THE DETAINEE DEBATE HEATS UP: THE RULE OF MARTIAL LAW VS. THE UNITARY SPOOKERY

As I noted yesterday, Obama issued a veto threat for the detainee provisions included in the Defense Authorization. Since then, both Dianne Feinstein and Carl Levin have given speeches on the floor, arguing against (DiFi) and for (Levin) the provisions.

And while I'd be happy to see the provisions in question fail (because the provisions represent a further militarization of our country), effectively the argument being made is between those (the Republicans, enabled by Levin) who support further militarization of law and those (DiFi and, especially, the Administration) who want the Executive Branch to continue fighting terrorism (and whatever else) with an intelligence-driven approach bound by few legal checks.

DOJ's Special Forms of Extended Interrogation and Coercion

In a sense, DiFi's speech on Thursday looked like an appeal to rule of law. For example, she warns of the danger of "further militariz[ing] our coun□ter□ter□ror□ism efforts." But what she really focused on in her speech—implicitly—are the tools the government has wrung out of the civilian legal system to make it easier to get intelligence (whoever picked a Senate Judiciary Committee member to be head of the Senate Intelligence Committee made this blurring of law and intelligence easier).

DiFi alludes to tools DOJ has that DOD does not. She mentions both Najibullah Zazi and Umar Farouk Abdulmutallab as people whose prosecution within the civilian justice system aided prosecution.

> Suppose a terrorist such as Zazi were forced into mandatory military custody. Then the government could also have been forced to split up codefendants, even in cases where they otherwise could be prosecuted as part of the same conspiracy in the same legal system.
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> [snip]
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> It was FBI agents who traveled to Abdulmutallab's home in Nigeria and persuaded family members to come to Detroit to assist them in getting him to talk. The situation would have been very different under Section 1032. Under the pending legislation, it would have been military personnel who were attempting to enlist prominent Nigerians to assist in their interrogation, and Abdulmutallab would have been classified as an enemy combatant and held in a military facility and, therefore, his family would not be inclined to cooperate. This is we have been told on the Intelligence Committee.

She appears to be invoking the way we're getting people to talk: by threatening and persuading their families. In the case of Zazi, we got him to cooperate by charging his father. In the case of Abdulmutallab, we presumably made some guarantees about treatment if his family would persuade him to cooperate (maybe that's why he stayed in a minimum security prison through the pre-trial period; I also wonder whether we threatened his prominent banker father).

Most charitably, this is akin to the problem Ali Soufan experienced with Salim Hamdan; Soufan was about to persuade Hamdan to cooperate in exchange for a shorter sentence when DOD dumped Hamdan in Gitmo where there was no option to trade cooperation for better treatment. As the case of Omar Khadr (who was not permitted to spend time with other detainees after he plead guilty) makes clear, in military custody, we

lose control of the conditions of someone's confinement as soon as they plead guilty, and so can't use that as a tool to get people to cooperate.

But there's something else DiFi is not saying, though is out there. With our creative interpretation of Miranda of late, we have interrogated Faisal Shahzad for two weeks without a lawyer; Manssor Arbabsiar for 12 days; and Ahmed Warsame for a month. We got Arbabsiar (and, I would bet, Warsame) to cooperate to ensnare others during the period of pre-arraignment arrest. Thus, for better or worse, civilian detention has actually been offering the government more ways to deploy detainees in intelligence operations than military detention.

And all that's before you even get to informants, people whom the government would threaten with prosecution as a terrorist to get them to infiltrate and provide testimony on others who can be made to espouse terrorism.

That's the problem (for the Administration) with Levin's argument, which is that you can just get a waiver in these circumstances.

> In fact, it does not mandate military custody and does not tie the Administration's hands, because it includes a national security waiver which allows suspects to be held in civilian custody.

I'm curious, as a threshold matter, whether a waiver would imply DOJ would have to hold the suspects, rather than deploying him to mosques around the country to try to entrap more suspects. But in any case, it would at a minimum require DOJ to tell a very leaky Congress before it decides to flip someone rather than jailing him. Given that both Obama and DiFi invoke the specter of the military patrolling our streets, I think this is the problem: that the Administration objects to a law making it harder to turn our streets into the playground for

informants.

A waiver would not only make it hard to keep the custody of someone like Warsame or Arbabsiar secret, but it would make it very difficult to flip suspects—not to mention the reporting of with whom and how often the Administration is doing such things.

Transferring Double Agents to Third Countries

Which is, I suspect, the tension behind the everlasting dispute over whether DOD can transfer people to a third country without signing their firstborn away. DiFi talks about how impossible it is to make the certifications required by the law.

> Again, here is an example: The administration proposed eliminating the requirement that the Secretary of Defense certify that the foreign country where the detainee will be sent is not "facing a threat that is likely to substantially affect its ability to exercise control over the individual."
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> How can the Secretary of Defense certify that—facing a threat that is likely to not just affect, but substantially affect, its ability to exercise control over the individual?
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> What does it mean for a nation to "exercise control" over a former Gitmo detainee? Does he have to be in custody? Can he have an ankle bracelet? Is he remanded to his home? Is he in some county facility somewhere? What does it mean?
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> The Secretary of Defense must also certify, in writing, that there is virtually no chance that the person being transferred out of American custody would turn against the United States once resettled.
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> I agree with the sentiment, but as it is

> written, this is another impossible condition to satisfy.

