

November 29, 2011

Rejecting the Obama Administration's False Choice on Detaining Terrorists

Executive Summary

- The Obama Administration has effectively created a false choice for dealing with terrorists captured overseas: either bring them to the United States to be given the full panoply of constitutional rights available to U.S. citizens in the civilian criminal system or release them to return to the fight against the United States.
- The detainee provisions of the FY12 Defense Authorization bill (S. 1867), which was unanimously passed by the Senate Armed Services Committee, would reverse this.
- Democrat critics have launched several misleading arguments against these provisions, which are undermined by Supreme Court precedent, past practice, and common sense.
- Military commissions have been used throughout our nation's history, notably by George Washington and by Franklin Roosevelt.
- Legislatively channeling captured terrorists into the military detention system is consistent with this nation's long historical practice.
- Congress should overcome the Obama Administration's reticence to adopt the clear and obvious choice by passing the FY12 Defense Authorization bill.

Introduction

Earlier this month, the Senate Armed Services Committee unanimously passed its version of the FY12 Defense Authorization bill (S. 1867), which included multiple provisions dealing with terrorist detention. These are meant to reverse the false choice the Obama Administration has effectively created of either bringing enemy aliens captured abroad to the United States to be given the full panoply of constitutional rights available to U.S. citizens in the civilian criminal system or releasing them to return to the fight against the United States.

This paper will explain 1) how we arrived at the false choice; 2) how the Defense Authorization bill reverses that false choice; and 3) how the arguments against the provisions in the Defense Authorization bill are undermined by this nation's historical practice of detaining enemy aliens captured abroad in the military system, Supreme Court precedent, and common sense.

False Choice of Giving Terrorists Constitutional Rights or Releasing Them

It became clear in a matter of two weeks this past summer that the Obama Administration's politically correct detention policies have created what amounts to a false choice on how to deal with captured terrorists. At his confirmation hearing to be head of the Special Operations Command, Admiral William McRaven testified that a captured terrorist can be transferred to the custody of another country, he can be brought back to the United States for trial, or he can be released. That last choice—releasing terrorists to continue their fight—was “the unenviable option, but it is an option.”¹

One week after this troubling testimony, the Obama Administration announced it had brought into the United States Ahmed Warsame, a senior al Qaeda terrorist captured overseas. He was charged in federal criminal court within blocks of Ground Zero with, among other things, providing material support to al Qaeda in the Arabian Peninsula,² which President Obama has described as “al Qaeda's most active operational affiliate.”³

The false choice between releasing terrorists and bringing them to the United States is unnecessary. Indeed, it exists only because President Obama made the political decision to take Guantanamo Bay off the table as a detention option for new prisoners.⁴

¹ Senate Armed Services Committee Nomination Hearing for Vice Admiral William H. McRaven to be Admiral and Commander U.S. Special Operations Command, June 28, 2011, <http://armed-services.senate.gov/Transcripts/2011/06%20June/11-59%20-%206-28-11.pdf>.

² Charlie Savage and Eric Schmitt, U.S. to Prosecute a Somalia Suspect in Civilian Court, July 5, 2011, <http://www.nytimes.com/2011/07/06/world/africa/06detain.html>.

³ Barack Obama, Remarks of the President at the “Change of Office” Ceremony for the Chairman of the Joint Chiefs of Staff, Sept. 30, 2011, <http://www.whitehouse.gov/the-press-office/2011/09/30/remarks-president-change-office-chairman-joint-chiefs-staff-ceremony>.

⁴ See Senate Armed Services Committee Nomination Hearing for John R. Allen to be General and Commander U.S. Forces-Afghanistan and NATO ISAF, June 28, 2011, <http://armed-services.senate.gov/Transcripts/2011/06%20June/11-59%20-%206-28-11.pdf> (confirming Senator Ayotte's characterization that Guantanamo is “still off the table” in terms of being used as a “long-term detention and interrogation facility”).

