

OBAMA APOLOGISTS IGNORING THE ROTTING CORPSE OF ANWAR AL- AWLAKI

It's been amusing to see how Obama apologists have taken Lawfare's very helpful explainer on the NDAA's detainee provisions to pretend that their president isn't signing a bill that he believes authorizes the indefinite detention of American citizens.

Take this example from Karoli.

Here's how she claims that Lawfare proves that the bill doesn't authorize indefinite detention of American citizens.

Key point rebutting the contention that the indefinite detention provisions apply to United States citizens:

Section 1022 purports not merely to authorize but to require military custody for a subset of those who are subject to detention under Section 1021. In particular, it requires that the military hold "a covered person" pending disposition under the law of war if that person is "a member of, or part of, al-Qaeda or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda" and is participating in an attack against the United States or its coalition partners. The president is allowed to waive this requirement for national security reasons. **The provision exempts U.S. citizens entirely, and it applies to lawful permanent resident aliens for conduct within the United States**

to whatever extent the Constitution permits. It requires the administration to promulgate procedures to make sure its requirements do not interfere with basic law enforcement functions in counterterrorism cases. And it insists that "Nothing in this section shall 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."
[emphasis original]

Of course, Karoli can only make this claim by pretending that section 1022—the section that makes military detention presumptive for non-citizens but doesn't foreclose military detention of US citizens—is section 1021—the section that affirms the President's authority to indefinitely detain people generally. And she can also make this claim only by ignoring the section where Lawfare answers her question directly.

Does the NDAA authorize the indefinite detention of citizens?

No, though it does not foreclose the possibility either.

The NDAA doesn't do anything to exempt Americans from indefinite detention. And the reason it

doesn't—at least according to the unrebutted claims of Carl Levin that I reported on over a month ago—is because the Administration asked the Senate Armed Services Committee to take out language that would have specifically exempted Americans from indefinite detention.

The initial bill reported by the committee included language expressly precluding “the detention of citizens or lawful resident aliens of the United States on the basis of conduct taking place within the United States, except to the extent permitted by the Constitution of the United States.” **The Administration asked that this language be removed from the bill.** [my emphasis]

So the effect is that (as Lawfare describes in detail) the bill remains unclear about whether Americans can be detained indefinitely and so we're left arguing about what the law is until such time as a plaintiff gets beyond the Executive Branch's state secrets invocations to actually decide the issue in court.

But what's not unclear is what Obama believes about the bill he's signing. That's true not just because (again, according to the unrebutted statement of Carl Levin) the Administration specifically made sure that the detention provisions could include Americans, but because the Administration used a bunch of laws about detention to justify the killing of American citizen Anwar al-Awlaki.

And, as Charlie Savage has reported, the legal justification the Administration invented for killing an American citizen in a premeditated drone strike consists of largely the same legal justification at issue in the NDAA detainee provisions.

▪ *The 2001 AUMF, which purportedly*

defined who our
enemies are
(though the NDAA
more logically
includes AQAP in
its scope than
the 2001 AUMF)

- *Hamdi*, which held
the President
could hold an
American citizen
in military
detention under
the 2001 AUMF
- *Ex Parte Quirin*,
which held that
an American
citizen who had
joined the
enemy's forces
could be tried in
a military
commission
- *Scott v.*
Harris (and *Tenne*
see v. Garner),
which held that
authorities could
use deadly force
in the course of
attempting to
detain American
citizens if that
person posed an
imminent threat
of injury or
death to others

In other words, Obama relied on substantially the same legal argument supporters of the NDAA detainee provisions made to argue that indefinite detention of American citizens was legal, with the addition of *Scott v. Harris* to turn the use of deadly force into an unfortunate side-effect of attempted detention. [original typos corrected]

We don't have to guess about what the Administration believes the law says about detention and its unfortunate premeditated side effect of death because we have the dead body of Anwar al-Awlaki to make it clear that the Administration thinks Hamdi gives the Executive expansive war powers that apply even to American citizens.

You don't get to the targeted killing of American citizens (which, after all, doesn't offer the possibility of a habeas corpus review) without first believing you've got the power to indefinitely detain Americans (with habeas review).

Now, to Obama's, um, credit, I don't think he actually **wants** to indefinitely detain Americans. He seems to have figured out that the civilian legal system is far more effective—and plenty flexible—for detaining terrorists for long (and usually life, in the case of actual terrorist attackers) sentences. He doesn't necessarily want to use the power of indefinite detention he believes he has, but (as the unrebutted claims of Carl Levin make clear) he wants to be able to continue to claim he has it, probably because a bunch of other claimed authorities—demonstrably, targeted killing, and probably some kinds of domestic surveillance—depend on it.

But that doesn't excuse what he will do by signing the bill into law. He's signing a bill that grants the executive broad powers of detention that he believes to include American citizens. And while he may not want to detain

Americans, that's no guarantee that President Newt won't want to.

