

## Obama Slow to Repudiate Bush in Race, Terrorism Court Cases

By Greg Stohr



March 16 (Bloomberg) -- The change sweeping Washington has been slow to show up in President **Barack Obama**'s legal stances on issues such as terrorism and racial preferences.

The new administration's court filings so far have been marked less by repudiation of former President **George W. Bush** than by nuance and in some cases continuity. Even when breaking with Bush, Obama's lawyers often have either laid out a middle-ground position or avoided taking a firm stand.

"What we're seeing are carefully calibrated positions that are moving away from the Bush administration, but doing so cautiously," said **Steven**

**Shapiro**, legal director of the American Civil Liberties Union in New York.

Those stances have left legal conservatives applauding the Democratic administration's approach on some issues, particularly terrorism. Meanwhile, liberals are left to wait for the Obama administration to become more forceful in its legal arguments as the president gets additional members of his team in place.

The go-slow approach has been on display in several **U.S. Supreme Court** cases, including the now-dismissed appeal of **Ali Saleh Kahlah al-Marri**, who was held without charges in a military brig for 5 1/2 years as an "enemy combatant."

In a break with Bush, Obama decided to shift al-Marri into the civilian justice system and press criminal charges against him. Even so, the new administration didn't rule out the possibility that, down the road, al-Marri might be returned to military custody.

Pleased Conservatives

"I am reasonably pleased with the Obama administration's policies on terrorism," said **Richard Samp**, chief counsel of the **Washington Legal Foundation**, which supported Bush's anti-terror arguments at the Supreme Court.

Samp pointed to the Obama administration's effort to dismiss a suit by five detainees who say they were tortured by arguing that the case would reveal state secrets.

Obama's lawyers similarly adopted the Bush administration's position on prisoners at the U.S. Air Force **base** in Bagram, Afghanistan, arguing that those captives shouldn't have access to U.S. courts.

Then last week, the administration told a judge that the president can detain people who "substantially supported" al-Qaeda or the Taliban in Afghanistan. Although that definition is narrower than the one used by Bush, human-rights groups said the change didn't go far enough. In a statement, the ACLU called the move "a half-step in the right direction."

As part of that change, the Obama administration also dropped the term "enemy combatant."

'Reserving the Right'

"More often than not, what they are doing so far is reserving the right to exercise their executive power but just declining to exercise it in some cases where the Bush administration had," Shapiro said.

Beyond terrorism, the administration recently took a middle ground in two other Supreme Court cases. One concerns a decision by New Haven, Connecticut, to cancel fire department promotions because no blacks had scored well enough on two tests to qualify. The city says it feared the promotions would leave it vulnerable to suit by black firefighters.

The administration last month **urged** rejection of the legal theories pressed by 19 white firefighters and one Hispanic who sued because they lost their chance at promotion.

At the same time, the government said a lower court went too far in dismissing the suit and that the firefighters should have a chance to prove that the city's expressed reasons were a "pretext" for discrimination against the white and Hispanic firefighters.

#### Moderation Questioned

The administration "certainly would like to give the impression that it's a moderate or middle-of-road brief," said **Sharon Browne**, a lawyer with the Pacific Legal Foundation in Sacramento, California, which backs the suing firefighters. She said the administration's reasoning nonetheless would let the government "color-code individuals."

In another Supreme Court case, involving the strip search of a middle school student suspected of carrying prescription pain relievers, the Obama administration **contends** that school officials violated the girl's constitutional rights. At the same time, the government says school officials shouldn't have to pay damages.

Both briefs mark a partial shift from the Bush administration, which urged against governmental considerations of race and in favor of giving school officials broad power to search students for evidence of drugs.

#### Environmental Moves

The one area where the new administration has moved aggressively is the environment, said Douglas Kendall, president of the **Constitutional Accountability Center** in Washington, which pushes for environmental safeguards and civil rights. In one of its first Supreme Court actions, the new administration withdrew a Bush administration appeal concerning power-plant emissions.

The fast action came in part because the Environmental Protection Agency chief was confirmed only two days after Obama was sworn in, Kendall said. The administration's aggressiveness "seems pretty directly correspondent to how much of their team is in place," he said.

The administration's potentially most important courtroom voice, solicitor general nominee **Elena Kagan**, has yet to receive a Senate confirmation vote. Kendall said Kagan's arrival at the solicitor general's office might change what so far has been its practice of "avoiding, where possible, taking unnecessary positions on hot-button issues."

Still, Kagan's confirmation would hardly guarantee sweeping change. In her testimony before the Senate committee that considered her nomination, she stressed stability in the law.

"I could not frequently or lightly ask the court to reverse one of its precedents," she wrote in answering follow-up questions from Republican Senator **Arlen Specter** of Pennsylvania, "and I certainly would not do so because I thought the case wrongly decided."

To contact the reporter on this story: **Greg Stohr** in Washington at [gstohr@bloomberg.net](mailto:gstohr@bloomberg.net).

*Last Updated: March 16, 2009 00:01 EDT*