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Obama to indefinitely imprison detainees without charges

What was once denounced as a radical "legal black hole" is now official bipartisan consensus

Glenn Greenwald

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One of the most intense controversies of the Bush years was the administration's indefinite imprisoning of "War on Terror" detainees without charges of any kind. So absolute was the consensus among progressives and Democrats against this policy that a well-worn slogan was invented to object: a "legal black hole." Liberal editorial pages routinely cited the refusal to charge the detainees -- not the interrogation practices there -- in order to brand the camp a "dungeon," a "gulag," a "tropical purgatory," and a "black-hole embarrassment." As late as 2007, Democratic Senators like Pat Leahy, on the floor of the Senate, cited the due-process-free imprisonments to rail against Guantanamo as "a national disgrace, an international embarrassment to us and to our ideals, and a festering threat to our security," as well as "a legal black hole that dishonors our principles." Leahy echoed the Democratic consensus when he said:

The Administration consistently insists that these detainees pose a threat to the safety of Americans. Vice President Cheney said that the other day. **If that is true, there must be credible evidence to support it. If there is such evidence, then they should prosecute these people.**

Leahy also insisted that the Constitution assigns the power to regulate detentions to Congress, not the President, and thus cited Bush's refusal to seek Congressional authorization for these detentions as a prime example of Bush's abuse of executive power and shredding of the Constitution.

But all year along, Barack Obama -- even as he called for the closing of Guantanamo -- has been strongly implying that he will retain George Bush's due-process-free system by continuing to imprison detainees without charges of any kind. In his [May "civil liberties" speech](#) cynically delivered at the National Archives in front of the U.S. Constitution, Obama announced that he would seek from Congress a law authorizing and governing the President's power to imprison detainees indefinitely and without charges. But in September, the administration announced he [changed his mind](#): rather than seek a law authorizing these detentions, he would instead simply claim that Congress already "implicitly" authorized these powers when it enacted the 2001 AUMF against Al Qaeda -- thereby, [as *The New York Times* put it](#), "adopting one of the arguments advanced by the Bush administration in years of debates about detention policies."

Today, [The New York Times' Charlie Savage reports](#):

The Obama administration has decided to continue to imprison without trials nearly 50 detainees at the Guantánamo Bay military prison in Cuba because a high-level task force has concluded that they are too difficult to prosecute but too dangerous to release, an administration official said on Thursday.

[The Washington Post](#) says that these decisions "represent the first time that the administration has clarified how many detainees it considers too dangerous to release but unprosecutable because officials fear trials could compromise intelligence-gathering and because detainees could challenge evidence obtained through coercion." Once that rationale is accepted, it necessarily applies not only to past detainees but future ones as well: the administration is claiming the power to imprison whomever it wants without charges whenever it believes that -- even in the face of the horrendously broad "material support for terrorism" laws the Congress has enacted -- it cannot prove in any tribunal that the individual has actually done anything wrong. They are simply decreed by presidential fiat to be "too dangerous to release." Perhaps worst of all, it converts what was once a leading prong in the radical Bush/Cheney assault on the Constitution -- the Presidential power to indefinitely imprison people without charges -- into complete bipartisan consensus, permanently removed from the realm of establishment controversy.

There are roughly 200 prisoners left at the camp, which means roughly 25% will be held without any charges at all. Using the administration's perverse multi-tiered justice system, the rest will either be tried in a real court, sent to a military commission or released. What this means, among other things, is that the President's long-touted policy of closing Guantanamo is a total sham: the essence of that "legal black hole" -- indefinite detention without charges -- will remain fully in place, perhaps [ludicrously and dangerously shifted to a different locale \(onto U.S. soil\)](#) but otherwise fully in tact. [The U.S. Supreme Court ruled in 2008](#) that the Military Commissions Act unconstitutionally denied the right of habeas corpus to Guantanamo detainees -- a principle the Obama administration has vigorously resisted when it comes to Bagram detainees -- but mere habeas corpus review does not come close to a real trial, which the [Bill of Rights guarantees](#) to all "**persons**" (not only "Americans") before the State can keep them locked in a cage.

Numerous Democrats have spent the year justifying Obama's desire for indefinite detention with dubious excuses that would have been unthinkable to hear from them during the Bush years. I addressed all of those excuses in full back in May, [here](#). As but one example, the claim most commonly cited to justify Obama's actions -- *these detainees can't be convicted because the evidence against them is "tainted" by torture* -- is: (a) completely unproven; (b) completely immoral (it's one of the longest-standing principles of Western justice that tortured-obtained evidence can't be used to justify imprisonment); and (c) completely contradictory (Democrats spent years claiming, and still do, that torture doesn't work and produces unreliable evidence; if that's true, who could possibly justify indefinitely imprisoning someone based on torture-obtained -- *i.e., inherently unreliable* -- evidence?). Whatever else is true, both Obama's policy and the rationale -- *we must imprison Terrorists without charges because there's no evidence to convict them but they're somehow still deemed too dangerous to release* -- is exactly what the Bush/Cheney faction endlessly repeated to justify its "legal black hole."

But no matter. If there's one thing we've seen repeatedly all year long, it's that many Democrats simply do not believe in the axiom [best expressed by The New York Times' Bob Herbert](#) when he said that "Americans should recoil as one against the idea of preventive detention." As Herbert wrote: "**policies that were wrong under George W. Bush are no less wrong because Barack Obama is in the White House.**" That precept should be too self-evident to require expression and yet is widely rejected. Hence, exactly that which very recently was condemned as "a dungeon, a gulag, a tropical purgatory, and a black-hole embarrassment" is now magically transformed into a beacon of sober pragmatism from a man - - a Constitutional Scholar -- solemnly devoted to restoring America's Standing and Values.

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Yesterday, prior to this decision being announced, I conducted a 20-minute interview with ACLU Executive Director Anthony Romero regarding that group's [newly released report](#) on Obama's civil liberties record after the first year in office, pointedly entitled: "America Unrestored." I'll post that discussion later today. Additionally, I will have an analysis of the Supreme Court's obviously momentous decision in *Citizens United* -- invalidating restrictions on corporate and union election spending -- posted later.

UPDATE: Just to add some thick irony to all of this, today is the one-year anniversary of [President Obama's Executive Order to close Guantanamo](#) within one year -- an anniversary the administration decided to celebrate not by fulfilling its terms, but instead by announcing that the central feature of Guantanamo -- indefinite detention with no charges -- will continue indefinitely.