

JON KYL JUSTIFIES MILITARY DETENTION BY CLAIMING CIA-MILITARY CREDIT FOR FBI INTERROGATIONS

In the entire two week debate over the detainee provisions of the Defense Authorization, the champions of military detention offered almost no rationale for it (a pity, then, that the opponents barely explained why it's such a bad idea), aside from Lindsey Graham repeating endlessly that detainees shouldn't get lawyers (he never explained how this claim jived with his promise that every detainee would have access to habeas corpus).

One exception is a statement that Jon Kyl submitted to the record but did not read (the statement starts on PDF 5). After reasserting the legality of the detainee provisions under Hamdi, Kyl's (was it Kyl's?) statement offered an "explanation" for military detention; I've reproduced that part of the statement in full below the line.

Now, the statement doesn't make any sense. It invokes what it claims were CIA interrogations and treats them as military interrogation; though in fact a number of the interrogations the statement invokes were FBI interrogations.

The statement claims detainees wouldn't have a lawyer, though the architects of the bill have made it clear (as has SCOTUS) detainees would have access to habeas corpus and therefore (presumably) lawyers.

Perhaps not surprising, the statement also invokes two discredited pieces of propaganda: Vice Admiral Lowell Jacoby's January 9, 2003 Declaration in opposition to granting Jose Padilla habeas corpus and George Bush's September 6, 2006 speech announcing he was

moving 14 high value detainees to Gitmo.

It relies on Jacoby's statement to argue for the value of a "relationship of dependency," which seems to no more than a rebranding of Bruce Jessen's "learned helplessness." And note, Jacoby's statement, written six months after DOD took custody of Padilla, spoke of intelligence he might offer prospectively; it doesn't claim to have gotten any intelligence using this "relationship of dependency."

And it relies on Bush's statement to claim that military or CIA interrogations exposed that KSM was Mukhtar and Jose Padilla's plans, both of which came from Ali Soufan's FBI interrogation of Zubaydah. It also claims the CIA interrogations yielded Ramzi bin al-Shibh's location, whereas Soufan, at least, claims that came from an FBI interrogation in Bagram. And it claims CIA's interrogation of KSM revealed the Liberty Towers plot that had been broken up a year earlier. In other words, Kyl's argument for why we need military detention consists of repeating discredited propaganda claiming CIA credit for interrogations largely conducted by the FBI. The same FBI officers who will lose their ability to interrogate detainees if and when this bill goes into place.

In short, one of the most comprehensive arguments for why we need military detention instead makes the case for retaining FBI primacy. At the same time, it appears to endorse the "learned helplessness" that ended up making delaying any value to KSM and other detainee interrogations.

Even the champions of military detention offer proof that we're safer with civilian detention.

What follows is the statement Kyl submitted to the record.

Why Military Detention Is Necessary: To Allow Intelligence Gathering That Will Prevent Future Terrorist Attacks Against the American People

Some may ask, why does it matter whether a person who has joined Al Qaeda is held in military custody or is placed in the civilian court system? One critical reason is intelligence gathering. A terrorist operative held in military custody can be effectively interrogated. In the civilian system, however, that same terrorist would be given a lawyer, and the first thing that lawyer will tell his client is, "don't say anything. We can fight this."

In military custody, by contrast, not only are there no lawyers for terrorists. The indefinite nature of the detention—it can last as long as the war continues—itself creates conditions that allow effective interrogation. It creates the relationship of dependency and trust that experienced interrogators have made clear is critical to persuading terrorist detainees to talk.

Navy Vice-Admiral Lowell Jacoby, who at the time was the Director of the Defense Intelligence Agency, explained how military custody is critical to effective interrogation in a declaration that he submitted in the Padilla litigation. He emphasized that successful noncoercive interrogation takes time—and it requires keeping the detainee away from lawyers.

Vice-Admiral Jacoby stated:

DIA's approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and the interrogator. Developing the kind of relationship of trust and dependency necessary for effective interrogations is a process that can take a significant amount of time. There are numerous examples of situations where interrogators have been unable to obtain valuable intelligence from a subject until months, or, even years, after the interrogation process began.

Anything that threatens the perceived

dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence gathering tool. Even seemingly minor interruptions can have profound psychological impacts on the delicate subject/interrogator relationship. Any insertion of counsel into the subject-interrogator relationship, for example—even if only for a limited duration or for a specific purpose—can undo months of work and may permanently shut down the interrogation process.

