

WHAT ABOUT INDEFINITE DETENTION IN AFGHANISTAN?

I made my two most critical points about Obama's Executive Order on indefinite detention in my snarky post yesterday. First, even assuming the idea of institutionalizing indefinite detention weren't bad on its face, Obama's EO doesn't provide any standards of review for the kind of people who should be indefinitely detained. The EO's standard is, "if it is necessary to protect against a significant threat to the security of the United States."

Equally troubling is that Obama chose to do this via EO. As I have pointed out, the Executive Branch maintains it can change the content of EOs without changing the actual text of them. And on something already as troubling as the institutionalization of indefinite detention, this additional wiggle room is just appalling.

All that said, I want to raise one question, both for the supporters of this policy and for those using this Gitmo 2.0 roll-out to discuss whether Obama, or Congress, deserves the blame for the fact that we haven't closed Gitmo.

Why doesn't this policy apply to detainees in Bagram and elsewhere? After all, we've got people who are just as indefinitely detained in Bagram right now as we've got here (the government might make the argument that we—the US—would lose custody when Afghanistan takes over the prison, but there are a slew of reasons to doubt this, not least that we still have formal custody of some Iraqis). So if this new indefinite detention system is such a great humanitarian shake, why not roll it out everywhere we've instituted indefinite detention?

Daphne Eviatar recently observed some Detainee Review Boards in Afghanistan. She emphasizes that Congress has not put the same legal limits

on freeing detainees as it has on Gitmo. Yet still, even those the Americans believe are innocent are not freed.

The reluctance to release these men may have something to do with the parallel holdup at Guantanamo Bay, where almost 90 prisoners have been approved for transfer or release but remain stuck in the U.S. prison there.

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Congress just made returning Guantanamo prisoners even more difficult by blocking their transfer unless the Defense secretary and secretary of State will certify that the receiving country will prevent the detainee from getting involved in any future anti-U.S. activities.

But there's no legal bar on returning home innocent men, like Hamidullah Kahn, who've been recommended for release from Bagram. Yet for some reason, the U.S. government isn't doing it.

Officials in both the Defense and State Departments I spoke to say they're aware of the problem but it's out of their hands. When I was at the Parwan Justice Center at Bagram earlier this week watching Detainee Review Board hearings, one soldier complained about how frustrating it is to be unable to tell innocent prisoners when they'll be going home, or what's causing the holdup. The problem, according to the U.S. officials I spoke to in Afghanistan, is somewhere in Washington.

And with the exception of frequency (Detainee Review Boards are supposed to take place every 6 months; Periodic Review Boards take place every 3 years (with reviews of cases, but not hearings, every 6 months), there are reasons the PRBs are better than the DRBs and the

Administrative Review Boards of Bush.

The detainee will receive an unclassified summary of the "factors and information" that will be offered to the PRB. The detainee will always get a "personal representative" (not necessarily a lawyer) to assist, and even more notably will have assistance of private counsel if he wishes (not at government expense). To the extent that the private counsel has appropriate clearances, the private counsel can have access to the classified portions of the record, though he or she cannot then share that information with the detainee. In that sense, the PRB is not fully adversarial but is far more adversarial than was the ARB process. In special circumstances, the government can supply the personal rep/private attorney with a substitute/summary of highly-sensitive classified information.

[snip]

Who serves on the PRB? Another major break with the ARB system, which involved only military officers. The PRB consists of "senior officials" designated for this task from State, Defense, Justice, Homeland Security, ODNI, and CJCS. This is a major change from the ARB process, as it converts an entirely military review system into an interagency process (shades of the Guantanamo review task force process). Equally significant, the PRB must make *unanimous* decisions. Should any one member disagree, the matter goes to a "review committee" consisting of SecState, SecDef, the AG, the Secretary of Homeland Security, the DNI, and the CJCS—i.e., the Principals Committee.

The Administration is congratulating itself for the prettier face they just put on indefinite

detention. But they only did it where their forever jails attract the most attention, in Gitmo. If these newfangled PRBs are such a great thing, shouldn't they be rolled out everywhere we've got forever detainees squirreled away because "it is necessary to protect against a significant threat to the security of the United States"?

It just seems like, if there is a purpose at all for this newfangled indefinite detention, then that purpose ought to apply across the board. But to the extent this EO applies only to a subset of those detainees we're indefinitely detaining, then it seems to be just an attempt to pretend Obama hasn't given up his plans to close Gitmo, "action" he can point to while blaming Congress for the delay, even while the Obama Administration does nothing about those detainees in Afghanistan that they can free without Congressional strictures.