New Federal Initiatives Project

An Analysis of the National Defense Authorization Bill

By
Benjamin Wittes*

June 21, 2011

The Federalist Society
for Law and Public Policy Studies

An Analysis of the National Defense Authorization Bill

This article describes the detention and Authorization for Use of Military Force (AUMF) provisions in the National Defense Authorization bill, which was passed by the House of Representatives by a 322-96 vote on May 26, how these provisions are different from the provisions in earlier versions of the bill, and where they are likely to generate opposition. House Armed Services Committee Chairman Buck McKeon introduced the bill in early March and provided updated language for the detention and AUMF sections on May 9. For organizational simplicity, I describe the bill in the order in which its sections appear and compare these sections to the analogous ones in the earlier version.

Section 1033 clarifies the ability of a defendant in a military commission to plead guilty in a capital case–a matter that is now legally ambiguous. This provision has not and likely will not engender much controversy.

Section 1034 is an attempt to update the AUMF and to include in it the specific power to detain. It reads in its entirety:

> Congress affirms that—
>
> (1) the United States is engaged in an armed conflict with al-Qaeda, the Taliban, and associated forces and that those entities continue to pose a threat to the United States and its citizens, both domestically and abroad;
>
> (2) the President has the authority to use all necessary and appropriate force during the current armed conflict with al-Qaeda, the Taliban, and associated forces pursuant to the Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 15 1541 note);
>
> (3) the current armed conflict includes nations, organization, and persons who—
>
> > (A) are part of, or are substantially supporting, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners; or
> >
> > (B) have engaged in hostilities or have directly supported hostilities in aid of a nation, organization, or person described in subparagraph (A); and
>
> (4) the President's authority pursuant to the Authorization for Use of Military Force (Public Law 3 107–40; 50 U.S.C. 1541 note) includes the authority to detain belligerents, including persons described in paragraph (3), until the termination of hostilities.

The current language is largely the same, though with some differences, as the earlier version McKeon introduced, and it would have the same impact. It would put Congress explicitly behind the power to detain the enemy for the first time, and it would serve as an updating of the AUMF, whose focus was mainly restricted to the perpetrators of the September 11 attacks.

This provision has already come under fire from some who argue that it is an expansion of the war just as Bin Laden has been killed. On the other hand, the House Armed Services Committee

expressed an intent to follow the Obama administration's interpretation of the AUMF as pertains to the scope of the conflict and the scope of detention authority in the conflict when it wrote the following language in its report accompanying McKeon's mark:

> The committee supports the Executive Branch's interpretation of the Authorization for Use of Military Force, as it was described in a March 13, 2009, filing before the U.S. District Court for the District of Columbia. While this affirmation is not intended to limit or alter the President's existing authority pursuant to the Authorization for Use of Military Force, the Executive Branch's March 13, 2009, interpretation remains consistent with the authorities provided by Congress.

H.R. 1540—FY12 NATIONAL DEFENSE AUTHORIZATION BILL, CHAIRMAN'S MARK 18 (2011), *available at* http://armedservices.house.gov/index.cfm/files/serve?File_id=61e9d0d1-581b-4204-ba0e-f601878bc710.

The source of the argument that the bill expands the scope of the war lies in the language of paragraphs (3) and (4). Paragraph (3) says that the current conflict "includes nations, organization, and persons" who are "part of, or substantially supporting," the enemy—thus arguably seeming to suggest that Congress has authorized the use of "all necessary and appropriate force" against mere supporters of our enemies. Interpreted this way, the language would arguably go beyond the administration's understanding the current AUMF in a couple of ways. First, it would authorize force against nations who might give non-trivial support to, for example, the Taliban—thus authorizing force against, say, Iran. Second, it would authorize force against groups and individuals for independent support of the enemy. While the administration has reserved the right to detain such people, it might not generally claim the authority to target mere supporters—even substantial supporters. Paragraph (4) arguably compounds this problem by labeling the people described in paragraph (3), including supporters, as "belligerents"—a word that strongly implies that they are legitimate targets.

Section 1035 requires the Defense Department to submit to the congressional armed services committees a "national security protocol" for each detainee at Guantanamo. The protocols would describe in considerable detail the rules governing each detainee's communication with non-governmental personnel–including lawyers. This provision reflects a concern about detainee communications with the outside world and would create a significant workload burden for the Pentagon. But it does not seem to do more than require that the rules for each detainee be written down. It does not dictate what those rules should be. The detainee bar might be concerned about it, as it would seem to encourage the administration to slap restrictions on attorney access–and to monitor privileged communications. But it does not appear to require any restrictions or monitoring.

Section 1036 codifies a review process for Guantanamo detainees in statute. It is dramatically different from McKeon's earlier response to President Obama's executive order on the subject and is specifically responsive to some of the criticisms some made of the earlier provision—including by this author. McKeon's earlier draft was cast as a list of things the president was forbidden to do in writing a review process, and it did not codify the review process itself. The current version, by contrast, is a fully elucidated review scheme and would thus significantly

define the law of detention–particularly in combination with the authority to detain specified in Section 1034.