AHMED WARSAME AND STUXNET

Back in November, I suggested one intended purpose of the detainee provisions in the Defense Authorization is to require a paper trail that would make it a little harder for the Administration to disappear detainees on floating prisons. The bill:

- Requires written procedures outlining how the Administration decides who counts as a terrorist
- Requires regular briefings on which groups and individuals the Administration considers to be covered by the AUMF
- Requires the Administration submit waivers whenever it deviates from presumptive military detention

These are imperfect controls, certainly. But they do seem like efforts to bureaucratize the existing, arbitrary, detention regime, in which the President just makes shit up and tells big parts of Congress—including the Armed Services Committees, who presumably have an interest in making sure the President doesn't make the military break the law—after the fact.

I suggested this effort to impose bureaucratic controls was, in part, a reaction to the Ahmed Warsame treatment, *in which it appears that the*

Armed Services Committees learned Obama had declared war against parts of al-Shabaab and used that declaration as justification to float Warsame around on a ship for two months. (It appears that the Intelligence Committees, but not the Armed Services Committees, got briefed in this case, though Admiral McRaven was testifying about floating prisons as it was happening). [Update: I may be mistaken about what Lindsey Graham's language about making sure the AUMF covered this action meant, so italicized language may be incorrect.]

This is not to say the ASCs are going to limit what the President does—just make sure they know about it and make sure the military has legal cover for what they're doing.

With that in mind, take a look at Robert Chesney's review of the new cyberwar authorization in the Defense Authorization, which reads:

SEC. 954. MILITARY ACTIVITIES IN CYBERSPACE.

Congress affirms that the Department of Defense has the capability, and upon direction by the President may conduct offensive operations in cyberspace to defend our Nation, Allies and interests, subject to—

(1) the policy principles and legal regimes that the Department follows for kinetic capabilities, including the law of armed conflict; and

(2) the War Powers Resolution (50 U.S.C. 1541 et seq.).

Chesney's interpretation of this troubling language is that by requiring a Presidential statement in some cases, it will force interagency consultation before, say, DOD launches a cyberwar on Iran. (Oh wait, too late.)

Second, the utility of insisting upon presidential authorization, as opposed to just SecDef authorization or that of a commander, is that it makes it likely if not certain that there would be interagency screening of the proposed OCO (or set thereof) under the auspices of the NSC staff process, with more than just DOD weighing in on the question. For example, the State Department – which institutional equities disposing it to perhaps pay more attention to collateral/unintended consequences that an operation might have on other countries – might well have more of a voice as a proposal for a particular operation makes its way up the chain to the President. In this respect, I should emphasize at this point that the public record reveals that there has been a fairly long-running fight over just these sorts of issues within the executive branch over the past couple of years. Ellen Nakashima's story last week is highly relevant here, and there also is relevant material in the Schmitt & Shanker book Counterstrike. Hard to tell from the outside if section 954 is a codification of what has been worked out, or if instead it will break some sort of logjam.

At least as Chesney reads it (and you should click through for the full post), this is about imposing the same kind of inadequate bureaucratic controls that the detainee provisions appear at least partly to impose.

Both, in other words, seem to be an effort to stop the Executive Branch from just launching wars unilaterally without a paper trail and adequate review.

Now, I suggested the detainee provisions were, in part, a response to Warsame's treatment. If so, is StuxNet (and Duqu) the reason behind the cyberwar provision? Is it the proposed Libyan

cyberattack, which was reportedly called off? Or did the Administration launch another cyberwar, one that hasn't broken in the press yet?

In any case, it's not like Congress is telling the President to stop launching wars. Just to do so in some organized bureaucratic fashion.

MITCH MCCONNELL'S GREATEST FEAR: DOJ PROVED HIM WRONG FOR 5% OF THE COST

When the Obama Administration charged two Iraqis on al Qaeda related charges in Bowling Green, KY, Mitch McConnell wrote an op-ed wailing about all the fearful things that could happen as a result.

In short, these two are not common criminals who should be provided all the rights and privileges of American citizens. They are enemy combatants who should be transferred to the military detention facility at Guantanamo Bay, Cuba, where they can be interrogated, detained, and brought to justice.

I commend the skill and professionalism of law enforcement and prosecutors for apprehending these terrorists and preventing further violence on our troops. And yes, it is possible to simply try them as common criminals in a civilian court. But after Congress created a \$200-million, state-of-the-art facility in Guantanamo Bay precisely to handle foreign fighters like them, why would we want to? It simply makes no sense to saddle Kentuckians with the security and logistical costs associated

with ensuring the safety of our residents during a civilian trial.

[snip]

Trying these terrorists in a civilian courtroom could also risk compromising classified information used as evidence in the trial. That too has happened before in trials of this sort—and the Justice Department has already said that they expect the use of classified information in this case.

[snip]

And what happens if these detainees are acquitted, as nearly happened with Ahmed Ghailani?

