

ADMINISTRATION HAS MEANS TO SUSTAIN CIVILIAN PRIMACY WITHOUT VETO

As we all wait to see whether Obama will follow through on his veto threat tied to the detainee provisions in the Defense Authorization, I want to make an observation.

The Obama Administration has the means—short of a veto—to sustain civilian law primacy even if this bill is passed. But they will not use it.

As Lindsey Graham and Carl Levin repeat over and over when defending the detainee provisions—the detainee provisions require the Executive Branch to come up with procedures to determine whether someone qualifies as a covered person.

Not later than 60 days after the date of the enactment of this Act, the President shall issue, and submit to Congress, procedures for implementing this section.

The procedures for implementing this section shall include, but not be limited to, procedures as follows:

(A) Procedures designating the persons authorized to make determinations under subsection (a)(2) and the process by which such determinations are to be made.

With (a)(2) being whether or not the detainee was a Covered Person:

The requirement [for military detention] shall apply to any person whose detention is authorized under 1031 who is determined—

(A) to be 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

(B) to have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners.

Nothing in the bill allows Congress to override the procedures developed by the Administration; it only requires that Congress get a copy of them.

Which would seem to permit the Administration to issue the following procedures:

1. The persons authorized to make determinations whether or not someone is a "Covered Person" are Article III jurors and/or jurists.
2. The process by which it will be determined whether or not someone is a "Covered Person" will be a civilian trial.

That would seem to render the effect of the most noxious part of the detainee provisions minimal: rather than imprisoning convicted terrorists at Florence SuperMax, those terrorists will be detained at Leavenworth. But they won't be transferred to military custody until after they get a civilian trial.

They won't do this, mind you, not just because it would make the Republicans go apeshit and would tie their hands. But they like the power that comes from the ability to make up this shit as they go along, and would never put in writing that courts must be involved. (Indeed, today Jeh Johnson repeated the Administration's prior assertion that courts are not authorized to review the Administration's targeting decisions.

But it would be a way to dispense with this
crappy bill.