

# OBAMA ISSUES VETO THREAT ON FOREVER WAR

The Administration just issued its official position on the House Armed Services Committee Defense Authorization bill. In it, Obama issues veto threats on several issues, including an extra engine for the Joint Strike Fighter and limits on START nuclear reductions (but not, it must be said, on any delay of DADT repeal, though he did oppose efforts to delay repeal).

Most interesting, though, is the veto threat on the forever war (see Ben Wittes for a good summary of most of these sections):

Detainee Matters: The Administration strongly objects to section 1034 which, in purporting to affirm the conflict, would effectively recharacterize its scope and would risk creating confusion regarding applicable standards. At a minimum, this is an issue that merits more extensive consideration before possible inclusion. The Administration strongly objects to the provisions that limit the use of authorized funds to transfer detainees and otherwise restrict detainee transfers and to the provisions that would legislate Executive branch processes for periodic review of detainee status and regarding prosecution of detainees. Although the Administration opposes the release of detainees within the United States, Section 1039 is a dangerous and unprecedented challenge to critical Executive branch authority to determine when and where to prosecute detainees, based on the facts and the circumstances of each case and our national security interests. It unnecessarily constrains our Nation's counterterrorism efforts and would undermine our national

security, particularly where our Federal courts are the best – or even the only – option for incapacitating dangerous terrorists. For decades, presidents of both political parties – including Presidents Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush – have leveraged the flexibility and strength of our Federal courts to incapacitate dangerous terrorists and gather critical intelligence. The prosecution of terrorists in Federal court is an essential element of our counterterrorism efforts – a powerful tool that must remain an available option. The certification requirement in section 1040, restricting transfers to foreign countries, interferes with the authority of the Executive branch to make important foreign policy and national security determinations regarding whether and under what circumstances such transfers should occur. The Administration must have the ability to act swiftly and to have broad flexibility in conducting its negotiations with foreign countries. Section 1036 undermines the system of periodic review established by the President’s March 7, 2011, Executive Order by substituting a rigid system of review that could limit the advice and expertise of critical intelligence and law enforcement professionals, undermining the Executive branch’s ability to ensure that these decisions are informed by all available information and protect the full spectrum of our national security interests. It also unnecessarily interferes with DoD’s ability to manage detention operations. Section 1042 is problematic and unnecessary, as there already is robust coordination between the Department of Justice, the Department of Defense, and the

Intelligence Community on terrorism-related cases, and this provision would undermine, rather than enhance, this coordination by requiring institutions to assume unfamiliar roles and could cause delays in taking into custody individuals who pose imminent threats to the nation's safety. If the final bill presented to the President includes these provisions that challenge critical Executive branch authority, the President's senior advisors would recommend a veto.

While I would have preferred a full-throated rejection of the forever war, this is a neat approach that, given realistic assumptions of what we can expect from Obama, pushes back in an interesting fashion.

What the Administration has done is list five different provisions:

- 1034: redefining the AUMF to be a forever war (and also giving the President the power to detain people in the forever war)
- 1039: barring the use of funds for civil trials
- 1040: imposing certification requirements on the Secretary of Defense to transfer detainees
- 1036: codifying an indefinite detention system, with fewer detainee rights than Obama's own EO calls for
- 1042: requiring the Attorney General ask permission from the DNI and Secretary of

## Defense before prosecuting “terrorist offenses” in civilian courts

And then said, generally, if “these provisions that challenge critical Executive branch authority” remain in the bill, his advisors would recommend a veto.

Of course, on its face, the forever war section doesn’t “challenge critical Executive branch authority,” unless you argue that by granting the President the ability to constantly redefine this war, you’re infringing on his authority to do so without a grant of such authority from Congress. That’s not how I understand the Constitution, but you can never be too sure anymore about the people who run our war machines.

Nevertheless, Obama is including that with a bunch of other restrictions (some of which passed in similar form on other laws, to which he responded with a non-signing statement signing statement, and some of which are new), so as to be able to say his opposition is grounded in separation of power concerns rather than the judgment that Congress shouldn’t mandate a forever war the President hasn’t asked for.

Again, I’d rather have a loud denunciation of the forever war. I’d rather have a clear argument about how we will start moving away from a war footing in our opposition to terrorism.

But I’m not going to get that, so I’ll take this graceful veto threat instead.