The bill is significantly different from earlier versions on the substance of the review system. Whereas the earlier version required the panels to be entirely military, the bill as passed sets up a two-tiered process in which the initial review panel is all military but the later panel is interagency. The bill has also adopted the White House's system of full reviews every three years and file reviews every year. And while it has retained McKeon's efforts to prevent detainees from being represented by counsel in the process, giving them only a military personal representative, it allows outside counsel (with written permission from the detainee) to be involved by preparing written submissions. What's more, it has embedded the considerations that now prevent detainee transfers into the review process itself, as considerations for review panels when reviewing a detainee's case. McKeon's review process is still different in material respects from the White House's, and less generous, to be sure. It is a pole in a debate about how generous the review mechanisms should be for detainees who are lawfully held and whose release is therefore a discretionary act. The White House has criticized McKeon's proposed review process as unduly restrictive, but it is possible that, between his version of the review system and the administration's, there is room for business to be done.

Section 1037 is a bar on spending money in fiscal year 2012 to build facilities in the United States to hold Guantanamo detainees.

Section 1038 bars the use of Defense Department fiscal year 2012 money "to permit any person who is a family member of an individual detained at Guantanamo to visit the individual at United States Naval Station, Guantanamo Bay, Cuba." This is a softening of the earlier version, which flatly prohibited family visits.

Section 1039 bars the use of the fiscal year 2012 funds to transfer detainees in military custody at Guantanamo or elsewhere to the United States or free them here. It would thus effectively preclude federal court criminal trials of people detained by the military overseas. This provision too has seen dramatic change. In the earlier version of the bill, it was a permanent bar, and the earlier version used to operate–in combination with other language mandating military detention–to prevent citizens and those arrested domestically from facing criminal trial as well. This provision remains anathema to the administration, which insists that it must retain the authority to try overseas detainees in federal court.

Section 1040 retains the current set of transfer restrictions to other countries for those Guantanamo detainees who clear the review process in fiscal year 2012–including an all-but-impossible-to-surmount restriction on transfers to countries with any history of detainee recidivism. In light of the changes McKeon has made to the review system in other portions of the bill, the reason for the inclusion of this provision is unclear. The considerations that make up the certification from the Secretary of Defense that it requires are all now embedded in the review process itself. So at one level, it is simply redundant of the review system the bill sets up. At another level, it isn't redundant at all. Making the Secretary of Defense sign a certification is significant, after all, so it will effectively operate as a lever to make the Secretary of Defense personally responsible for every result the review mechanism yields. As such, it arguably would gum up the review system that the bill would elsewhere create. The administration is adamantly

opposed to this provision as well, considering it flatly inconsistent with administration efforts to reduce the Guantanamo population and ultimately close the facility. Largely because of Sections 1039 and 1040, the administration has threatened a veto of the entire National Defense Authorization Act.

Finally, Section 1043 of the bill, whose language was added on the House floor through an amendment by Rep. Vern Buchanan, would require a military commission trial for any terrorism suspect who is amenable to trial before a military commission. It reads as follows:

> After the date of the enactment of this Act, any foreign national, who—
> (1) engages or has engaged in conduct constituting an offense relating to a terrorist attack against persons or property in the United States or against any United States Government property or personnel outside the United States; and
> (2) is subject to trial for that offense by a military commission under chapter 47A of title 10, United States Code;
> shall be tried for that offense only by a military commission under that chapter.

This provision can be expected to generate additional opposition from the administration on the same grounds as Section 1039.

The key questions relating to the bill now are how important senators like Carl Levin will react, whether the administration will stand its ground or attempt to reach a compromise, and how Democrats will engage over the bill.

* *Benjamin Wittes is a senior fellow in Governance Studies at The Brookings Institution. He co-founded and co-writes the* Lawfare *blog (http://www.lawfareblog.com), which is devoted to non-ideological discussion of the "Hard National Security Choices," and is a member of the Hoover Institution's Task Force on National Security and Law.*

Related Links

Full Text of House Resolution 1540, the National Defense Authorization Act for Fiscal Year 2012, http://www.gpo.gov/fdsys/pkg/BILLS-112hr1540ih/pdf/BILLS-112hr1540ih.pdf

United States House of Representatives Armed Services Committee, House Approves Defense Authorization Bill with Bipartisan Support, May 26, 2011, http://armedservices.house.gov/index.cfm/press-releases?ContentRecord_id=28782e97-7f20-490d-93c0-bcf7c1fb99ea

Executive Office of the President, Office of Management and Budget, Statement of Administration Policy: H.R. 1540 – National Defense Authorization Act for FY 2012, May 24, 2011, http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1540r_20110524.pdf

Evan Perez & Nathan Hodge, Defense Bill Would ‘Affirm’ War with al Qaeda, Wall Street Journal, May 9, 2011, http://blogs.wsj.com/washwire/2011/05/09/defense-bill-would-affirm-war-with-al-qaeda/

Editorial, Getting Tough on Gitmo Restrictions, The Washington Post, May 30, 2011, http://www.washingtonpost.com/opinions/getting-tough-on-gitmo-restrictions/2011/05/27/AG9SEzEH_story.html