

Congress Is Poised to Let Obama Imprison Anyone He Wants

By Conor Friedersdorf

Worse than the PATRIOT Act, new legislation would allow the president to detain Americans without evidence, charges, or a trial, as long as they're first declared terrorists

The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive." -- [Justice Antonin Scalia](#)

President Obama, like his predecessor, claims that he is empowered to indefinitely imprison accused terrorists on his word alone. Thus the decade of warnings by the ACLU, the Center for Constitutional Rights, the Cato Institute, and other civil libertarians about excessive executive power.

Now Osama bin Laden is dead. The war in Afghanistan is ending. U.S. officials say [al-Qaeda is on the brink of collapse](#). You'd think it would be time for Congress to rein in the Presidency Gone Wild, as has happened after past periods of executive war-making and attendant excesses.

Instead, everything is upside down.

Congress is poised to affirm that President Obama and his successors can imprison whomever they want, for as long as they want, on no authority but their own, so long as they first assert that the person in question is a terrorist. They needn't present evidence, or persuade a judge, or get a majority of votes from a jury. Just whispering "he's a terrorist" is enough.

Yes, even if the suspect is an American citizen.

As everyone acknowledges, innocents previously thought to be terrorists were among the detainees at Guantanamo Bay. Even in the criminal justice system, with its guarantees of due process, counsel, and appeals, and a standard of "guilty beyond a reasonable doubt," innocents are jailed. It is likely we've even executed innocent men. But we're prepared to trust that the president, routinely excoriated by his critics for making mistakes, won't ever

make a mistake, even when permitted to act without any of the procedural safeguards known to prevent them.

The offending legislation is the [National Defense Authorization Act of 2012](#). Aside from authorizing the indefinite military detention of American citizens, it would mandate that the military rather than the Justice Department would handle most terrorism cases, including plots hatched and attempted or carried out in the United States. In other words, it would militarize domestic law enforcement in the name of fighting terrorism, break with generations of precedent, and just have the military handle terrorism related stuff, *even on U.S. soil*.

Mandating the militarization of counterterrorism is a bad idea for all sorts of reasons. Sen. Mark Udall (D-Colo.), who tried and failed to strip the bill of its most egregious provisions, explains some of them [here](#). As Andrew Rosenthal [puts it](#), "The Pentagon, the intelligence community, the Justice Department and the White House oppose the detainee rules. The people who would have to carry out these boneheaded policies think they would actually weaken national security."

That is an accurate characterization.

Even more troubling, however, is the indefinite-detention-of-citizens angle.

Investing one leader with unchecked power so extreme and prone to catastrophic abuse is a needless approach best suited to a nation of ignorant cowards; needless because guaranteeing the rare American citizen accused of terrorism access to the courts hardly makes us appreciably less safe; ignorant because avoiding the always-corrosive effects of unchecked power is one of the oldest political lessons; and cowardly because it sacrifices so much, *erasing even the distinction between being accused by the state and being guilty*, in the name of safety from a threat that poses a statistical risk to the average American orders of magnitude less than dying of food poisoning.

Supporters of the bill will tell you, "But these are terrorists! We're at war with them! They have no civilian rights!"

To which critics say, "How do you know they're terrorists? Who determines that?"

"The president!"

"And if he's mistaken? Or worse, decides to target his domestic enemies with a false accusation?"

Senate supporters of the bill *never* talk about either possibility.

Everything is so upside down that the cosponsors of this tyrannical legislation, Sens. John McCain (R-Ariz.) and Carl Levin (D-Mich.), felt compelled to write [a Washington Post op-ed](#) to defend its most controversial provisions, and as if to underscore the myopia of

our political culture, Congress giving Obama the go-ahead to indefinitely detain Americans without due process *didn't even rank as controversial enough to be mentioned* in their piece! In fact, the op-ed states, "The bill does not tie the administration's hands in deciding how best to handle a detainee."

