

# Questions For Obama On National Security Law

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During the long campaign, team Obama displayed confidence that, once in office, it would swiftly and surely remake national security law. Now, even as last November's vicious Mumbai attacks by Muslim extremists have become a fading reminder of the civilized world's vulnerabilities, the president and his national security team are undoubtedly discovering that legal reform encounters formidable challenges. Unfortunately, these challenges are not limited to those revolving around detention and interrogation policy, on which most of the recent public discussion has focused.

Terrorists--particularly the Muslim extremists, who not only operate in stealth and target civilian populations but also arm, or seek to arm, themselves with weapons of mass destruction--raise daunting legal problems. Their conduct is not adequately covered by either criminal law, though they certainly are lawbreakers, or the laws of war, though, like national armies, they may threaten a state's territorial integrity and political sovereignty.

The Bush administration made serious and sometimes unprompted mistakes in applying old laws and in failing to work with Congress to craft new ones. Nevertheless, in the continuing struggle against Islamic extremism, the Obama administration no less than the Bush

administration will confront difficult choices that involve painful trade-offs between security and liberty.

Here are some of the most important questions that the Obama administration and the new Congress will have to wrestle with to formulate a coherent, effective and just national security law:

Last week, Obama issued an executive order declaring that the American detention facility at Guantánamo Bay, Cuba, would be closed within a year, and another establishing a special task force to examine detention policy. The task force must deal with major issues: What should be done with the approximately 245 people still held at Guantánamo Bay? Is new legislation needed to address their cases, and, if so, what would such legislation look like? For future such cases, should the U.S. continue to detain suspected terrorists under the laws of war as enemy combatants, or pass a statute permitting some other form of extra-criminal detention? Or should America use only regular civilian courts and the regular criminal process to authorize the detentions of those suspected of terrorism?

In addition, the president issued an executive order last week requiring the CIA to adhere to the strict rules that govern military interrogations and to close down its secret prisons abroad. The special task force will also need to consider under what circumstances, if any, should the law permit CIA interrogators to depart from military interrogation rules?

Most agree that criminal trials, when feasible, should be used to handle terrorism cases. For detainees facing criminal charges, should the U.S. continue the use of military commissions, or should it use general courts martial, ordinary criminal trial in federal court, or the creation of some new tribunal such as a special civilian national security court with special procedures and rules of evidence, or an international court?

The Bush administration actively opposed the development of the International Criminal Court. What position will the Obama administration take toward the ICC, and, specifically, should its authorizing treaty be submitted for ratification?

Under what circumstances would President Obama order the use of American military force in the absence of a U.N. Security Council Resolution authorization? Under what circumstances would he order the use of American military force in the absence of a Congressional authorization?

What further rethinking does America's law of surveillance require following the Foreign Intelligence Surveillance Act's passage last year? In particular, will the Obama administration maintain the National Security Agency's wiretapping program or alter it in important ways?

The Bush administration often refused to release the key legal analyses supporting its most controversial antiterrorism programs, in particular legal opinions of the Justice Department's Office of Legal Counsel. To what extent will an Obama administration commit to generally

making key government legal opinions public? Under what circumstances should they be kept secret, and, if so, for how long?

Should the U.S. continue the practice of targeted killings, and if so under what circumstances?

Was Congress correct to create a Department of Homeland Security? What might be done to improve it?

Did Congress effectively restructure the intelligence community in the Intelligence Reform Act of 2004? In particular, did the creation of a director of national intelligence consolidate the many agencies that make up the intelligence community, or rather bloat the bureaucracy? What might be done to improve intelligence community governance?

Members of Congress have discussed prosecution and other legal actions against Bush administration officials for their conduct in the war on terror. Will the Obama administration support such efforts, and if so, on what grounds?

A paradox in the struggle against terrorism is that we define success by prevention, yet successful prevention, because much of it goes unnoticed, causes vigilance to wane and the public to grow more complacent. Indeed, opinion polls show public concern about the terrorist threat has declined dramatically over the last several years. What will the Obama administration do to maintain the political will in the battle against Islamic extremism? Would it, for example, be willing to disclose more information—including sensitive information—to preserve public awareness of the threat?

The questions are hard and the stakes are high. Adequate answers will depend on recognizing the complex imperatives of both security and law, and respecting the constitutional powers and procedures and democratic norms through which they must be balanced.

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