[snip]

Unlike the Attorney General, Eric Holder, who believes that our “most effective terror-fighting weapon” is our court system, the good people of Kentucky know that our military is what keeps us safe. Our men and women in uniform have sacrificed everything to preserve our freedom and our rights as Americans.

Today, one of the two, Waad Ramadan Alwan, pleaded guilty to all charges against him.

Alwan, 30, a former resident of Iraq, pleaded guilty to all counts of a 23-count indictment charging him with conspiracy to kill U.S. nationals abroad; conspiracy to use a weapon of mass destruction (explosives) against U.S. nationals abroad; distributing information on the manufacture and use of improvised explosive devices (IEDs); attempting to provide material support to terrorists and to al Qaeda in Iraq; as well as conspiracy to transfer, possess and export Stinger missiles. Alwan was indicted by a federal grand

jury in Bowling Green, Ky., on May 26, 2011.

Alwan faces a maximum sentence of life in prison under the sentencing guidelines and a mandatory minimum of 25 years in prison.

Presumably, Alwan will testify against his co-defendant, Mohanad Shareef Hammadi under the kind of cooperation agreement not readily available at Gitmo.

Thus far, the citizens of KY have only had to pay for security for a few hearings (if my experience at a hearing for the much more dangerous Umar Farouk Abdulmutallab is any indication, the additional security amounted to a few more burly guards). Alwan released no classified information. He plead guilty without even a trial.

In short, at least for Alwan, McConnell's fear-mongering proved to be totally baseless.

And rather than spend the \$400,000 we would have spent to house Alwan for six months at Gitmo—with similar amounts to be expected for the length of his potential life sentence—we have probably spent \$20,000 to house him, even assuming SuperMax levels of security (which Abdulmutallab, at a low security prison, presumably didn't have). Why was Mitch afraid of saving \$380,000?

More importantly, why was Mitch so afraid of this typical result, in which a terrorism suspect pleads guilty before trial?

DID DIANNE FEINSTEIN'S

“FIX” ON AUMF LANGUAGE ACTUALLY AUTHORIZE KILLING AMERICAN CITIZENS?

To explain why it caved on its Defense Authorization veto threat, the Obama Administration had the following to say about the affirmation of detention authority.

Ensuring that we track current law and minimize risks associated with legislating on AUMF:

Made our requested modifications to the provision that codifies military detention authority under the September 2001 Authorization for Use of Military Force. Though this provision remains unnecessary, the changes ensure that we are merely restating our existing legal authorities and minimize the risk of unnecessary and distracting litigation.

That is, the Administration says its past complaints about the AUMF language have been addressed.

On November 17, when Obama issued his veto threat, the AUMF language said:

Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107-40) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war.

COVERED PERSONS—A covered person under this section is any person as follows:

(1) A person who planned, authorized,

committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.

(2) A person who was part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or who has supported such hostilities in aid of such enemy forces.

[snip]

(d) CONSTRUCTION.—. Nothing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force.

The language of the conference bill Obama says he won't veto says:

Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107-40) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war.

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(2) A person who was part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the

United States or its coalition partners, including any person who has committed a belligerent act or who has supported such hostilities in aid of such enemy forces.

[snip]

(d) CONSTRUCTION.—. Nothing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force.

If you haven't figured it out, the specific language relating to the terms of the AUMF **remains precisely the same.**

In other words, Congress made no substantive changes to the AUMF language between the time the Administration issued its veto threat and the time it withdrew the threat.

And yet, when Obama issued his veto threat, he had this complaint about it.

Section 1031 attempts to expressly codify the detention authority that exists under the Authorization for Use of Military Force (Public Law 107-40) (the "AUMF"). The authorities granted by the AUMF, including the detention authority, are essential to our ability to protect the American people from the threat posed by al-Qa'ida and its associated forces, and have enabled us to confront the full range of threats this country faces from those organizations and individuals. Because the authorities codified in this section already exist, the Administration does not believe codification is necessary and poses some risk. 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. While

the current language minimizes many of those risks, future legislative action must ensure that the codification in statute of express military detention authority does not carry unintended consequences that could compromise our ability to protect the American people.

There are two explanations for why Obama backed off his veto threat on this point, then. First, we know the Administration **did** make a request regarding the language in the AUMF clause, though before it issued its veto threat.

As I reported last month, the big change between the original language and the Senate bill in this clause was the removal of the language exempting US citizens from indefinite detention. And that was a change made at the request of the Administration.

The initial bill reported by the committee included language expressly precluding “the detention of citizens or lawful resident aliens of the United States on the basis of conduct taking place within the United States, except to the extent permitted by the Constitution of the United States.” **The Administration asked that this language be removed from the bill.** [my emphasis]

So maybe Obama backed off his veto threat because the final bill didn’t specifically exempt Americans from indefinite detention.

