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Common-Sense Principles for Detainee Policy

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Congress will soon debate proposed detainee legislation. Both the House and Senate have several detainee-related provisions in their versions of the National Defense Authorization Act (NDAA) of 2012—the main funding bill for the Department of Defense for the next fiscal year. And as in years past, this debate promises to be heated.

Given the relative broad agreement on the major issues, the proposed legislation focuses on refinements to existing detainee policy.

But most of the proposed legislation potentially encroaches on the commander in chief's executive power under the U.S. Constitution, denies the President needed flexibility, or exists solely because of distrust of this Administration's wartime detention decisions. Congress should not allow politics to get in the way of prudent detention policy and should work to eliminate those provisions that are unnecessary and disruptive.

Reaffirming the AUMF Makes Sense. The primary statutory authority for the war against terrorists is the September 18, 2001, Authorization for Use of Military Force (AUMF).

It authorizes the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." The AUMF does not define who the enemy is, nor does it mention the words detain or detention.

Both the Bush and the Obama Administrations have relied on the AUMF to justify detention of those directly linked to 9/11, al-Qaeda, or those "associated" with or who "substantially supported" the enemy during wartime. The United States government has cited the AUMF in court pleadings as the express legal authority underpinning all post-9/11 combatant detentions. And the U.S. Supreme Court held in Hamdi v. Rumsfeld that the AUMF allowed for the detention of enemy combatants for the duration of hostilities.

The 2001 AUMF has not been amended. As combat operations wind down in Afghanistan, it is increasingly likely that some will argue that the AUMF no longer provides a legal justification for continued detention of belligerents held by the U.S. in Guantanamo and elsewhere, despite the fact that terrorists will continue to threaten the U.S. for the foreseeable future.

Law of war expert Robert Chesney recently testified before Congress on this issue, stating, "This argument may or may not prevail, but one can be certain that it will be raised through a new round of habeas petitions, and it has some chance of succeeding."[1]

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Chesney suggested that Congress could consider reaffirming the 2001 AUMF by "directly and explicitly legislat[ing] the authority it wishes for the President to have—i.e. it should provide the requisite detention authority as a matter of domestic law."

Both the House (section 1034) and Senate (section 1031) do just that by reaffirming that the U.S. is engaged in armed conflict with al-Qaeda, the Taliban, and associated forces. Both include express detention authority for the duration of the hostilities.

The Senate provision also specifically recognizes the government's authority to subject appropriate detainees to long-term detention, trial military commissions, transfer for trial to another court, or transfer to the custody or control of a foreign country or entity.

These provisions track existing policy and practice and are a codification thereof. Despite claims to the contrary, if enacted, these provisions are not an expansion of the war effort but merely a codification of existing practice.

Indeed, an argument can be made that the provisions do not go far enough, as they apply only to al-Qaeda, the Taliban, and "associated forces," thereby excluding other lethal and emerging terrorist organizations. Given emerging terror threats, Congress would be wise to not only codify existing practice under the AUMF but debate whether the revised AUMF should go further to include other terrorist organizations or individuals engaged in armed conflict against the U.S.

Reauthorizing the AUMF makes sense and gives the President express authorization to continue common-sense detention practices well after active combat operations end in Afghanistan. It also has the added benefit of institutionalizing (via legislation) existing practice, which puts future detainee policy and practice on a firmer footing.

The Troublesome Proposals. The most controversial provision is section 1032 of the Senate NDAA, called the "mandatory military custody" provision. It requires that non-American members of al-Qaeda or "affiliated" entities be held in military custody pending "disposition under the law of war." Covered persons who are a "participant in the course of planning or carrying out an attack or attempt[ed]" attack are subject to the rule. The Secretary of Defense may waive the requirement if it is in the "national security interests of the United States" and after consulting with two senior officials.

As written, the rule can be interpreted to require the FBI, CIA, or other element of the government to immediately capture covered persons and turn them over to the military. Oftentimes, however, the best course of action is to monitor the suspected terrorist, not arrest him. Doing so oftentimes allows officials to gather more intelligence. Given the rule's inflexibility, the Secretary of Defense would likely issue waivers on a routine basis, thus undercutting the very purpose of the law.

One renowned detainee policy scholar accurately summarized the flaws of section 1032 by saying that it "would be profoundly disruptive in the most sensitive operational situations."[2]

Guantanamo Detainee Transfer Restrictions. The House and Senate bills also place restrictions on transfers of detainees from Guantanamo to foreign countries. Each bill allows for a waiver of the transfer restriction for any individual detainee but only if the Secretary of Defense personally "certifies" that doing so would be in the national security interest of the U.S.

Although there are slight differences between the bills, the practical effect of both is that it creates an incentive not to transfer additional detainees from Guantanamo to third countries because of the onerous certification requirements. The pro-

1. Robert Chesney, "Ten Years After the Authorization for Use of Military Force: Current Status of Legal Authorities, Detention, and Prosecution in the War on Terror," testimony before the Committee on Armed Forces, U.S. House of Representatives, July 26, 2011, at *http://www.lawfareblog.com/2011/09/my-responses-to-questions-for-the-record-after-julys-hasc-hearing-on-detention-policy/* (October 17, 2011).
2. Benjamin Wittes, "Senate NDAA Thought #1," Lawfare, June 25, 2011, at *http://www.lawfareblog.com/2011/06/senate-ndaa-thought-1/* (October 17, 2011).

posed restrictions exist because of understandable concerns about recidivism and premature, politically motivated transfers. The remedy for those concerns, however, is strict congressional oversight, not legislation.

Finally, these restrictions create the incentive not to bring more detainees to Guantanamo, which even this Administration may need to do for a few select, high-value detainees in the future.

The Bottom Line. Congress should work with the executive branch on detainee legislation. In debating these and other detainee-related provisions, lawmakers should ask this simple question: Does the proposed legislation support and respect the President's executive power under the Constitution to prosecute the war as he sees fit, or does it impose inflexible and unnecessary restrictions on him?

To win this long war against terrorists, the President must have the maximum flexibility to use all tools of national power. Those tools should include—but are certainly not limited to—most decisions regarding the detention, release, transfer, review, and forum for prosecution of the enemy within the bounds of Supreme Court precedent, treaty obligations, the laws of war, and common sense.

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