Reversing the False Choice: Defense Authorization Bill Detention Provisions

The terrorist detention provisions of the FY12 Defense Authorization bill, which passed the Senate Armed Services Committee unanimously, are directed at reversing the Obama Administration's false choice.⁵

- Section 1031 affirms the authority of the President to detain in military custody certain persons captured in the course of hostilities authorized by the 2001 Authorization for Use of Military Force⁶ (AUMF) pending their disposition under the law of war.
- Section 1032 requires military custody of a certain subset of unprivileged enemy belligerents pending their disposition under the law of war. This provision applies only to individuals determined to be part of al Qaeda or an associated force who were also participants in planning or carrying out an attack or attempted attack against the United States or its coalition partners.⁷
 - This provision by its terms does not apply to U.S. citizens, and the Secretary of Defense is given authority to waive its requirements and application.
- Section 1033 prohibits the transfer of a Guantanamo detainee out of U.S. custody unless the Secretary of Defense makes a variety of certifications about the government receiving the detainee, namely that the receiving country has agreed to take such actions as the Secretary determines are necessary to ensure that the individual cannot engage in any terrorist activity. The section further prohibits, except in cases of court-ordered release or a military commission pre-trial agreement entered into prior to enactment, the transfer of a Guantanamo detainee to a country if there is a confirmed case in that country of any Guantanamo detainee recidivism.
 - This section also provides flexibility to the executive branch in that the Secretary may waive this prohibition.

Myths & Facts About the Detainee Provisions

The Obama Administration, with some Senate Democrats as their proxy, has launched several misleading arguments against these sections of the bill. The arguments are undermined by Supreme Court precedent, past practice, or common sense.

Myth: Section 1031 is inconsistent with the AUMF and Constitution “because it would authorize the indefinite detention of American citizens without charge or trial.”⁸

⁵ FY12 Defense Authorization bill, S. 1867 (introduced in Senate Nov. 15, 2011).

⁶ Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

⁷ Committee Report to Accompany S. 1253, FY12 Defense Authorization Bill, S. Rpt. 112-26 at p. 176-77 (June 22, 2011) (noting military custody for “unprivileged enemy belligerents who do not fall into this category” is authorized by section 1031, but not required).

⁸ Letter of Senate Democrats to Senate Majority Leader Reid, Oct. 21, 2011,

http://www.feinstein.senate.gov/public/index.cfm?a=Files.Serve&File_id=f0f3bb47-a38b-47da-a619-abf609510a5d.

Fact: First, the Supreme Court has already rejected this argument against Section 1031, when it held in the *Hamdi* case the detention of enemy combatants without the prospect of criminal charges or trial until the end of hostilities to be proper under the AUMF and the Constitution as long as there is a procedure in place for prisoners to challenge their classification as an enemy combatant. Those procedures currently exist. Notably, the person challenging his detention in that case was a U.S. citizen.

Justice O'Connor specifically took on detainee Hamdi's argument that he was subject to indefinite detention without criminal charge, acknowledging the possibility that "Hamdi's detention could last for the rest of his life."⁹ She found this to be of no moment, however, because longstanding law-of-war principles authorize the detention of enemy combatants "for the duration of the relevant conflict."¹⁰

Second, the true animating purpose of the section is to reaffirm the President's authority to detain terrorists. Its definition as to who is authorized to be detained is taken essentially verbatim from the Obama Administration Justice Department's legal briefs submitted in Guantanamo detainee habeas cases arguing who the President is authorized to detain under the law of war.¹¹ Section 1031 is current Administration policy as held lawful by the Supreme Court.

Military commissions have been used throughout our nation's history to prosecute enemy combatants. For example, George Washington used a military commission to prosecute British spy John Andre for conspiring with Benedict Arnold. President Roosevelt used them to prosecute German saboteurs who had infiltrated the United States during World War II. In that case, the enemy alien saboteurs prosecuted in a military commission were captured on U.S. soil and included among them at least one U.S. citizen.¹² The decision to prosecute al Qaeda terrorists in a military commission rather than in a federal criminal court is supported by history and national security.