There’s the one other change made to this section between Obama’s veto threat and his retraction of that threat today. DiFi’s cop-out language:

(e) AUTHORITIES—Nothing in this section shall be constructed 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.

The only thing that changed between Obama's veto threat and his retraction of his threat—though it was depicted as a sop to civil libertarians worried about indefinite detention—is DiFi's language.

And while DiFi's amendment seems somewhat duplicative of the "CONSTRUCTION" language—reiterating Obama's authority under the Afghan AUMF—it is actually more than that. To some degree, it accomplishes the same thing Mark Udall's wrong-headed amendment did: not only reaffirm the President's authority under the Afghan AUMF, but also the Iraq AUMF and "any other statutory or constitutional authority" regarding detention.

(2) The Authorization for Use of Military Force Against Iraq Resolution 2002 (Public Law 107-243).

(3) Any other statutory or constitutional authority for use of military force.

As I've noted, the Iraq AUMF has served to generalize Presidential claims to war powers against terrorists who have no ties to al Qaeda since at least 2004.

And while the Afghan AUMF and Hamdi and Quirin were—according to Charlie Savage—the primary bases claimed for the Administration's authority to kill Anwar al-Awlaki (in spite of the fact that AQAP did not exist, and therefore should not really be included in, the 2001 AUMF), the Administration also relied on two SCOTUS cases approving of the use of "deadly force" to prevent the escape of even unarmed suspects who might pose a "significant threat of death or serious physical injury" to others (even if only to the cop using the deadly force).

It also cited several other Supreme

Court precedents, like a 2007 case involving a high-speed chase and a 1985 case involving the shooting of a fleeing suspect, finding that it was constitutional for the police to take actions that put a suspect in serious risk of death in order to curtail an imminent risk to innocent people.

The document's authors argued that "imminent" risks could include those by an enemy leader who is in the business of attacking the United States whenever possible, even if he is not in the midst of launching an attack at the precise moment he is located.

In other words, by affirming all purportedly existing statutory authority, DiFi's "fix" not only reaffirmed the AUMF covering a war Obama ended today, but also affirmed the Executive Branch's authority to use deadly force when ostensibly trying to detain people it claims present a "significant threat of death or serious physical injury." It affirms language that allows "deadly force" in the name of attempted detention.

In any case, it's one or the other (or both). Either the AUMF language became acceptable to Obama because it included American citizens in the Afghan AUMF and/or it became acceptable because, among other things, it affirmed the Executive Branch's authority to use deadly force in the guise of apprehending someone whom the Executive Branch says represents a "significant threat."

My guess is the correct answer to this "either/or" question is "both."

So DiFi's fix, which had the support of many Senators trying to protect civil liberties, probably made the matter worse.

In its more general capitulation on the veto, the Administration stated that the existing bill protects the Administration's authority to

“incapacitate dangerous terrorists.”

“Incapacitate dangerous terrorists,” “use of deadly force” with those who present a “significant threat of death or serious physical injury.” No matter how you describe Presidential authority to kill Americans with no due process, the status quo appears undiminished.

Update: I added “among other things” because the statutes the Executive Branch has relied on include a bunch of other things besides just the “deadly use of force.”

ENGLAND GAVE US HABEAS CORPUS ONCE BEFORE...

Can they do it again?

The British human rights organization today won a habeas corpus petition for their client, Yunus Rahmatullah, who has been detained at Bagram for 7 years, in the English Court of Appeal.

The Master of the Rolls, Lord Neuberger, Lord Justice Maurice Kay, and Lord Justice Sullivan, said the case raised important principles of law. Their court ruling is the latest in a series relating to the treatment of detainees in Iraq and Afghanistan that have been highly critical of the Foreign Office and Ministry of Defence.

The judges rejected a claim by a senior MoD official, Damian Parmenter, that granting a writ for habeas corpus would be “futile”.

Kay said: “On the face of it [Rahmatullah] is being unlawfully detained and [British ministers] have

procedures at their disposal ... to enable them to take steps which could bring the unlawful detention to an end."

[snip]

Though Rahmatullah is in US custody, the UK is the "detaining authority pursuant to the memorandum of understanding struck between the UK and US" during the Iraq invasion, Leigh Day said. British ministers remained "responsible" for Rahmatullah under the Geneva conventions.

The decision relies on the Memoranda of Understanding regarding detainees signed between the Brits and the US. The Iraqi one signed in 2003 notes, among other things, that,

Any prisoners of war, civilian internees, and civilian detainees transferred by a Detaining Power [the UK on the present facts] will be returned by the Accepting Power [the US on the present facts] to the Detaining Power without delay upon request by the Detaining Power. [brackets original]

And while the British government claims that MOU is no longer in effect, the judges aren't buying it.

It is true that Mr Parmenter says that the Ministry of Defense believes that the first MoU is spent. However, in the light of the terms of the two MoUs, that expression of opinion is not enough to dissuade me that it is inarguable that, if the first MoU applied to a person when he was handed over, it was not intended to be disapplied simply because the second MoU was entered into or because hostilities ceased.

