



## ACLU: Obama's "New Normal" Is Bush's Old One

Though neoconservatives and other pro-national security-state types would have Americans believe that President Obama has made a clean break with the Bush administration's anti-terrorism program — things like "enhanced interrogation techniques" (i.e., torture), warrantless wiretapping, and imprisonment without trial — the fact is that very little has changed in this regard since January 20, 2009, as the American Civil Liberties Union documents in a scathing 22-page report entitled "Establishing a New Normal: National Security, Civil Liberties, and Human Rights Under the Obama Administration."



While offering somewhat muted praise for Obama's rare repudiations of Bush's egregious, unconstitutional policies, the report ultimately concludes that "the administration's record on issues related to civil liberties and national security has been, at best, mixed. Indeed, on a range of issues ... there is a very real danger that the Obama administration will enshrine permanently within the law policies and practices that were widely considered extreme and unlawful during the Bush administration. There is a real danger, in other words, that the Obama administration will preside over the creation of a 'new normal'" — one in which "the dangerous notion that America is in a permanent state of emergency and that core liberties must be surrendered forever" has become accepted.

The report faults the administration for its failure to uphold civil rights and the Constitution in the areas of transparency, torture and accountability, detention, targeted killing, military commissions, speech and surveillance, and watch lists.

With regard to transparency, the ACLU credits the Obama administration with, at least initially, signaling its commitment to more openness in government, having reformed the Freedom of Information Act process and released the Bush-era Justice Department memos authorizing torture along with official reports about those memos.

"The administration's commitment to transparency, however, has been inconsistent, and it has waned over time," says the report. For example, having first said it would comply with a court decision requiring the release of prisoner-abuse photos from detention facilities in Iraq and Afghanistan, the administration "later reversed course and declared that it would seek Supreme Court review, and it supported an invidious amendment to the FOIA intended to retroactively exempt the photos from release under the statute" — an amendment that also allows the Secretary of Defense to withhold any detainee photos he so desires.

In addition, writes the ACLU, "The administration has fought to keep secret hundreds of records relating to the Bush administration's rendition, detention, and interrogation policies" and "has argued that the CIA's authority to withhold information concerning 'intelligence sources and methods' extends even to methods that are illegal." It has also withheld information about Obama's "targeted killing"



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program, in which the President asserts that he can order the assassination of anyone who he suspects is a terrorist, anywhere in the world; and it has aggressively pursued government whistle-blowers.

During the Bush administration, “hundreds of prisoners were tortured in U.S.-run detention facilities, and ... more than one hundred were killed, many in the course of interrogations,” according to the report. Although Obama, says the report, “categorically disavowed torture” and instituted safeguards to prevent it from happening in the future, his administration has since “become an obstacle to accountability for torture.” It has argued against lawsuits brought by torture survivors using exactly the same logic as the Bush administration. It has also done little to investigate its predecessor’s torture program, Obama saying he prefers to “look forward, not back.” However, as the ACLU rightly avers, “Sanctioning impunity for government officials who authorized torture sends a problematic message to the world, invites abuses by future administrations, and further undermines the rule of law that is the basis of any democracy.”

When it comes to indefinite detention without charges, trial, or even any semblance of due process of law, Obama has made few improvements. The report describes Obama’s initial actions that held some promise: “On his second full day in office, President Obama ordered the CIA to close its secret prisons, set a one-year deadline for closing the Guantánamo prison, and established an interagency task force to review the cases of everyone detained at Guantánamo.” It’s all downhill from there.

“Eighteen months later Guantánamo is still open and some 180 prisoners remain there,” says the report. The administration has released some detainees, but it has refused to release others “even when the detainees have been cleared for release after years of harsh detention,” and “the administration bears responsibility for opposing in court the release of detainees against whom the government has scant evidence of wrongdoing.”

