

JAY CARNEY: NDAA STILL DOESN'T GIVE THE COURTS ANY OVERSIGHT OVER DETENTION AND KILLING

Jason Leopold pointed out this language in Jay Carney's press briefing yesterday:

Q You had objections to the defense bill; you've dropped them. There's still a lot of civil liberties experts who are convinced that that bill contains the seed of the future detention of U.S. citizens indeterminately if they're suspected of terrorism. Are you really that convinced that there was a big enough change that you'd drop an important issue like this?

MR. CARNEY: Well, let me make clear that this was not the preferred approach of this administration, and **we made clear that any bill that challenges or constrains the President's critical authorities to collect intelligence, incapacitate dangerous terrorists, and protect the nation would prompt the President's senior advisors to recommend a veto.**

After intensive engagement by senior administration officials, the administration has succeeded in prompting the authors of the detainee provisions to make several important changes, including the removal of problematic provisions.

While we remain concerned about the uncertainty that this law will create for our counterterrorism professionals, **the most recent changes give the President additional discretion in**

determining how the law will be implemented, consistent with our values and the rule of law, which are at the heart of our country's strength. This legislation authorizes critical funding for military personnel overseas, and its passage sends an important signal that Congress supports our efforts as we end the war in Iraq and transition to Afghan lead, while ensuring that our military can meet the challenges of the 21st century. On the provision in particular that you reference, it does not increase or otherwise change any of our authorities in regard to detention of American citizens. It is simply a restatement of the authorities that were granted to the President in 2001.

Q Is this just a recognition that ultimately the courts would settle disputes like that?

MR. CARNEY: No, the changes give discretion to the President in the implementation of this law. If, as this law is being implemented, the President feels that our counterterrorism professionals are being constrained and that their flexibility is being constrained in a way that does not reflect our values, then he will ask for changes. He will go to the authors of these provisions and ask for legislative changes that are separate from the defense authorization bill.

But again, the changes that were made were sufficient to allow senior advisors to withdraw the recommendation of a veto, but we are still concerned about the uncertainty that this law creates.
[my emphasis]

The whole thing is a reaffirmation of unchecked Presidential power. But I agree with Leopold that the specific exchange in which, in response

to a question whether the Courts will decide any disagreement about what the law means, Carney answers that no, the President will, is particularly troubling.

He seems basically to be saying that, if there is a dispute, the President will claim the law gave him discretion and do what he wants. He seems also to be saying (repeating a claim the Administration has made of late) that courts have no place in reviewing not just detention policy (and the targeted killing rooted in detention policy), but even this bill itself. That shouldn't be a surprise, really, since the Administration's veto threat complained that codifying the authorities Congress thought the President had threatened to disrupt "settled jurisprudence."

After a decade of settled jurisprudence on detention authority, Congress must be careful not to open a whole new series of legal questions that will distract from our efforts to protect the country.

But it does raise alarms about the Administration's disdain for separation of powers.

I had made two predictions about where these detainee provisions would go. I thought that codifying them might make it less likely the Administration would continue to avoid all court review by invoking state secrets (as they did with Anwar al-Awlaki). And I also predicted that Obama will issue a doozy of a signing statement, reiterating his understanding that this bill does nothing to limit his "flexibility."

I see I was overly optimistic about the former, but suspect I'll be proven correct about the latter.