And after rehearsing the requirements of the

Geneva Conventions (and emphasizing that the Brits had to sign these MOUs in the first place because George Bush said the Conventions didn't apply with al Qaeda), the ruling includes this implicit threat.

It is unnecessary (and would be inappropriate) to address the question whether, by not taking that course [of demanding the US release Rahmatullah], it might, conceivably, be said that as a result of the combination of section 1 of the 1957 Act and Article 130 of Geneva IV, the UK Government could be aiding or abetting a "grave crime".

That may not make the British request that we release Rahmatullah sufficiently persuasive to make it happen. But it sure does clarify the issues at hand, doesn't it?

Update: English v. British corrected per chetnolian.

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.

BABY-SITTING TERRORISTS RATHER THAN TRACKING OSAMA BIN LADEN

A few comments from Mary got me thinking about how damning today's AP story on our Romanian black site is for the torture apologists' tale that torture—and CIA interrogations more generally—helped find Osama bin Laden.

The AP's story reminds readers that Abu Faraj al-Libi, who was first captured on May 2, 2005, provided information about Abu Ahmed al-Kuwaiti. The suggestion is that al-Libi provided the information while in Romania.

A deceptive Al-Libi, who was taken to the prison in June 2005, provided information that would later help the CIA identify Osama bin Laden's trusted courier, a man who unwittingly led the CIA to bin Laden himself.

Al-Libi's Gitmo file reports that the Pakistanis transferred him to US custody on June 6, 2005, so assuming the two 2005 cables reporting on al-Kuwaiti, whom the report calls Maulawi Abd al-Khaliq Jan, were written while he was officially in US custody, then that would clearly be the case.

So al-Libi was doused while in Romania, which led him to describe that he was "responsible for facilitation within the settled areas of Pakistan, communication with UBL and external links" and "responsible for communicating with al-Qaida members abroad and obtaining funds and personnel from those al-Qaida members." He said he accomplished his communication with OBL via a courier he called Abd al-Khaliq. And the CIA's response to that information was ... to stop looking for OBL.

But here's what's really curious about the story.

As the AP story makes clear, sitting just one cell over in the prison in which al-Libi apparently provided that information was one of the other guys who, the CIA says, gave information on al-Kuwaiti: Khalid Sheikh Mohammed.

There it held al-Qaida operatives Khalid Sheikh Mohammed, the mastermind of the Sept. 11, 2001 attacks, and others in a basement prison before they were ultimately transferred to Guantanamo

Bay, Cuba, in 2006, according to former U.S. intelligence officials familiar with the location and inner workings of the prison.

[snip]

Flight records for a Boeing 737 known to be used by the CIA showed a flight from Poland to Bucharest in September 2003. Among the prisoners on board, according to former CIA officials, were Mohammed and Walid bin Attash, who has been implicated in the bombing of the USS Cole.

While it's not critical to this post, it is sort of curious that KSM reportedly provided information on al-Kuwaiti in Fall 2003—so probably not until he got moved to Romania. Maybe the springs in the floors made it easy to talk about OBL's couriers?

So in spite of the fact that al-Libi was talking about someone who was a KSM protégé in the very same prison where the CIA still held KSM, no one thought to cross-check this information with KSM?

Nope. You see, the CIA considered itself to be babysitting KSM. His intelligence value had diminished, they say.

One former officer complained that the CIA spent most of its time baby-sitting detainees like Binalshibh and Mohammed whose intelligence value diminished as the years passed.

One more note on this. Al-Libi and KSM were setting in the same prison actively hiding details about al-Kuwaiti after the time Hassan Ghul had already told us how important al-Kuwaiti was, as described in this earlier Goldman and Apuzzo piece.

Then in 2004, top al-Qaida operative Hassan Ghul was captured in Iraq. Ghul

told the CIA that al-Kuwaiti was a courier, someone crucial to the terrorist organization. In particular, Ghul said, the courier was close to Faraj al-Libi, who replaced Mohammed as al-Qaida's operational commander. It was a key break in the hunt for in bin Laden's personal courier.

In fact, Ghul was apparently himself in Eastern Europe at the time (though it sounds like the Romanian prison had five of six cells accounted for at that point).

You'd think the CIA might have asked all of these guys about this courier, as they were all in our custody in Eastern European prisons at the time, at least two of them in the same place.

But apparently the CIA was too busy babysitting.

ARCHIVING TERRORISTS IN THE FALSE-FLOORED CELLS IN THE BASEMENT

Goldman and Apuzzo are back on the dark sites beat, this time with a description of the dark site in Bucharest, Romania where the CIA stashed Khalid Sheikh Mohammed and others after shutting down the site in Poland.

This prison was built into the basement of a classified archive now used by NATO and the EU.