Myth: Cases involving terrorists captured on U.S. soil being transferred to military custody have "spawned extensive litigation and raised major statutory and constitutional questions concerning the legality of the government's actions."¹³

Fact: Jose Padilla, an American citizen al Qaeda terrorist captured on U.S. soil, did challenge the legality of his military detention. The final judicial pronouncement was that the President possessed all the authority he needed to hold in military custody a U.S. citizen enemy combatant taken into custody in the United States.¹⁴ The detainee provisions of the defense authorization bill reaffirm that position, and the legal authority for them is sound.

⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 519-20 (2004).

¹⁰ *Id.* at 521.

¹¹ In re Guantanamo Bay Detainee Litigation, Government Memorandum Re Detention Authority Relative to Detainees Held at Guantanamo Bay, filed March 13, 2009 (D.D.C. 08-442 (TFH)), <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf>.

¹² *Ex Parte Quirin*, 317 U.S. 1 (1942).

¹³ Senate Democrats Letter to Senate Majority Leader Reid, *supra* note 8.

¹⁴ *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

Myth: It is a “bragging right” for the United States that more than 400 have terrorists have been tried in federal court since September 11, while only six military commission cases have been concluded.¹⁵

Fact: First, the idea that treating terrorists like criminals by trying them in the civilian justice system will increase America’s standing in world opinion is demonstrably false. As former Attorney General Mukasey has noted: “[W]e did just that after the first World Trade Center bombing, after the plot to blow up airliners over the Pacific, and after the embassy bombings in Kenya and Tanzania. In return, we got the 9/11 attacks and the murder of nearly 3,000 innocents. True, this won us a great deal of goodwill abroad—people around the globe lined up for blocks outside our embassies to sign the condolence books. That is the kind of goodwill we can do without.”¹⁶

Second, the threat posed by many of the 400 people tried in civilian court—many of whom faced only immigration or false document offenses¹⁷—is simply not comparable to the worst of the terrorists at Guantanamo, such as Khalid Sheikh Mohammad and his co-conspirators. It proves too much to cite the terrorist prosecutions in civilian criminal court as demonstrating the federal criminal system has a history of handling terrorism trials akin to that of the September 11 attacks.

Third, not all the experiences with terrorists in the civilian criminal justice system are worth repeating. Ahmed Ghailani, for example, was acquitted of all but one of the 285 charges brought against him in the civilian criminal justice system in connection with his participation in the 1998 East Africa Embassy bombings. There is also the case of Abdul Farouk Abdulmuttalab, the so-called Underwear Bomber, who was given *Miranda* rights and promptly stopped cooperating with investigators until his parents were found overseas and brought to the United States to talk their son into cooperating again.¹⁸ It surely cannot be a counterterrorism practice worth repeating in the war against al Qaeda to tell terrorists they have a right to remain silent, then rely on the terrorist’s parents to cajole him into revealing intelligence information that could protect the American homeland from future attack

Fourth, the number of military commission trials has been small, mainly because President Obama, as one of his first acts in office, put every military commission case on hold.¹⁹ This includes halting the military commission trial of Khalid Sheikh Mohammad, who had

¹⁵ 157 Cong. Rec. S6836 (Oct. 20, 2011) (statement of Sen. Durbin) (“It is a bragging right, or at least something we should be proud of, that in the United States we use that system and use it so successfully.”); Senator Patrick Leahy, Opening Statement of the Senate Judiciary Committee Chairman at a Oversight Hearing with Attorney General Eric Holder, Nov. 8, 2011, http://leahy.senate.gov/press/press_releases/release/?id=bb2db016-a7ef-4eed-ae2d-c06a94941863 (“Between September 11, 2001, and the end of 2010, 438 suspects were successful [sic] prosecuted by the Bush and Obama administrations on terrorism charges in Federal courts. Military commissions have resulted in only six convictions since September 11.”).

¹⁶ Michael B. Mukasey, Civilian Courts Are No Place to Try Terrorists, Oct. 19, 2009, <http://online.wsj.com/article/SB10001424052748704107204574475300052267212.html>.

