

ERIC HOLDER, INDEFINITELY DETAINED BY DOD?

The most shocking phrase in the Senate's Defense Authorization detainee provisions to me was not the language affirming indefinite detention. That language simply affirms and possibly narrows the status quo. Rather, it was this language purporting to strike a "balance" between military and civilian detention for alleged terrorists by offering the Secretary of Defense the option of waiving military custody for terrorist detainees.

The Secretary of Defense may, in consultation with the Secretary of State and the Director of National Intelligence, waive the requirement of paragraph (1) [mandating military custody of terrorism detainees] if the Secretary submits to Congress a certification in writing that such a waiver is in the national security interests of the United States.

The presumption of military detention is bad enough. But to codify that the Defense Secretary would not even consult with DOJ on this front was shocking. After all, there is no reason any of these people—Defense Secretary, DNI, or Secretary of State—would know about a terrorist suspect captured in the US. They certainly wouldn't know the investigation and prosecution strategies. Yet, the language passed last Thursday would not only allow the Defense Secretary to bypass DOJ as a default, but wouldn't even require the Defense Secretary to ask whether it's a good idea to move a suspect into DOD custody.

It effectively makes civilian prosecutors supplicants to the military bureaucracy to be allowed to do their work. And it's particularly

troubling given all the Bush-era instances in which FBI's experts on al Qaeda were prevented from using that expertise to question detainees so Cheney's torturers could torture them instead.

And the language in the Senate bill is actually more restrictive than the equivalent language in the House equivalent, which simply gives the Secretary of Defense input on civilian prosecution decisions.

SEC. 1042. REQUIREMENT FOR DEPARTMENT OF JUSTICE CONSULTATION REGARDING PROSECUTION OF TERRORISTS.

(a) IN GENERAL.—Before any officer or employee of the Department of Justice institutes any prosecution of an alien in a United States district court for a terrorist offense, the Attorney General, Deputy Attorney General, or Assistant Attorney General for the Criminal Division, shall consult with the Director of National Intelligence and the Secretary of Defense about—

(1) whether the prosecution should take place in a United States district court or before a military commission under chapter 47A of title 10, United States Code; and

(2) whether the individual should be transferred into military custody for purposes of intelligence interviews.

Whereas in May, crazy House Republicans wanted to give the Secretary of Defense veto power over civilian prosecutions, on Thursday the Senate voted to take the Attorney General out of discussions over whether civilian prosecutions are better than military detention altogether.

And yet, of all the Administration complaints about these provisions—John Brennan, David Petraeus, James Clapper, Leon Panetta—Robert Mueller is the only one who spoke from DOJ

[Update: National Security Division head Lisa Monaco spoke at the ABA National Security conference]. Unless I missed it, Eric Holder didn't issue a statement. And it was only after the bill passed the Senate that some anonymous DOJ official released a comprehensive explanation of why this is such a bad idea (click through for the whole explanation, but here's the part on the Defense Secretary getting to decide).

To be sure, the bill contains a waiver provision under which the Secretary of Defense may waive mandatory military custody after consulting with the Secretary of State and the Director of National Intelligence. But the Secretaries of Defense and State and the Director of National Intelligence are not those primarily responsible for investigating and responding to acts of terrorism on U.S. soil; this responsibility has been assigned for many years – by Presidents of both political parties – to the FBI. In many circumstances, it may not be possible to arrange briefings, secure the necessary concurrences, and execute a waiver in the time frame needed to meet operational needs. Moreover, it is no answer to the acute operational problems the proposed provision creates for terrorism investigations to say that it can be waived. The law enforcement professionals on the front lines who are charged with protecting the country from terrorist threats on U.S. soil need a predictable, stable, and time-tested framework of rules within which to operate, not a complex system of exceptions and waivers that will inevitably sow confusion and result in operational errors.

In the middle of a debate over whether we should basically upend the most successful means we've

had to pursue terrorists in this country, only Robert Mueller and—belatedly and not entirely effectively, Dianne Feinstein—made a case for how stupid this is.

Of course, Eric Holder is rather distracted of late, trying to keep his job in the face of the expanding Fast and Furious investigations.

And that may well be the point. For better or worse, Republicans have teed up on Holder the way they did against Clinton, making him unable to defend civilian law more generally. (Remember when Republicans claimed Clinton tried to take out Osama bin Laden's camps in Afghanistan solely to distract from Monica Lewinsky? This feels familiar.)

But that leaves a void, a void the Administration has not filled.

Obama claims he's still going to veto the Defense Authorization because of these detainee provisions. Good. I think he should. But if he really plans to do so, someone needs to be fear-mongering 24/7 about how much less safe these provisions will make us (and they will).

Obama seems to want to make every political conversation about the economy right now. But when he prepares to veto this bill, the militarists will rightly point out there's a lot of money attached to this bill, too. So to lay the groundwork for why this is important even in spite of the financial hit a delay in reauthorization will cause, someone needs to make it clear that the military presumption will make us all less safe.