MUKASEY ASKS CONGRESS TO RESOLVE BOUMEDIENE ISSUES INSTEAD OF COURTS

Boy, for a guy who was, not long ago, an Article III Court judge, Attorney General Mukasey sure has scant respect for Federal judges. In a speech to AEI today, Mukasey calls on Congress to get the Administration out of its most difficult quandries as a result of the Boumediene decision. Here's an excerpt from his speech, with my editorializing:

> First, and most important, Congress should make clear that **a federal court may not order the Government to bring enemy combatants into the United States**. There are more than 200 detainees remaining at Guantanamo Bay, and many of them pose an extraordinary threat to Americans; many already have demonstrated their ability and their desire to kill Americans. As a federal judge, I presided over a prominent terrorism-related trial, and the expense and effort required to provide security before, during, and after the trial were staggering. Simply bringing a detainee into the United States for the limited purpose of participating in his habeas proceeding would require extraordinary efforts to maintain the security of the site. To the extent detainees need to participate personally, technology should enable them to do so by video link from Guantanamo Bay, which is both remote and safe.
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> Far more critically, although the Constitution may require generally that a habeas court have the authority to order release, **no court should be able to order that an alien captured and**

> **detained abroad during wartime be admitted and released into the United States.**

I love (as in, despise) the way Attorney General Orwell uses court security costs to rationalize indefinite detention even after Boumediene. His logic: if we bring an "enemy combatant" into the States, it'll cost a lot. So "enemy combatants" can't face their accusers in DC District Court. And that means that an "alien captured and detained abroad during wartime" cannot be released into the US. Of course, if it came to the point of releasing someone, that would be because the US could not prove that, in spite of the fact the person had been held as an "enemy combatant" for up to 7 years, once that person finally had a habeas review, a Court decided he was not, in fact, an "enemy combatant" but instead someone the government probably shouldn't have been holding. Some might call that a "mistake"—a very ugly, costly mistake. The implication is, of course, that we might have to release the person into the US because no one else would take him (which is part of the reason we can't release a lot of the people we've got in Gitmo who have already been determined not to be "enemy combatants"), then we would just have to keep him detained because we could not release him into the US. Not because he was dangerous, mind you, or because of court security costs, but because we made a horrible, costly mistake.

> Second, it is imperative that the proceedings for these enemy combatants be conducted in a way that protects how our Nation gathers intelligence, and what that intelligence is. In the terrorism case I mentioned a minute ago, the government was required by law to turn over to the defense a list of unindicted co-conspirators – a list that included Osama bin Laden. This was in 1995, long before most Americans had ever heard of Osama bin Laden. As we

> learned later, that list found its way into bin Laden's hands in Khartoum, tipping him off to the fact that the United States Government was aware not only of him but also of the identity of many of his co-conspirators. We simply cannot afford to reveal to terrorists all that we know about them and how we acquired that information. We need to protect our national security secrets, and we can do so in a way that is fair to both the Government and detainees alike.

Shorter Mukasey: It's Andrew McCarthy's and Patrick Fitzgerald's fault that we haven't captured Osama bin Laden. Mukasey pretends, first of all, that OBL didn't already know we were hip to his evil ways. Now, to be fair to Muaksey, he doesn't say explicitly what his statement implies—that the detainees shouldn't get the info against them. But that is the ultimate implication—that Mukasey would like Congress to invent new ways to prevent the detainees from seeing (or even their attorney's from seeing) the evidence against them.

> Third, Congress should make clear that habeas proceedings should not delay the military commission trials of detainees charged with war crimes. Twenty individuals have already been charged, and many more may be charged in the upcoming months. Last Thursday, we received a favorable decision from a federal court rejecting the effort of a detainee to block his military commission trial from going forward, but detainees will inevitably file further court challenges in an effort to delay these proceedings. Americans charged with crimes in our courts must wait until after their trials and appeals are finished before they can seek habeas relief. So should alien enemy combatants. Congress can and should

> reaffirm that habeas review for those combatants must await the outcome of their trials. The victims of the September 11th terrorist attacks should not have to wait any longer to see those who stand accused face trial.

Shorter Mukasey: Yeah, we took 6 years to get around to charging KSM, but anything that happened **now** would constitute a delay. And that's a delay that would postpone our show trials until after the election, which makes it, therefore, an unacceptable delay.

What Mukasey doesn't admit, of course, is that the standard for evidence in the habeas hearings will be higher than that for the Gitmo Show Trials, which is likely one of the reasons he doesn't want habeas to "delay" the Show Trials.

> Fourth, any legislation should acknowledge again and explicitly that this Nation remains engaged in an armed conflict with al Qaeda, the Taliban, and associated organizations, who have already proclaimed themselves at war with us and who are dedicated to the slaughter of Americans-soldiers and civilians alike. In order for us to prevail in that conflict, Congress should reaffirm that for the duration of the conflict the United States may detain as enemy combatants those who have engaged in hostilities or purposefully supported al Qaeda, the Taliban, and associated organizations.

Shorter Mukasey: As we did successfully with torture and illegal wiretapping, we want Congress to retroactively rubber stamp Bush's illegal declarations—particularly as it regards the Taliban, who just happens to be resurgent in Afghanistan because Bush withdrew resources from Afghanistan to fight his optional and illegal war in Iraq.