¹⁷ Jeff Sessions, Press Release, Sessions Responds to Misleading DoJ Terror Statistics, March 26, 2010, http://sessions.senate.gov/public/index.cfm?FuseAction=PressShop.NewsReleases&ContentRecord_id=9c0cc391-e6c3-babd-b721-621a2b775397&Region_id=&Issue_id=

¹⁸ 157 Cong. Rec. S6833 (Oct. 20, 2011) (statement of Sen. Durbin).

¹⁹ Exec. Order No. 13,492 ¶ 7, 74 Fed. Reg. 4,897, 4,899 (Jan. 27, 2009).

offered to plead guilty in a commission. The President finally re-commenced the cases in 2011, meaning no military commission cases were allowed to proceed for more than two years.

The argument that the civilian criminal justice system is somehow inherently superior to the military commission system does not withstand scrutiny, and does not justify the Obama Administration's reflexive policy to treat terrorists as common criminals, as demonstrated by its reticence to use military commissions.

Myth: The bill will deprive the Administration of the flexibility it needs in terrorism matters.

Fact: S. 1867 gives the President ample authority to waive the detainee provisions if the Administration would prefer to confer upon operational al Qaeda terrorists the full range of Constitutional rights available to U.S. citizens in civilian criminal courts.

Of course, the way the Obama Administration has used such flexibility does not instill confidence. Bringing Ahmed Warsame to the United States this past summer is just the latest in a trend of avoiding the military detention system. The same approach was attempted with Khalid Sheikh Mohammad and his co-conspirators, as well as done with Ahmed Ghalani for his participation in the 1998 East Africa Embassy bombings.

Preferring Military Detention of Terrorists to the False Choice

Simply because President Obama has chosen to present a false choice about how to deal with terrorists captured overseas does not mean the American people must accept those as the only options.

The Military Commissions Act of 2009 as a legal construct, and the military commission courthouse at Guantanamo Bay as a physical construct, were both specifically designed to handle national security information in a secure way. That Act passed Congress on a bipartisan basis and was signed into law by President Obama. The use of military commissions is a wise alternative to the fact that past public criminal trials of terrorists, namely the Blind Sheikh and Ramzi Yousef trials, have compromised U.S. intelligence information on al Qaeda.²⁰

The detainee provisions of the FY12 Defense Authorization bill are consistent with past Senate action. First, in considering the FY10 Defense Authorization bill, a Senate with a filibuster-proof Democratic majority adopted without objection an amendment stating "the preferred forum for the trial of alien unprivileged enemy belligerents . . . for violations of the law of war . . . is trial by military commission."²¹ Moreover, the Senate has voted twice, each time with at least 90 votes, to provide that Guantanamo detainees should not be moved to U.S. prison facilities.²²

²⁰ 9/11 Commission Final Report, p. 472 n.8, <http://www.gpoaccess.gov/911/>; Michael B. Mukasey, "Jose Padilla Makes Bad Law—Terror trials hurt the nation even when they lead to convictions," Wall St. J., Aug. 22, 2007.

²¹ S. Amdt. 1650 to S. 1390, FY10 Defense Authorization Bill, 153 Cong. Rec. S8004-05 (July 23, 2009).

²² Roll Call Vote No. 196, 111th Cong., 1st Sess. (May 20, 2009); Roll Call Vote No. 259, 110th Cong., 1st Sess. (July 19, 2007).

Legislatively channeling captured terrorists into the military detention system is consistent with both this nation's long historical practice and recent Senate action on the matter. Enemy aliens captured abroad should be detained in military custody. The military commission system should be the preferred forum rather than the court of last resort when prosecution in an Article III court is not viewed favorably.

Conclusion

The bipartisan detainee provisions of the FY12 Defense Authorization bill are designed to defeat the Obama Administration's false choice between treating al Qaeda terrorists as common criminals or releasing them to return to the fight. Supreme Court precedent and this country's history make clear the preferred policy choice for such matters is to detain alien enemy combatants in the military system and prosecute them for their violations of the law of war in a military commission. Congress should overcome the Obama Administration's reticence to adopt that clear and obvious choice by passing the FY12 Defense Authorization bill with the terrorist detention provisions unanimously adopted by the Senate Armed Services Committee.