

A SIGNING STATEMENT TO PROTECT PRESIDENTIAL POWERS OBAMA WON'T COMMIT TO USE

That's the short version of this Dafna Linzer story on Obama Administration plans to combat Congressional efforts to keep Gitmo open forever. Obama will include a signing statement with the appropriations bill asserting that limits on what he can do with Gitmo are unconstitutional [see update below].

Obama administration officials say they plan to reject Congressional efforts to limit the president's options on Guantanamo, setting the stage for a confrontation between the president and the new Congress on an issue that has been politically divisive since Inauguration Day.

[snip]

White House aides are recommending that President Obama sign the spending bill and then issue a "signing statement" challenging at least some of the Guantanamo provisions as intrusions on his constitutional authority.

[snip]

If the bill were signed without challenge, the remaining prosecutorial option left for the administration would be to charge detainees in military commissions at Guantanamo, with those convicted serving time at the facility. So far, the administration has been unwilling to bring new charges in that setting.

"The bill," said one administration

official, “undermines the principles outlined in the president’s archives speech and **there is no way to pretend you are closing Guantanamo if that law goes through unchallenged.**” [my emphasis]

Note, this unnamed administration official used that word, “pretend,” not me.

But, Linzer goes on, the Administration has not yet decided whether Obama will use these powers he is trying to protect.

The White House has, until now, balked at confrontation even as it watched its policy options dwindle. **Not one administration official who spoke about the internal deliberations could say for sure whether the White House, in moving to protect the right to prosecute detainees in federal court, would in fact use it.**

“All presidents want to preserve maneuverability and authority, that is natural,” said Elisa Massimino, president of the civil rights organization Human Rights First. “But President Obama has had the authority to move prisoners to the United States, he’s done the background work to identify people to bring to justice and he’s squandered the opportunities to exercise that authority. It is striking to now see a fiercer desire to preserve authority than to use it,” she said. [my emphasis]

Apparently, I guess, Obama’s just going to fight Congress on this to protect presidential power for Dick Cheney to use in a future Republican administration, not to use himself.

Now, aside from my concerns about the separation of powers on this move, I’m amused by the centrality of prosecutorial discretion in it.

After all, the whole point of guarding the executive branch's prosecutorial discretion is to shield it from the whims of politics, to ensure the integrity of prosecutorial decision making.

But Obama threw that integrity out the window when he allowed his Chief of Staff to override the Attorney General's authority on Gitmo generally and the location of the 9/11 trial specifically. So Obama's going to argue he needs to protect prosecutorial discretion, but it's a prosecutorial discretion already tainted by White House interference.

Which means this plan—to use a signing statement to demand prosecutorial independence—amounts to Obama stating that only he (well, and his former Chief of Staff Rahm Emanuel), not Congress, gets to interfere politically with prosecutorial decision-making.

Update: As MadDog notes, Linzer has updated her piece to note that the signing statement may make no constitutional complaint, but simply note Obama's opposition to that part of the law.

Others have recommended that he express opposition to the Guantanamo sections without addressing their constitutionality.

I guess that would serve the purpose of “pretending” to want to close Gitmo without having to try too hard.