

EFFORTS TO COMBAT LEVIN-MCCAIN DON'T DO ANYTHING TO PROHIBIT INDEFINITE DETENTION OF AMERICANS

When he gets defensive, Carl Levin can be tremendously cantankerous (sometimes that's a good thing, but not when he's pushing terrible law like the detainee provisions in the Defense Authorization).

That cantankerous Carl Levin of late started repeatedly invoking Hamdi in response to claims the Levin-McCain language newly subjects American citizens to indefinite detention.

Now, in terms of constitutional provisions, the ultimate authority on the constitution of the United States is the Supreme Court of the United States, and here is what they have said. In the Hamdi case about the issue which both our friends have raised about American citizens being subject to the law of war. **"A citizen," the Supreme Court said in 2004, "no less than an alien, can be part of supporting forces hostile to the United States and engage in armed conflict against the United States. Such a citizen,"** referring to an American citizen, **"if released would pose the same threat of returning to the front during the ongoing conflict."** And here is the bottom line for the Supreme Court. If we just take this one line out of this whole debate, it would be a breath of fresh air to cut through some of the words that have been used here this morning, one line. **"There is no bar to this nation's holding one of its own citizens as an enemy combatant."** Okay? That's not me, that's not Senator

Graham, that's not Senator McCain.
That's the Supreme Court of the United States recently. "There is no bar to this nation's holding one of its own citizens as an enemy combatant." [my emphasis]

He's being insufferable, but when I see claims that the new AUMF language—which actually may impose new limits on the use of the AUMF from the current known usage—is what makes it legal to indefinitely detain US citizens, I'm sympathetic to his stubborn repetition.

This law doesn't codify indefinite detention. SCOTUS already did that in Hamdi.

I'm sympathetic to Levin's cantankerous repetition because of what I see as the real problem with those attacking the detainee provisions because they purportedly codify indefinite detention of Americans (as opposed to a range of other superb reasons to oppose the language). None of the supposed fixes to the detainee provisions—neither defeat of the provisions outright nor the Udall Amendment—does a damn thing to limit the indefinite detention of American citizens. On the contrary, both simply allow the President—whether it be President Obama or a future President (say) Gingrich—to continue interpreting the AUMF as he or she sees fit (though Udall's amendment might—if the Administration cooperated where they've refused to in the past—provide transparency to such interpretations).

And that's important. Because the only thing that has prevented the Executive from holding American citizens indefinitely in the past—it did hold Jose Padilla for a time, after all, after capturing him in the US—is the threat that courts might override that decision in a habeas review. But since the time when both Administrations moved people into DOJ custody to avoid such a review, habeas corpus has been gutted by the DC Circuit. No Administration would have to worry about holding a Padilla

indefinitely based on Abu Zubadayh's torture-tainted testimony, after all, because Janice Rogers Brown has decided that judges should not question the Executive's intelligence reports, not even if they're obviously flawed.

Sure, Presidents might still avoid military detention because it risks alarming Americans. It might avoid military detention because it has established so much flexibility within the DOJ system itself that military detention offers no advantage. But the reasons it would or would not use military detention have become more and more about politics, in light of habeas developments since that time.

Nothing stops the President from arresting an American and holding him in military custody except for habeas corpus. Nothing **has** stopped the President from doing so. No legislative efforts to guard the President's "flexibility" on these issues will change that. And now that habeas has been gutted, that bar is even lower. But that fact is true independent of Levin-McCain.

But there are, presumably, things Congress could do to rein in the President's authority to hold Americans indefinitely. For example, it could explicitly exempt American citizens from military detention (as SASC originally did, until the Administration asked them to take language out).

Or it could simply end the endless wars that legally justify military detention. The most concrete effort yesterday to rein in the President's authority to detain Americans indefinitely yesterday was not the Udall Amendment, but the Paul Amendment attempting to repeal the Iraq War AUMF. That's because OLC has used the Iraq AUMF to expand the definition of "terrorist" beyond those with a concrete tie to al Qaeda. By repealing the Iraq War AUMF, you would at least limit the types of alleged terrorists the Administration could detain. Oddly, Udall's Amendment reaffirmed the Iraq AUMF language, even though he did vote in favor

of Paul's repeal. And at least 12 Democrats—people like Blumenthal, Coons, Kerry, Mikulski, and Schumer—who voted for the Udall Amendment voted against the Paul Amendment.

Congress could also pass language reaffirming real judicial review of habeas petitions—basically reversing Janice Rogers Brown's crappy opinion. Presumably, Presidents would be less likely to use indefinite military detention if habeas offered a real prospect of review.

But I'm not aware of anyone screaming about indefinite detention who has proposed these things (though it's possible someone did as an amendment).

Update: I take that back. This DiFi Amendment would do that:

SA 1126. Mrs. FEINSTEIN (for herself, Mr. Leahy, Mr. Durbin, and Mr. Udall of Colorado) submitted an amendment intended to be proposed by her to the bill S. 1867,

[snip]

On page 360, between lines 21 and 22, insert the following:

(e) *Applicability to Citizens.*—The authority described in this section for the Armed Forces of the United States to detain a person does not include the authority to detain a citizen of the United States without trial until the end of the hostilities.

One "benefit" of Levin-McCain, at least, is that it has raised awareness of what is, in fact, the case already. The President has long claimed the authority, backed by Hamdi, to hold American citizens in military detention, though with exceptions like Padilla, both Bush and Obama have largely applied that authority to do different things, like wiretap everyone or kill Anwar al-Awlaki. Eliminating the threat of

indefinite detention (and along with it, the targeted killing of American citizens) will require affirmative legislation, not the passivity or (worse) defense of unchecked executive power currently embraced by Democrats. It will take civil libertarians using the same heavy hand with Executive Power as Republicans (with Levin) have used to enshrine presumptive military detention.