That was actually their focus: Whether another provision of this nearly approved bill does too much *to take away* the president's discretion. Obama has even threatened to veto the bill, if and when the Senate passes it, not because he is alarmed by its civil-liberties implications, but because the extraordinary powers it would hand him are in some cases *less sweeping* and more constraining than what he has asserted for himself via frustratingly secret Office of Legal Counsel memos. (For example, it would force him to keep some War on Terror detainees in military custody.)

Where is the Tea Party Caucus, the avowed champions of liberty and small government, the self-described "constitutional conservatives," the people so mistrustful of Obama that some of them say that he is deliberately trying to make the American people less free and lying about it?

Have they nothing to say about affirming his power to detain indefinitely?

In the Senate, Rand Paul alone among Tea-Party-affiliated Republicans opposes the legislation. Republican Sens. Mike Lee, Ron Johnson, and Jim DeMint, all current or former members of the Tea Party Senate Caucus, voted against Sen. Udall's amendment to strip away the bill's worst civil-liberties abuses, and for preserving their supposed nemesis Obama's power to indefinitely detain any American citizen if he makes so much as an evidence-free assertion that citizen is a terrorist. Other Tea-Party favorites like Marco Rubio, Ron Johnson, and Pat Toomey voted the same way.

They're all unworthy of the Senate, as are the Democrats, Sen. Levin first among them, who voted the same way.

The House version of the bill was less egregious, but every single member of the House Tea Party Caucus save Tom McClintock (R-Calif.) voted for it. If the bill makes it to conference committee, will these 51 Tea Party Republicans change course and side with the Constitution's guarantees of due process and a trial in open court even for those accused of treason? Or will they become complicit in declaring all of America a battlefield where anyone can be indefinitely detained?

(I'm betting they keep supporting the bill for reasons I explain [here](#).)

Here's how Minnesota Sen. Al Franken, a Democrat, put it during floor debate:

What we are talking about is that Americans could be subjected to life imprisonment-- think about that for just a moment--life imprisonment without ever being charged, tried, or convicted of a crime, without ever having an opportunity to prove your innocence to a judge and a jury of your peers, and without the government ever having to prove your guilt beyond a reasonable doubt. I believe that denigrates the very foundation of this

country. It denigrates the Bill of Rights and what our Founders intended when they created a civilian, nonmilitary justice system for trying and punishing people for crimes committed on U.S. soil.

And here is what Sen. Paul, a Republican, said:

We are talking about people who are merely suspected of terrorism or suspected of committing a crime and have been judged by no court. We are talking about American citizens who could be taken from the United States and sent to a camp at Guantanamo Bay and held indefinitely. This should be alarming to everyone watching this proceeding today because it puts every single American citizen at risk. There is one thing and one thing only that is protecting American citizens, and that is our Constitution, the checks we put on government power...

...the detainee provisions of the Defense authorization bill do another grave harm to freedom. They imply perpetual war for the first time in the history of the United States. No benchmarks are established that would ever terminate the conflict with al-Qaida, the Taliban, or other foreign terrorist organizations. In fact, this bill explicitly says that no part of this bill is to imply any restriction on the authorization of force. When will the wars ever end? When will these provisions end? No congressional view is allowed or imagined. No victory is defined. No peace is possible if victory is made impossible by definition.

That brings us to a final thought. One bizarre thing about this bill is that its grant of authority could and probably should be interpreted as fleeting: Everything in it is pursuant to the Authorization for Use of Military Force that Congress passed after the Sept. 11 terrorist attacks.

As I recently [noted](#), that legislation states, "The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Very few of those people are still at large in the world. It is only because we act as though the Authorization for Use of Military Force confers permission to fight a general, unending, ill-defined "War on Terrorism" that any of this matters at all.

Merely acknowledging that the post-Sept.-11 declaration of war is all but spent would render the present bill largely meaningless. As we've seen, however, the Senate is debating the new bill with the presumption that the 2001 AUMF will go on justifying military action abroad and at home against foreign and domestic enemies alike for many years on end. Or as they put it, indefinitely. This is one more reminder of the factual shakiness of the legal foundation for the War on Terror, and the fact that in practice we just ignore the legal problems.