Unlike the CIA's facility in Lithuania's countryside or the one hidden in a Polish military installation, the CIA's prison in Romania was not in a remote location. It was hidden in plain sight, a couple blocks off a major boulevard on a street lined with trees and homes,

along busy train tracks.

The building is used as the National Registry Office for Classified Information, which is also known as ORNISS. Classified information from NATO and the European Union is stored there. Former intelligence officials both described the location of the prison and identified pictures of the building.

[snip]

The basement consisted of six prefabricated cells, each with a clock and arrow pointing to Mecca, the officials said. The cells were on springs, keeping them slightly off balance and causing disorientation among some detainees.

Of course, the site presumably couldn't have served as an archive for NATO and the EU at the time it was being used as a prison starting in Fall 2003. Romania entered NATO in 2004 and the EU in 2007.

Now, perhaps this was an old communist era facility, as the Polish prison was.

But it sure seems ill-advised for Romania to turn an old CIA prison—where torture prohibited by the EU charter took place—into an EU bureaucratic archive.

THE ALBATROSS OF OBAMA'S "RULE OF EXECUTIVE ORDER"

The other day, John Bellinger and Matthew Waxman joined the long list of people voicing opposition to the detention provisions of the Defense Authorization. Yet there's a part of their column that has received little focus, in spite of the fact it's one of the things Bellinger emphasized when he linked to their column at Lawfare.



Bellinger and Waxman scold President Obama for not following through on his promise to develop laws covering terrorism detainees.

President Obama should have followed through on his pledge in his May 2009 National Archives Speech to work with Congress to develop an appropriate legal regime for detention of terror suspects who cannot be prosecuted or released, and Congress should have been more responsive to the concerns of counterterrorism officials in the Executive branch.

The substance of that promise—given at a time, remember, when Democrats had the majority in the House and 59 (soon to be 60) Senators in the Senate—was:

Now let me be clear: We are indeed at war with al Qaeda and its affiliates. We do need to update our institutions to deal with this threat. But we must do so with an abiding confidence in the rule of law and due process; in checks and balances and accountability.

[snip]

There are no neat or easy answers here. I wish there were. But I can tell you that the wrong answer is to pretend like this problem will go away if we maintain an unsustainable status quo. As President, I refuse to allow this problem to fester. I refuse to pass it on to somebody else. It is my responsibility to solve the problem. Our security interests will not permit us to delay. Our courts won't allow it. And neither should our conscience.

[snip]

Having said that, we must recognize that these detention policies cannot be unbounded. They can't be based simply on what I or the executive branch decide alone.

[snip]

I want to be very clear that our goal is to construct a legitimate legal framework for the remaining Guantanamo detainees that cannot be transferred. Our goal is not to avoid a legitimate legal framework. In our constitutional system, prolonged detention should not be the decision of any one man. If and when we determine that the United States must hold individuals to keep them from carrying out an act of war, we will do so within a system that involves judicial and congressional oversight. And so, **going forward, my administration will work with Congress to develop an appropriate legal regime so that our efforts are consistent with our values and our Constitution.**

[snip]

We seek the strongest and most sustainable legal framework for addressing these issues in the long term – not to serve immediate politics, but to do what's right over the long term.

By doing that we can leave behind a legacy that outlasts my administration, my presidency, that endures for the next President and the President after that – a legacy that protects the American people and enjoys a broad legitimacy at home and abroad. [my emphasis]

Obama made that promise in a speech that spoke grandly about the importance of using our fundamental values—our laws—to beat tyranny.

I believe with every fiber of my being that in the long run we also cannot keep this country safe unless we enlist the power of our most fundamental values. The documents that we hold in this very hall – the Declaration of Independence, the Constitution, the Bill of Rights – these are not simply words written into aging parchment. They are the foundation of liberty and justice in this country, and a light that shines for all who seek freedom, fairness, equality, and dignity around the world.

[snip]

From Europe to the Pacific, we've been the nation that has shut down torture chambers and replaced tyranny with the rule of law. That is who we are.

[snip]

The Framers who drafted the Constitution could not have foreseen the challenges that have unfolded over the last 222 years. But our Constitution has endured through secession and civil rights, through World War and Cold War, because it provides a foundation of principles that can be applied pragmatically; it provides a compass that can help us find our way. It hasn't always been easy. We are an imperfect people. Every now and then, there are those who think that America's safety and success requires us

to walk away from the sacred principles enshrined in this building. And we hear such voices today. But over the long haul the American people have resisted that temptation. And though we've made our share of mistakes, required some course corrections, ultimately we have held fast to the principles that have been the source of our strength and a beacon to the world.

Obama invoked "rule of law" on eight different occasions in the speech.

