

OBAMA'S EO ON INDEFINITE DETENTION: WANTING BUD MCKEON'S CAKE AND EATING IT TOO

[Update, 12/7/11: I find I'm still linking back to this post, and cringing everytime I see I got McKeon's name, Buck, wrong. Apologies.]

I plan to do some more reading on Obama's proposed Executive Order on Indefinite Detention (not least, once an EO becomes public). But here are some preliminary thoughts after having read Adam Serwer's very good summary of the debate thus far.

The biggest reason to do this, IMO, is to head Lindsey Graham (who wants to pass a law authorizing indefinite detention) and Bud McKeon (who wants to rewrite the AUMF to authorize a limitless war on terror, along with the detention that would "authorize") off at the pass. What Graham and McKeon want is undoubtedly worse.

But there are several problems with this as is.

1) I'm with Ben Wittes. I have a real problem with doing this via Executive Order. The whole problem with an executive just inventing his own judicial system is that it is unilateral and probably no more legal than Bush's original review boards were. So even though liberals might LIKE this outcome better (and like it FAR better than what McKeon wants), legally it seems no more defensible. It still is an abuse of separation of powers.

2) Moreover, doing this with an EO is all the more problematic because EOs, as Bush showed and Obama's first White House Counsel endorsed, are susceptible to pixie dust—to being changed with no public notice. There is nothing in principle

to prevent Obama from secretly changing the terms of his EO on indefinite detention from including just al Qaeda and related groups to including FARC and drug traffickers to including Assange.

3) You might say the AUMF prevents that from happening. But if that's so, then why is the AUMF not sufficient (that is, if as everyone says and DOJ concluded last year, international law provides for detention during wartime, then why do we need an EO reasserting that authority?). Sure, this EO puts a nice gloss on indefinite detention authorized—they say—under AUMF, but I'm afraid it also serves to push the boundaries of the AUMF. After all, Obama's own Guantanamo Task Force has said the Yemenis could be released but couldn't be released to Yemen, suggesting his own lawyers agree that they are not the kind of High Value Detainees who really fall under detention guidelines under the AUMF, but we've got to keep them anyway—partly—because of a war against AQAP, a force not included in the AUMF, but also—partly—because our unreliable ally there is fighting a civil war that threatens to morph into our war on terror and makes it dangerous—for reasons that may not have anything to do with Islamic terrorism—to release into that country. Yet the Yemenis appear to be included in this EO. In other words, the notion that such issues should form the basis for indefinite detention when they are not tied to the terms of the AUMF seems more likely to be abused under an EO.

4) All of which comes back to Bud McKeon, who wants to rewrite the AUMF to authorize forever wherever war. This EO seems, as much an effort to get around Republican hopes for expansive indefinite detention, also an effort to get around revisiting the terms of the AUMF, even though we badly need to do so. Mind you, I'd like us to revisit it, declare the War on Terror as defined by the AUMF won, and the ongoing fight against terrorism a law enforcement exercise. That is, in my opinion, the legally correct thing to do. But Obama doesn't want to

lose his expansive executive powers which a law enforcement approach would require (and surely is unwilling to take the politically bold stance of observing that the war we're fighting in Afghanistan has little to do with 9/11). So he's basically endorsing McKeon's awful stance, while trying to avoid doing so publicly. He basically wants the untenable outcome McKeon is pushing without the backlash from civil libertarians in this country (which are admittedly an increasingly small concern for Obama) or the international community (which is probably a growing concern) that he'd get for embracing McKeon's unjustifiable stance. He wants to have Bud McKeon's cake and eat it too.

And no matter what one thinks the correct stance is, this seems to be all about Obama having missed his opportunity to take a correct and defensible legal stance in 2009 (thanks Rahm), but also refusing to take a stance he'll need to fight for going forward. Now, frankly, of all the political fights Obama refuses to fight, I suspect an assessment that this is now an unwinnable fight might, for once, be accurate (which is different than agreeing that it was unwinnable in summer 2009). In other words, his assessment than an attempt to head Bud McKeon off at the pass may indeed be morally preferable if legally suspect. But all the claims about EOs stopping short of institutionalizing a permanent system of indefinite detention also ignore the ways that doing this via EO is at the least legally troublesome and may be far worse in the long run.