I hope Russ Feingold is as apoplectic about this request as I am…

> Fifth, Congress should establish sensible procedures for habeas challenges going forward. In order to eliminate the risk of duplicative efforts and inconsistent rulings, Congress should ensure that one district court takes exclusive jurisdiction over these habeas cases and should direct that common legal issues be decided by one judge in a coordinated fashion. And Congress should adopt rules that strike a reasonable balance between the detainees' rights to a fair hearing on the one hand, and our national security needs and the realities of wartime detention on the other hand. In other words, Congress should accept the Supreme Court's explicit invitation to make these proceedings, in a word repeated often in the Boumediene decision, practical-that is, proceedings adapted to the real world we live in, not the ideal world we wish we lived in.
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> Such rules should not provide greater protection than we would provide to American citizens held as enemy combatants in this conflict. And they must ensure that court proceedings are not permitted to interfere with the mission of our armed forces. Our soldiers fighting the War on Terror, for example, should not be required to leave the front lines to testify as witnesses in habeas hearings; affidavits, prepared after battlefield activities have ceased, should be enough.
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> And military personnel should not be required to risk their lives to create the sort of arrest reports and chain-of-custody reports that are used, under very different circumstances, by ordinary law enforcement officers in the

> United States. Battlefields are not an environment where such reports can be generated without substantial risk to American lives. As one editorialist put it, this is not CSI Kandahar. Federal courts have never treated habeas corpus as demanding full-dress trials, even in ordinary criminal cases, and it would be particularly unwise to do so here given the grave national security concerns I have discussed.

Now, I've got a request for comment in with Judges Hogan and Lamberth, who have been proceeding in very orderly and timely fashion in the DC District Court to make sure they "eliminate[d] the risk of duplicative efforts and inconsistent rulings." But as a regular old citizen, I'm aghast that Mukasey directed this request to Congress, and not to them, during the hearings currently proceeding at Prettyman. If Mukasey can't win this argument before Judge Hogan, then there's probably a reason he can't win it, and the effort to go to Congress again to bypass rule of law is just plain insulting.

> Sixth and finally, because of the significant resource constraints on the Government's ability to defend the hundreds of habeas cases proceeding in the district courts, Congress should make clear that the detainees cannot pursue other forms of litigation to challenge their detention. One unintended consequence of the Supreme Court's decision in Boumediene is that detainees now have two separate, and redundant, procedures to challenge their detention, one under the Detainee Treatment Act and the other under the Constitution. Congress should eliminate statutory judicial review under the Detainee Treatment Act, and it should reaffirm its previous decision to eliminate other burdensome litigation not required by the Constitution, such

> as challenges to conditions of confinement or transfers out of United States custody.
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> Here I must make explicit, and perhaps risk reiterating, a point I would hope was obvious from the discussion so far. We are talking here about habeas corpus proceedings, not about criminal trials of the sort that some but not all of the detainees at Guantanamo Bay may face. Some people have argued that we should either charge the detainees we are holding at Guantanamo with crimes, or release them. We can and we have charged some detainees with war crimes. These proceedings are exceptionally important, and I referred to them earlier.
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> **But to suggest that the government must charge detainees with crimes or release them is to seriously misunderstand the principal reasons why we detain enemy combatants in the first place: it has to do with self-protection, because these are dangerous people who pose threats to our citizens and to our soldiers**. The Department of Defense and the Department of State have worked together to release those whom we believe can be transferred to a third country, consistent with the safety of our citizens and our military personnel abroad, and with our humanitarian commitments; of the 775 people who have been detained at Guantanamo, only about one-third remain. The fact that we have not charged all of those remaining at Guantanamo with crimes should not be regarded as a fair criticism of our detention policies; rather, it reflects the fundamental reality that these individuals were captured in an armed conflict, not in a police raid

Here’s the main kernal of Mukasey’s panicked speech. First of all, the claim that we keep

"enemy combatants" for safety reasons flies in the face of all of the evidence flooding out that, in fact, we keep "enemy combatants" to try to get intelligence out of them. And one of the things Mukasey is rationalizing here is keeping detainees in permanent limbo, with no final resolution. Since these guys believe that they get better data when the detainees undergo learned helplessness, it is understandable why Mukasey wants to keep these folks in their indefinite limbo. Also, Mukasey doesn't mention that two people whom the US alleges were solidly members of the 9/11 plot—Abu Zubaydah and al-Qahtani—but who cannot be tried because our illegal interrogation methods have turned these men into vegetables and because a trial would expose the fact that the torture against both started before the official approval for that torture came through. But that's another reason why Mukasey wants to be able to keep people indefinitely—so the evidence of the torture that Bush, and only Bush, approved does not become public.

Sadly, Mukasey knows he's got a really compliant Congress going into an election seasons, a Congress which has shown absolutely no ability to withstand requests like this, even if they are transparently designed to help the Administration avoid consequences for its actions.

And, I can't help but notice, Mukasey's timing of this, two days before he visits HJC, also means that Mukasey will likely face fewer tough questions about DOJ's other obstruction in that hearing.