The ACLU also faults the administration for “its embrace of the theory underlying the Guantánamo detention regime: that the Executive Branch can detain militarily — without charge or trial — terrorism suspects captured far from a conventional battlefield.” The administration’s task force has already selected 48 Guantánamo detainees to imprison indefinitely. The administration has argued that anyone held in a prison in a war zone, even if he was captured *outside* the war zone, has no right to challenge his detention in U.S. courts; and having succeeded with this argument in court, it is now considering using the Bagram, Afghanistan, prison as its own personal gulag.

Obama’s plan to transfer some Guantánamo detainees to a prison in Illinois doesn’t meet with the ACLU’s approval either, and for good reason: It doesn’t resolve the issue of whether the government can imprison individuals without due process. Says the report: “If a precedent is established that terrorism suspects can be held without trial within the United States, this administration and future administrations will be tempted to bypass routinely the constitutional restraints of the criminal justice system in favor of indefinite military detention.”

The section on Obama’s “targeted killing” program is brief but says just what is necessary: It is a horrible, secretive, unconstitutional program that invests the government with the power to murder anyone, regardless of his guilt or innocence, with no legal proceedings whatsoever.

Having argued against the use of military commissions for trials at Guantánamo when he was campaigning for the presidency, upon setting foot in the White House Obama took up right where Bush had left off, merely calling for a few minor reforms in the system. The report notes that “there is still a very real danger that defendants might be convicted on the basis of hearsay evidence obtained



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coercively from other detainees who will not be available for cross-examination.”

The report also thoroughly eviscerates the notion that the government can be trusted to do the right thing in deciding which cases to try in civilian courts and which to try before military commissions, explaining:

So long as the federal government can choose between two systems of justice, one of which (the federal criminal courts) is fair and legitimate, while the other (the military commissions) tips the scales in favor of the prosecution, both systems will be tainted by the likelihood that the government will use the federal courts only in cases in which conviction seems virtually assured, while reserving the military commissions for cases with weaker evidence or where there are credible allegations that the defendants were abused in U.S. custody.

“With limited exceptions,” writes the ACLU, “the Obama administration’s positions on national security issues relating to speech and surveillance have mirrored those taken by the Bush administration in its second term.”

On warrantless surveillance, then-Senator Obama voted to grant immunity to telecommunications companies that had assisted the Bush administration in spying on Americans’ telephone calls and other communications. Since becoming President, Obama has defended the act “by insisting that the statute is effectively immune from judicial review,” the report says.

The Obama administration has also, according to the report, “been reluctant to yield any of the expansive surveillance powers claimed by the last administration,” pushing for Patriot Act reauthorization, allowing border agents to search Americans’ laptops and cellphones at the border (a power that has been used “thousands of times” in the last 20 months alone), and claiming the power to prosecute individuals for alleged “material support” for terrorism “even if the support in question consists solely of speech — advice on issues relating to international law, for example, or on peaceful resolution of conflicts.” Solicitor General and Supreme Court nominee Elena Kagan, says the report, “even proposed that lawyers could be sent to prison for filing friend-of-the-court briefs on behalf of designated terrorist organizations.”

Obama’s use of terrorist “watch lists” has been merely an extension of Bush’s. These lists are often based on hearsay evidence or the similarity of innocent people’s names to those of terrorists. They are created in secret and are nearly impossible to challenge. The Obama administration, asserts the report, “has expanded their use and resisted the introduction of minimal due process safeguards to prevent abuse and protect civil liberties.” It “has added thousands of names to the No Fly List, sweeping up many innocent individuals.” The ACLU correctly describes the No Fly List as “an unconstitutional scheme under which an individual’s right to travel and, in some cases, a citizen’s ability to return to the United States, is under the complete control of entirely unaccountable bureaucrats relying on secret evidence and using secret standards.”

Obama has also opposed any due process at all in the matter of freezing the assets of U.S. charities the government suspects of wrongdoing. For Obama, if the government says an organization has committed a crime, it is guilty, and its assets may be frozen without any judicial proceedings whatsoever.

The ACLU deserves credit for boldly exposing the Obama administration’s crimes despite whatever sympathy its members may have for the President. Obama’s record, like Bush’s, is a miserable litany of violations of both basic human decency and the Constitution he swore to uphold.

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