had. But what has not been known is that while the administration has stuck to that broad principle, it has been arguing over how to apply the body of law, which was developed for conventional armies, to a war against a terrorist organization.

An examination of that conflict offers rich insight into how the team of former law professors and campaign lawyers, nearly all veterans of the Clinton administration, is shaping important policies under Mr. Obama.

In February 2009, just weeks after the inauguration, John D. Bates, a federal judge overseeing several cases involving detainees in Guantánamo Bay, Cuba, asked a provocative question: Did the new administration want to modify Mr. Bush's position that the president could wield sweeping powers to imprison people without trial as wartime detainees?

Career Justice Department lawyers handling Guantánamo lawsuits feared that rolling back the Bush position might make it harder to win. And the new acting head of the department's Office of Legal Counsel — David Barron, a Harvard law professor and co-author of [a lengthy law review critique](#) of Bush administration claims that the commander in chief can override statutes — worried that Judge Bates had given them too little time to devise the answer.

But the White House counsel, Greg Craig, a campaign adviser to Mr. Obama who had been a foreign policy official in the Clinton administration, saw this as an important opportunity to demonstrate a break with Mr. Bush. And at a White House meeting, Mr. Obama weighed in, declaring that he did not want to invoke unrestrained commander-in-chief powers in detention matters.

With the president's directions in hand, Mr. Obama's Justice Department came back on March 13, 2009, with a more modest position than Mr. Bush had advanced. It told Judge Bates that the president could detain without trial only people who were part of Al Qaeda or its affiliates, or their "substantial" supporters. The department rooted that power in the authorization granted by Congress to use military force against the perpetrators of the Sept. 11 attacks. And it acknowledged that the scope and limits of that power were defined by the laws of war, as translated to a conflict against terrorists.

But behind closed doors, the debate flared again that summer, when the Obama administration confronted the case of Belkacem Bensayah, an Algerian man who had been arrested in Bosnia

— far from the active combat zone — and was being held without trial by the United States at Guantánamo. Mr. Bensayah was accused of facilitating the travel of people who wanted to go to Afghanistan to join Al Qaeda. A judge found that such “direct support” was enough to hold him as a wartime prisoner, and the Justice Department asked an appeals court to uphold that ruling.

The arguments over the case forced onto the table discussion of lingering discontent at the State Department over one aspect of the Obama position on detention. There was broad agreement that the law of armed conflict allowed the United States to detain as wartime prisoners anyone who was actually a part of Al Qaeda, as well as nonmembers who took positions alongside the enemy force and helped it. But some criticized the notion that the United States could also consider mere supporters, arrested far away, to be just as detainable without trial as enemy fighters.

That view was amplified after Harold Koh, a former human-rights official and Yale Law School dean who had been a leading critic of the Bush administration’s detainee policies, became the State Department’s top lawyer in late June. Mr. Koh produced a lengthy, secret memo contending that there was no support in the laws of war for the United States’ position in the Bensayah case.

Mr. Koh found himself in immediate conflict with the Pentagon’s top lawyer, Jeh C. Johnson, a former Air Force general counsel and trial lawyer who had been an adviser to Mr. Obama during the presidential campaign. Mr. Johnson produced his own secret memorandum arguing for a more flexible interpretation of who could be detained under the laws of war — now or in the future.

In September 2009, national-security officials from across the government packed into the Office of Legal Counsel’s conference room on the fifth floor of the Justice Department, lining the walls, to watch Mr. Koh and Mr. Johnson debate around a long table. It was up to Mr. Barron, who sat at the head of the table, to decide who was right.

But he did not. Instead, days later, he circulated a preliminary draft memorandum stating that while the Office of Legal Counsel had found no precedents justifying the detention of mere supporters of Al Qaeda who were picked up far away from enemy forces, it was not prepared to state any definitive conclusion.

So with no consensus, the legal team decided on a tactical approach. For as long as possible they would try to avoid that hard question. They changed the subject by instead asking courts to agree that people like Mr. Bensayah, looked at from another angle, had performed functions that made them effectively part of the terrorist organization — and so were clearly detainable.

The appeals court has not yet ruled on Mr. Bensayah's case. But the hours and effort that high-level officials expended on wrestling over adjustments to the reasoning in his case — only to reach the same outcome, that he was detainable without trial — dovetailed with a pattern identified by critics as varied as civil libertarians and former Bush lawyers.

"I think the change in tone has been important and has helped internationally," said John B. Bellinger III, a top Bush era [National Security Council](#) and State Department lawyer. "But the change in law has been largely cosmetic. And of course there has been no change in outcome."

But at a recent American Bar Association event, Mr. Koh argued that the administration's changes — including requiring strict adherence to anti-torture rules and ensuring that all detainees are being held pursuant to recognizable legal authorities — have been meaningful. The United States, he said, can now defend its national-security policies as fully compliant with domestic and international law under "common and universal standards, not double standards."

"We are not saying that we don't have to fight battles," he said. "We're just saying that we should fight those battles within the framework of law."

Last week, in another speech, Mr. Koh also for the first time outlined portions of the administration's legal rationale for targeted killings using drone strikes, which some scholars have criticized. His remarks, however, focused on issues like whether it was lawful to single out specific enemy figures for killing — not defining the limits of who may be deemed an enemy.

But Mr. Feldman, the Harvard professor, said the detention debate also had "serious consequences" for the targeted killings policy because, "If we're at war with you, then we can detain you — but we can also try to kill you."

That said, he cautioned, additional factors complicate the analysis of selecting lawful targets. Among them, it is not clear whether Mr. Obama is more willing in classified settings to assert that, as commander in chief, he can use drone strikes to defend the country against perceived threats that cannot be linked to the Congressionally authorized war against Al Qaeda.

And even in detention matters, Bush-era theories have remained attractive to some. This January, two appeals court judges appointed by Mr. Bush — Janice Rogers Brown and Brett M. Kavanaugh, both of whom had been singled out by Democrats after their nominations as too ideological — reopened the debate by unexpectedly declaring, in another Guantánamo case, that the laws of armed conflict did not limit the president's war powers.

In the Justice Department, career litigators who defend against Guantánamo lawsuits wanted

to embrace that reasoning, arguing it would help them win. Judges have sided with detainees seeking release in some 34 of 46 cases to date — though the decisions largely turned on skepticism about specific evidence, not the general legal theory about who was detainable.

But political appointees — including Mr. Barron, Mr. Koh and even Mr. Johnson — criticized the reasoning of the appeals court ruling as vulnerable to reversal and argued that the administration should not abandon its respect for the laws of war.

In classified briefs filed in several detainee cases this month, officials said, the Justice Department adopted an ambivalent stance. It cited the ruling as a precedent while also reasserting its own contradictory argument that the laws of war matter. The debate would go on.

“We’ll see how the cases develop,” Attorney General [Eric H. Holder Jr.](#) said in an interview in February, in the midst of that latest round. But, he added, “I don’t think we are going to deviate from our argument.”