As the case of Jabir al-Fayfi—who was released into Saudi custody, put through their "de-radicalization" program, only to "join" AQAP and then return again years later to tip us off to the printer toner plot—makes clear, we are not just transferring people we believe were mistakenly captured. We are also transferring people who agree—with whatever degree of good faith—to turn double agent for us. That's almost certainly why the Administration objects to these certifications, though of course no one will admit it.

Now, as Levin notes as he responds directly to the language in the Administration's veto threat, the current formulation allows for the Administration to waive certification requirements; it just doesn't envision being able to do so quickly and with no oversight.

> [Reading from the Administration's veto threat]
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> > The certification and waiver, required by section 1033 before a detainee may be transferred from Guantanamo Bay to a foreign country, continue to hinder the Executive Branch's ability to exercise its military, national security, and foreign relations activities. While these provisions may be intended to be somewhat less restrictive than the analogous provisions in current law, they continue to pose unnecessary obstacles, effectively blocking transfers that would advance our national security interests, and would, in certain circumstances, violate constitutional separation of powers principles. The Executive Branch must have

> > the flexibility to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers.
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> The provision is not only "intended to be somewhat less restrictive" than provisions included in previous authorization and appropriations acts signed by the President: it is less restrictive. Unlike last year's bill, this year's provision includes a waiver, which allows the Administration to proceed with a transfer even if the certification requirements cannot be met.
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> Congress has expressed strong concerns about recidivism among GITMO detainees who have been released in the past. It cannot be in our national security interests to "act swiftly" if we fail to provide adequate safeguards against terrorists rejoining the fight against us.

Again, I suspect that's the Administration objection. It allows them to do these things. But requires they do them with a paper trail Congress can audit. In short, it's a future Fast and Furious scandal, the guaranteed exposure of all of their harebrained undercover operations, waiting to happen.

Limiting the Administration to What the AUMF Says, Not What They Claim It Does

Now, thus far in the debate, it looks like DiFi's arguing for rule of law and Levin's just arguing for the indefensible position of giving the military primacy, while allowing for a system of waivers when people want to be quaint and use the civil law. But ultimately, Levin is espousing a (martial) rule of law position, one which—on the matter of who can be detained—may

be preferable to the Administration "rule of law" position that DiFi championed in her speech.

That's because the Administration's objection to the section affirming military detention lies not in an opposition to militarization, but an opposition to defining in law how the AUMF can be interpreted.

> 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.

As I've noted before, the problem is that the Administration has, for a decade, been greatly expanding the application of the AUMF beyond those who hit us on 9/11 using OLC opinions. They've done so to justify a lot of practices not envisioned by the AUMF Congress. And no court has stopped them—largely because the government has hidden most of these interpretations behind state secrets.

But make no mistake: this definition now includes American citizens, as DiFi makes clear (though does not object to).

> Section 1031 needs to be reviewed to consider whether it is consistent with the September 18, 2001, authorization for use of military force, especially because it would authorize the indefinite detention of American citizens without charge or trial …..

Not only does Levin agree with DiFi's take, he makes it clear that it was the Administration itself who made sure the language applied to American citizens.

> The committee accepted all of the Administration's proposed changes to section 1031. As the Administration has acknowledged, the provision does nothing more than codify existing law. Indeed, as revised pursuant to Administration recommendations, the provision expressly "affirms" an authority that already exists. The Supreme Court held in the *Hamdi* case that existing law authorizes the detention of American citizens under the law of war in the limited circumstances spelled out here, so this is nothing new.
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> 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]

And yet, even given the authority to detain Americans indefinitely, the Administration still complains!

I think the problem is everything the Administration has derived from the AUMF, including things like wiretapping (remember,

they have never foresworn the crappy 2006 White Paper on illegal wiretapping) and—more importantly—targeted assassinations. And while the following description probably would include Awlaki, it wouldn't include a bunch of self-radicalized (or entrapped) teenagers who are being treated as if the AUMF applies.

> A person who was a 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 has directly supported such hostilities in aid of such enemy forces.

This effectively allows the US to indefinitely detain—or do whatever else they want to do to—aspirational, US citizen terrorists engaging in material support for terrorism.

But the Administration doesn't like even this!

That's because, I suspect, it doesn't give them the same leeway Marty Lederman's secret interpretations do. I'm guessing that, because it doesn't obviously apply all the counterterrorist tools they've derived from the AUMF to disaffected teenagers here in the US, they worry this will limit their authority going forward.

The Bush and the Obama Administrations have spent the last decade building a shaky skyscraper of counterterrorism tools on the foundation of the AUMF. And now Congress threatens (threatens!) to codify even their expansive interpretation of the rule. And yet, they're balking because it might limit their ability to keep building that skyscraper.

Most of the people commenting on this interpret it as being a fight between two positions: the "rule of law" (DOJ) position versus the military (DOD) position.

But that’s not right. DOJ has become (or returned to being) an intelligence agency. No one is arguing for rule of law as we once knew it. Rather, it’s a fight between those espousing martial rule of law and those espousing unilateral intelligence ops.

Update: Forgot this: Josh Gerstein cites two anonymous Administration officials getting cranky because anyone in Congress deigned to exercise any oversight.