Specifically with regard to Jose Padilla, Vice Admiral Jacoby also noted in his Declaration that: “Providing [Padilla] access to counsel now would create expectations by Padilla that his ultimate release may be obtained through an adversarial civil litigation process. This would break—probably irreparably—the sense of dependency and trust that the interrogators are attempting to create.”

In other words, military custody is critical to successful interrogation. Once a terrorist detainee is transferred to the civilian court system, the conditions for successful interrogation are destroyed.

Preventing the detention of U.S. citizens who collaborate with Al Qaeda would be a historic abandonment of the law of war. And, by preventing effective interrogation of these collaborators, it would likely have severe consequences for our ability to prevent future terrorist attacks against the American people.

We know from cold, hard experience that successful interrogation is critical to uncovering information that will prevent future attacks against civilians.

On September 6 of 2006, when President Bush announced the transfer of 14 high-value terrorism detainees to Guantanamo, he also

described information that the United States had obtained by interrogating these detainees. Abu Zubaydah was captured by U.S. forces several months after the September 11 attacks. Under interrogation, he revealed that Khalid Sheikh Mohammed was the principal organizer of the September 11 attacks. This is information that the United States did not already know—and that we only obtained through the successful military interrogation of Zubaydah.

Zubaydah also described a terrorist attack that Al Qaida operatives were planning to launch inside this country—an attack of which the United States had no previous knowledge. Zubaydah described the operatives involved in this attack and where they were located. This information allowed the United States to capture these operatives—one while he was traveling to the United States.

Again, just imagine what might have happened if the Feinstein amendment had already been law, and if the Congress had stripped away the executive branch's ability to hold Al Qaeda collaborators in military custody and interrogate them. We simply would not learn what that detainee knows—including any knowledge that he may have of planned future terrorist attacks.

Under military interrogation, Abu Zubaydah also revealed the identity of another September 11 plotter, Ramzi bin al Shibh, and provided information that led to his capture. U.S. forces then interrogated bin al Shibh. Information that both he and Zubaydah provided helped lead to the capture of Khalid Sheikh Mohammed.

Under interrogation, Khalid Sheikh Mohammed provided information that helped stop another planned terrorist attack on the United States. K.S.M. also provided information that led to the capture of a terrorist named Zubair. And K.S.M.'s interrogation also led to the identification and capture of an entire 17-member Jemaah Islamiya terrorist cell in Southeast Asia.

Information obtained from interrogation of terrorists detained by the United States also helped to stop a planned truck-bomb attack on U.S. troops in Djibouti. Interrogation helped stop a planned car-bomb attack on the U.S. embassy in Pakistan. And it helped stop a plot to hijack passengers planes and crash them into Heathrow airport in London.

As President Bush stated in his September 6, 2006 remarks, “[i]nformation from terrorists in CIA custody has played a role in the capture or questioning of nearly every senior al Qaida member or associate detained by the U.S. and its allies.” The President concluded by noting that Al Qaida members subjected to interrogation by U.S. forces: “have painted a picture of al Qaeda’s structure and financing, and communications and logistics. They identified al Qaeda’s travel routes and safe havens, and explained how al Qaeda’s senior leadership communicates with its operatives in places like Iraq. They provided information that has allowed us to make sense of documents and computer records that we have seized in terrorist raids. They’ve identified voices in recordings of intercepted calls, and helped us understand the meaning of potentially critical terrorist communications.

[Were it not for information obtained through interrogation], our intelligence community believes that al Qaeda and its allies would have succeeded in launching another attack against the American homeland. By giving us information about terrorist plans we could not get anywhere else, this [interrogation] program has saved innocent lives.”

If the Feinstein amendment were adopted, this is all information that we would be unable to obtain if the Al Qaeda collaborator that our forces had captured was a U.S. citizen. It would simply be impossible to effectively interrogate that Al Qaeda collaborator—the relationship of trust and dependency that military custody creates would be broken, and the detainee would

instead have a lawyer telling him to be quiet. And we know that information obtained by interrogating Al Qaeda detainees has been by far the most valuable source of information for preventing future terrorist attacks.

Again, in every past war, our forces have had the ability to capture, detain, and interrogate U.S. citizens who collaborate with the enemy or join forces with the enemy. I would submit that in this war, intelligence gathering is more critical than ever. Al Qaeda doesn't hold territory that we can capture. It operates completely outside the rules of war, and directly targets innocent civilians. Our only effective weapon against Al Qaeda is intelligence gathering. And the Feinstein amendment threatens to take away that weapon—to take away our best defense for preventing future terrorist attacks against the American people.
[my emphasis]