THE NATIONAL INTEREST

Published on *The National Interest* (http://nationalinterest.org)
Source URL (retrieved on *Dec 5, 2011*): http://nationalinterest.org/blog/the-skeptics/the-real-trouble-the-defense-authorization-bill-6216

The Real Trouble With the Defense Authorization Bill

December 2, 2011
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The Senate yesterday passed [3] the 2012 defense-authorization bill [4]. It includes a controversial provision meant to put al-Qaeda suspects and their associates in military custody rather than prosecute them as criminals. The White House has rather [5] weakly [6] threatened a veto, complaining primarily [7] that the bill undercuts their discretion in dealing with terrorists.

If the White House vetoes the bill, it will be for the wrong reasons. The trouble is not what the law mandates but what it affirms. It does not require the president to put any terrorists in military custody but rather to comply with a new bureaucratic process if he chooses not to do so. Even as we move toward the end of the wars in Iraq and Afghanistan, the law affirms a presidential power to detain anyone, including American citizens, in the name of fighting a nebulous and seemingly permanent terrorist menace. That is bad for both civil liberties and for our ability to think clearly about terrorism.

Most debate about the bill concerns section 1032. It says that the armed forces "shall hold" anyone that is part of al-Qaeda or an associated force and participants in an attack on the United States or its coalition partners for the course of hostilities authorized by Congress in 2001—and dispose of those suspects under laws of wars. American citizens are excluded. Thanks to a compromise negotiated [8] by Armed Service Committee Chair Carl Levin and Ranking Member John McCain, the section now allows the secretary of defense, after consulting with the secretary of state and director of national intelligence, to keep the suspect in civilian courts by informing Congress that doing so serves national security.

The administration objects to 1032 largely because it undercuts their discretion. However, as Levin and McCain note in a recent op-ed [9], the administration still "determines whether a detainee meets the criteria for military custody." The president could presumably just decline to label a detainee as someone fitting the requirements of military detention in the first place and try him in civilian court without getting a waiver from the secretary of defense.

The provision's main relevance is as a talking point. Republicans already fond of castigating the president for allowing alleged terrorists to have their day in court can pretend that he is ignoring this law when he does so.

The real trouble with the bill is the preceding section, 1031. It "affirms" that the authorization of military force passed prior to the invasion of Afghanistan allows the president, through the military, to detain without trial al-Qaeda members, Taliban fighters, associated forces engaged in hostilities against the United States and those that support those groups. Nothing excludes American citizens.

The section says that it does not expand presidential war powers, but that contradicts its other language and common sense. By explicitly endorsing constitutionally dubious powers that the president already claims, Congress makes those

claims more likely to survive legal challenge.

The 2001 Authorization of Military Force [10] allows the president to make war on "nations, organizations, or persons" that he determines to have been involved in or aided the September 11 attacks and those that harbored these groups. Effectively, that meant al-Qaeda and the Taliban. Our last two presidents have used that authority to claim the right to kill or indefinitely detain anyone, anywhere that they decide is associated with some arm of al-Qaeda. The courts have trimmed these powers in ways that remain uncertain, particularly as applied to U.S. citizens. In *Hamdi v. Rumsfeld* [11], the Supreme Court held that the U.S. military has the power to detain without trial Americans captured on foreign battlefields but that the detainee can challenge the detention in court. Contrary to Carl Levin's assertions, the ruling did not [12] say that people seized in the United States fit that category.

This defense bill's expansive list of enemies strengthens the president's claim that he can detain almost anyone without trial in the name of counterterrorism. Future White House lawyers will cite it to justify those powers. Courts may tell Americans that challenge their detention on constitutional grounds that Congress's endorsement of the president's claims to detention powers makes them sounder [13].

The bill may even strengthen the president's case for using other [14] war powers, like killing citizens with drone strikes. That interpretation is bolstered by the detainee language's similarity to the reauthorization of force contained in the House's defense bill [15]. That legislation explicitly [16] gives the president the power to make war on al-Qaeda, the Taliban and associated forces. By using nearly identical language to describe who the president can detain under his war powers, the Senate bill may stealthily achieve the same end.

Liberalism means minimizing the exercise of war powers. To say, as backers of this legislation do, that the constitution allows our government to kill and detain people without trial is not an argument that we should do so often. Because those powers so offend liberalism, those that advocate them should have the burden of explaining why they are necessary, even if they are constitutional.

Instead, advocates of these extraordinary powers take it as nearly self-evident that military detention is somehow safer than criminal trials. But criminal proceedings, because they are adversarial, produce better information than military interrogations. That information makes the public better consumers of counterterrorism policies. Public debate does not always make better public policy, but it often helps [17].

You can see how by looking at the footnotes of books about terrorism, like the 9-11 report [18]. Many of sources are records of criminal trials of terrorists. Had all those suspects been held without trial, their testimony and the government's claims about them might have remained secret. What did become public would be less trustworthy because it would not have been vetted by an institutional adversary, as in court.

Take the case of Umar Farouk Abdulmutallab, the Underwear Bomber, and its connection to the killing of Anwar al-Awlaki, the jihadist propagandist killed earlier this year in Yemen. Both before and after getting a Miranda warning, Abdulmutallab apparently told his FBI interrogators a great deal of information about his trip to Yemen to prepare the explosives he tried to detonate in plane over Detroit. Had he not plead guilty on the first day of trial, prosecutors were set to argue [19] that Awlaki had aided the plot. The government would have had to substantiate its claim that Awlaki, an American citizen, had graduated from being a propagandist to plotting attacks and therefore become a combatant they could legally kill—something they still have not done. The trial would have shed light on how the White House decides which of its citizens it can kill in the name of counterterrorism. That information would at least inform debate.

Civil liberties are a sufficient reason to oppose handing the executive the power to detain more or less whomever it wants. But our system of government does not divide powers simply for fairness. Unilateral decisions are more likely to be foolish ones.

More by

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[14] http://drones./
[15] http://armedservices.house.gov/index.cfm/files/serve?File_id=7953f7b8-84cb-49ef-ab26-9ed7078c9d6c
[16] http://www.cato-at-liberty.org/the-defense-authorization-bill-is-awful/
[17] http://nationalinterest.org/blog/the-skeptics/nobody-knows-if-drone-strikes-pakistan-work-so-let%E2%80%99s-stop-5775
[18] http://www.gpoaccess.gov/911/
[19] http://www.npr.org/2011/10/11/141228767/underwear-bomber-trial-may-shed-light-on-awlaki