

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

LAKHDAR BOUMEDIENE, et al.

Petitioners,

v.

GEORGE WALKER BUSH, et al.

Respondents.

Civil Action No. 04-cv-1166 (RJL)

**PETITIONERS' SUPPLEMENTAL MEMORANDUM OF LAW REGARDING THE
IMPLICATIONS OF AN "ENEMY COMBATANT" DETERMINATION**

Petitioners submit this Memorandum of Law to clarify a point made during argument on Tuesday, October 28, regarding the implications of an enemy combatant determination.

The parties have briefed the definition of “enemy combatant,” and the Court has made its ruling. This Memorandum is not a motion for reconsideration. The Court expressed some concern regarding whether and in what circumstances an enemy combatant may be lawfully targeted with deadly force. This Memorandum is simply intended to address that concern.

Whatever definition of “enemy combatant” is applied, the categorization of a person as an “enemy combatant” is an extremely grave determination: an enemy combatant is someone the United States military can attack and kill, on sight and without warning. As noted in our prior Memorandum, “[t]he term ‘combatant’ has an established meaning in the law of armed conflict. It refers to a person whom the military may lawfully kill or capture and, if captured, detain for the duration of hostilities.” *Pets. Mem Regarding Enemy Combatant Def’n*, Oct. 19, 2008, at 2. Lawful combatants, *e.g.* uniformed U.S. military forces, are “entitled to carry out attacks on enemy military personnel and equipment” and “bear[] no criminal responsibility for killing or injuring enemy military personnel or civilians taking an active part in hostilities, or for causing damage or destruction to property, provided his or her acts have been in compliance with the law of war.” U.S. Dep’t of the Army, United States Operational Law Handbook – Judge Advocate General’s School Publication JS-422 Ch. 2 § VIII.A.1.a (2006) (hereafter “Operational Law Handbook,” available at www.jagcnet.army.mil); see also Solis Decl., Trav. Ex. 18, ¶ 6.c (discussing Army General Order 100, 1863 Lieber Code, and noting that “combatant’s privilege” is that “he or she may kill or wound opposing combatants, and destroy enemy targets or objects, without penalty.”)

There are few limits and exceptions. Under the law of war, it is forbidden to kill or injure enemy personnel who have already surrendered or been taken out of combat – including prisoners of war and the wounded. Operational Law Handbook Ch. 2 § VII.A.2 -3.¹ There are also prohibitions on inflicting “unnecessary suffering,” although it is the case that “[t]he prohibition of *unnecessary suffering* constitutes acknowledgement that *necessary suffering* to combatants is lawful, and may include severe injury or loss of life. There is no agreed definition for unnecessary suffering.” Id. Ch. 2 § IV.B.1 (emphasis in original).

Some experts have opined that the principle of military necessity “might preclude killing a nonthreatening enemy combatant who can easily be arrested without the use of force.” Bradley & Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2121 n. 325 (2005). The United States military strives to ensure that the “loss of life and damage to property *incidental to attacks* must not be *excessive* in relation to the *concrete and direct military advantage* expected to be gained.” The Law of Land Warfare, Army Field Manual FM 27-10, ¶ 41, change 1 (emphasis added).² But “[m]ilitary advantage’ is not restricted to tactical gains,” and is instead “linked to the full context of war strategy.” Operational Law Handbook Ch. 2. § V.B.1. Killing a bona fide enemy combatant is unlikely to be considered “incidental” to an attack, and even less likely to be considered “excessive” in relation to the “concrete and direct military advantage” expected to be gained by his killing, given the circumstances of the war on terror. Id. As Major Scott Reid of the U.S. Army candidly put it in a paper submitted to the

¹ United States armed forces must comply with the law of war during all armed conflicts, however such conflicts are characterized. DoD Directive 5100.77, 9 Dec. 1998, ¶ 5.3.1.

² As noted in our prior Memorandum, it is always forbidden to intentionally target civilians, and even civilians directly participating in hostilities may not be targeted with lethal force if arrest, interrogation, and trial are available and would accomplish the military objective. See generally Pets. Mem Regarding Enemy Combatant Def’n, Oct. 19, 2008, at 3 n.3.

Faculty of the Naval War College:

The biggest advantage in treating Al Qaeda and Taliban members as enemy combatants is the right to kill them by virtue of their collective enemy status instead of arresting them for their individual criminal acts. If terror acts are only domestic crimes, then law enforcement agencies must investigate to determine who is individually responsible. They must capture the criminals unless it is necessary to kill in self-defense. However, if the nature and frequency of terror acts rise to the level of an armed conflict, there is no requirement to determine individual criminal responsibility, demand surrender, or limit the use of force to self-defense.

Scott Reid, Terrorists As Enemy Combatants: An Analysis of How the United States Applies the Law of Armed Conflict in the Global War on Terrorism (Naval War College 2004) (citations omitted, available at <http://handle.dtic.mil/100.2/ADA422754>). See also Solis Decl., Trav. Ex. 18, ¶ 6.c (“In the war on terrorism, the term ‘enemy combatant’ has come into use. . . . [T]he combatant is a member of a group in armed conflict with the United States or its allies, and is a lawful target who may be killed by United States and allied combatants.”).

A killing could thus be justified by military commanders as “necessary” under the law of war, even if the combatant might appear “nonthreatening” to some, provided that the killing serves an advantage within the full context of the war strategy and the combatant has not placed himself into a protected category – e.g., by surrendering or by otherwise being “out of combat” – at the time when lethal force is applied. The Government’s contention that Petitioners were lawfully detained as enemy combatants, therefore, is tantamount to saying that in October 2001, the Petitioners, or others similarly situated, could have been lawfully attacked and killed on sight and without warning, rather than detained through Bosnian police intermediaries.

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Respectfully submitted,

/s/ Allyson J. Portney

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Dated: October 31, 2008

CERTIFICATE OF SERVICE

I, Allyson J. Portney, hereby certify that on October 31, 2008, I electronically filed and served the foregoing PETITIONERS' SUPPLEMENTAL MEMORANDUM OF LAW REGARDING THE IMPLICATIONS OF AN "ENEMY COMBATANT" DETERMINATION.

/s/ Allyson Portney
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