

DEFENSE AUTHORIZATION CONFERENCE MAKES FEW CHANGES TO DETAINEE PROVISIONS

According to a press release from Senator Levin's office, the conference on the Defense Authorization has made few changes to the detainee provisions institutionalizing military detention of alleged terrorists.

With regards to Section 1031, which authorized the indefinite detention of alleged terrorists, the conference bill,

Reaffirm[s] the military's existing authority to detain individuals captured in the course of hostilities conducted pursuant to the Authorization for the Use of Military Force. No change has been made to the Senate version of this provision, which confirms that nothing in the provision may be "construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States."

Section 1032, which mandates presumptive military detention, adds language purporting not to change FBI's national security authorities (though I don't understand how that could practically be the case).

Require military detention – subject to a Presidential waiver – for foreign al Qaeda terrorists who attack the United States. This provision specifically exempts United States citizens and lawful resident aliens, authorizes

transfer of detainees to civilian custody for trial in civilian court, and leaves it up to the President to establish procedures for determining how and when persons determined to be subject to military custody would be transferred, and to ensure that such determinations do not interfere with ongoing intelligence, surveillance, or interrogation operations. Language added in conference confirms that nothing in the provision may be “construed to affect the existing criminal enforcement and national security authorities of the Federal Bureau of Investigation or any other domestic law enforcement agency with regard to a covered person, regardless whether such covered person is held in military custody.” [my emphasis]

And the conference does change the breathtaking limits on Attorney General authority in the Senate bill I laid out [here](#), apparently adopting the House formulation of requiring the AG to ask permission of the Defense Secretary before the AG does his or her job.

Require the Attorney General to consult with the Secretary of Defense before prosecuting a foreign al Qaeda terrorist who is determined to be covered under the previous section, or any other person who is held in military custody outside the United States, on whether the more appropriate forum for trial is a federal court or a military commission and whether the individual should be held in civilian or military custody pending trial.

It seems to me the language does enough to avoid a veto from the cowardly Obama, but still does terrible damage to both the clarity of national security roles and overall investigative expertise.