And then, Obama proceeded not only to renege on his promise to pass a law codifying detainee policy, but to try to pre-empt Congressional efforts to pass such laws by whipping together an Executive Order covering detention. After arguing that detention (and, presumably, targeted killing) should not be "based simply on what [he] or the executive branch decide alone," he made sure that the Executive Branch would retain the ability to make up these policies in secret, with little oversight, an approach Obama's DOD General Counsel reaffirmed last week.

Obama promised us rule of law. But then, he gave us rule of Executive Order.

And because he was unwilling to fight for the principles he extolled so eloquently (not even with majorities in both houses of Congress), Congress is threatening to pass the kind of law Obama once promised—but one that would upend our entire legal system.

Back when Obama made this tribute to our Constitution, he also issued a warning.

And if we refuse to deal with these issues today, then I guarantee you that they will be an albatross around our efforts to combat terrorism in the future.

There was some real wisdom in that Archives speech.

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JON KYL JUSTIFIES MILITARY DETENTION BY CLAIMING CIA-MILITARY CREDIT FOR FBI INTERROGATIONS

In the entire two week debate over the detainee provisions of the Defense Authorization, the champions of military detention offered almost no rationale for it (a pity, then, that the opponents barely explained why it's such a bad idea), aside from Lindsey Graham repeating endlessly that detainees shouldn't get lawyers (he never explained how this claim jived with his promise that every detainee would have access to habeas corpus).

One exception is a statement that Jon Kyl submitted to the record but did not read (the statement starts on PDF 5). After reasserting the legality of the detainee provisions under Hamdi, Kyl's (**was** it Kyl's?) statement offered an "explanation" for military detention; I've reproduced that part of the statement in full below the line.

Now, the statement doesn't make any sense. It invokes what it claims were CIA interrogations and treats them as military interrogation; though in fact a number of the interrogations the statement invokes were FBI interrogations.

The statement claims detainees wouldn't have a

lawyer, though the architects of the bill have made it clear (as has SCOTUS) detainees would have access to habeas corpus and therefore (presumably) lawyers.

Perhaps not surprising, the statement also invokes two discredited pieces of propaganda: Vice Admiral Lowell Jacoby's January 9, 2003 Declaration in opposition to granting Jose Padilla habeas corpus and George Bush's September 6, 2006 speech announcing he was moving 14 high value detainees to Gitmo.

It relies on Jacoby's statement to argue for the value of a "relationship of dependency," which seems to no more than a rebranding of Bruce Jessen's "learned helplessness." And note, Jacoby's statement, written six months after DOD took custody of Padilla, spoke of intelligence he might offer prospectively; it doesn't claim to have gotten any intelligence using this "relationship of dependency."

And it relies on Bush's statement to claim that military or CIA interrogations exposed that KSM was Mukhtar and Jose Padilla's plans, both of which came from Ali Soufan's FBI interrogation of Zubaydah. It also claims the CIA interrogations yielded Ramzi bin al-Shibh's location, whereas Soufan, at least, claims that came from an FBI interrogation in Bagram. And it claims CIA's interrogation of KSM revealed the Liberty Towers plot that had been broken up a year earlier. In other words, Kyl's argument for why we need military detention consists of repeating discredited propaganda claiming CIA credit for interrogations largely conducted by the FBI. The same FBI officers who will lose their ability to interrogate detainees if and when this bill goes into place.

In short, one of the most comprehensive arguments for why we need military detention instead makes the case for retaining FBI primacy. At the same time, it appears to endorse the "learned helplessness" that ended up making delaying any value to KSM and other detainee interrogations.

Even the champions of military detention offer proof that we're safer with civilian detention.

What follows is the statement Kyl submitted to the record.

Why Military Detention Is Necessary: To Allow Intelligence Gathering That Will Prevent Future Terrorist Attacks Against the American People

Some may ask, why does it matter whether a person who has joined Al Qaeda is held in military custody or is placed in the civilian court system? One critical reason is intelligence gathering. A terrorist operative held in military custody can be effectively interrogated. In the civilian system, however, that same terrorist would be given a lawyer, and the first thing that lawyer will tell his client is, "don't say anything. We can fight this."

In military custody, by contrast, not only are there no lawyers for terrorists. The indefinite nature of the detention—it can last as long as the war continues—itself creates conditions that allow effective interrogation. **It creates the relationship of dependency and trust that experienced interrogators have made clear is critical to persuading terrorist detainees to talk.**

Navy Vice-Admiral Lowell Jacoby, who at the time was the Director of the Defense Intelligence Agency, explained how military custody is critical to effective interrogation in a declaration that he submitted in the Padilla litigation. He emphasized that successful noncoercive interrogation takes time—and it requires keeping the detainee away from lawyers.

Vice-Admiral Jacoby stated:

DIA's approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and the interrogator. Developing the kind of

relationship of trust and dependency necessary for effective interrogations is a process that can take a significant amount of time. There are numerous examples of situations where interrogators have been unable to obtain valuable intelligence from a subject until months, or, even years, after the interrogation process began.

Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence gathering tool. Even seemingly minor interruptions can have profound psychological impacts on the delicate subject/interrogator relationship. Any insertion of counsel into the subject-interrogator relationship, for example—even if only for a limited duration or for a specific purpose—can undo months of work and may permanently shut down the interrogation process.

Specifically with regard to Jose Padilla, Vice Admiral Jacoby also noted in his Declaration that: “Providing [Padilla] access to counsel now would create expectations by Padilla that his ultimate release may be obtained through an adversarial civil litigation process. This would break—probably irreparably—the sense of dependency and trust that the interrogators are attempting to create.”

In other words, military custody is critical to successful interrogation. Once a terrorist detainee is transferred to the civilian court system, the conditions for successful interrogation are destroyed.

Preventing the detention of U.S. citizens who collaborate with Al Qaeda would be a historic abandonment of the law of war. And, by preventing effective interrogation of these collaborators, it would likely have severe

consequences for our ability to prevent future terrorist attacks against the American people.

We know from cold, hard experience that successful interrogation is critical to uncovering information that will prevent future attacks against civilians.

On September 6 of 2006, when President Bush announced the transfer of 14 high-value terrorism detainees to Guantanamo, he also described information that the United States had obtained by interrogating these detainees. Abu Zubaydah was captured by U.S. forces several months after the September 11 attacks. **Under interrogation, he revealed that Khalid Sheikh Mohammed was the principal organizer of the September 11 attacks.** This is information that the United States did not already know—and that we only obtained through the **successful military interrogation** of Zubaydah.

Zubaydah also described a terrorist attack that Al Qaida operatives were planning to launch inside this country—an attack of which the United States had no previous knowledge. Zubaydah described the operatives involved in this attack and where they were located. This information allowed the United States to capture these operatives—one while he was traveling to the United States.

Again, just imagine what might have happened if the Feinstein amendment had already been law, and if the Congress had stripped away the executive branch's ability to hold Al Qaeda collaborators in military custody and interrogate them. We simply would not learn what that detainee knows—including any knowledge that he may have of planned future terrorist attacks.

Under military interrogation, **Abu Zubaydah also revealed the identity of another September 11 plotter, Ramzi bin al Shibh**, and provided information that led to his capture. U.S. forces then interrogated bin al Shibh. Information that both he and Zubaydah provided helped lead to the capture of Khalid Sheikh Mohammed.

Under interrogation, **Khalid Sheikh Mohammed provided information that helped stop another planned terrorist attack on the United States.**

K.S.M. also provided information that led to the capture of a terrorist named Zubair. And K.S.M.'s interrogation also led to the identification and capture of an entire 17-member Jemaah Islamiya terrorist cell in Southeast Asia.

Information obtained from interrogation of terrorists detained by the United States also helped to stop a planned truck-bomb attack on U.S. troops in Djibouti. Interrogation helped stop a planned car-bomb attack on the U.S. embassy in Pakistan. And it helped stop a plot to hijack passengers planes and crash them into Heathrow airport in London.

As President Bush stated in his September 6, 2006 remarks, "[i]nformation from terrorists in CIA custody has played a role in the capture or questioning of nearly every senior al Qaida member or associate detained by the U.S. and its allies." The President concluded by noting that Al Qaida members subjected to interrogation by U.S. forces: "have painted a picture of al Qaeda's structure and financing, and communications and logistics. They identified al Qaeda's travel routes and safe havens, and explained how al Qaeda's senior leadership communicates with its operatives in places like Iraq. They provided information that has allowed us to make sense of documents and computer records that we have seized in terrorist raids. They've identified voices in recordings of intercepted calls, and helped us understand the meaning of potentially critical terrorist communications.

[Were it not for information obtained through interrogation], our intelligence community believes that al Qaeda and its allies would have succeeded in launching another attack against the American homeland. By giving us information about terrorist plans we could not get anywhere else, this [interrogation] program has saved

innocent lives.”

If the Feinstein amendment were adopted, this is all information that we would be unable to obtain if the Al Qaeda collaborator that our forces had captured was a U.S. citizen. **It would simply be impossible to effectively interrogate that Al Qaeda collaborator—the relationship of trust and dependency that military custody creates would be broken, and the detainee would instead have a lawyer telling him to be quiet.** And we know that information obtained by interrogating Al Qaeda detainees has been by far the most valuable source of information for preventing future terrorist attacks.

Again, in every past war, our forces have had the ability to capture, detain, and interrogate U.S. citizens who collaborate with the enemy or join forces with the enemy. I would submit that in this war, intelligence gathering is more critical than ever. Al Qaeda doesn’t hold territory that we can capture. It operates completely outside the rules of war, and directly targets innocent civilians. Our only effective weapon against Al Qaeda is intelligence gathering. And the Feinstein amendment threatens to take away that weapon—to take away our best defense for preventing future terrorist attacks against the American people.
[my emphasis]