THE NATIONAL INTEREST

The Defense Authorization Bill: Still Troubled

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Both Houses have now passed [3] the 2012 Defense Authorization Bill [4]. The President, having dropped his veto threat, will sign it today. That's too bad.

Authorization bills, keep in mind, are [5] essentially a collection of restrictions and permissions slips for appropriations. In practice, however, budgeteers and appropriators have more say over how we spend. So while authorizers share responsibility for our bloated military spending, I'll save my customary [6] complaints [7] on that topic for the appropriations bill and focus here on the new policies this bill sets.

On the positive side, the bill creates several reporting requirements that slightly aid future efforts to trim our military ambitions and spending. It requires the Pentagon to look at accelerating the minor [8] drawdown in nuclear weapons required by the New Start Treaty. Another report is to examine options for shrinking our ballistic missile submarine fleet, which could save [9] several hundred billion dollars annually. The bill also requires the administration to produce "independent" studies of overseas basing costs and opportunities for savings. These reports are not likely to themselves promote much change but might serve as ammunition for those that do.

A little noted problem with the bill is that it authorizes the shift of base Pentagon spending to the Overseas Contingency Operations account—the war account. Because the Budget Control Act caps military spending but not war funding, costs shifted from the former to the latter to reduce the cuts needed to get under the caps—creating [10] an illusion of savings. Appropriators are trying [11] to protect around $10 billion in base defense costs for 2012 using this ploy. Analysts are still figuring how big a shift in funds the authorization bill endorses. But as Taxpayers for Common Sense has noted [12], the answer is at least several billion

The most odious aspect of this bill is its detention provisions. These sections of the bill are confusing because they seem to say various things that they then unsay. Section 1021 requires the president to place al Qaeda members and their associates, with the exception of American citizens, into military custody and

deny them civilian trial. It then destroys this “requirement” by letting the president waive it and claim that it serves “national security interests.” Section 1022 affirms that the president has the authority under the 2001 Authorization of Military Force to detain without trial anyone that belongs to al Qaeda or the Taliban, or associates of those groups that are engaged in hostilities with the United States. Language further down in the section insists that this affirmation does not “limit or expand” the President’s authority or endorse his claimed power to seize suspected terrorists in the United States and deprive them of trials.

What that compromise [13] language section leaves us with—beyond a further muddying of these legal waters—is a punt. The offense to civil liberties is less what the bill does than what it doesn’t: deny that the president can arbitrarily detain without trial anyone he decides is al Qaeda or its helper. So when Congressional leaders dismiss [14] civil liberty concerns about the legislation by saying it “merely codifies current law” one response is that that’s exactly the problem.

But as I noted [15] the other day, it isn’t clear that Congress’ efforts here to keep its hand off current law will entirely succeed. Federal courts hearing cases questioning the constitutionality of war powers, including the president’s right to detain people, tend to consider [16] whether congress has endorsed or rejected the power in question. Judges may take all this throat-clearing as a tacit endorsement of the president’s claims, making them more likely to survive constitutional scrutiny. The question is not whether there is damage to civil liberties here but how bad it is.