AHMED ABDULKADIR WARSAME AND THE PAPER TRAIL PREVENTING FLOATING GHOST PRISONS

Given the defeat of the Udall Amendment, it looks likely the Defense Authorization will include provisions mandating military detention for most accused terrorists (though the Administration has already doubled down on their veto threat).

So I'd like to look at an aspect of the existing detainee provision language that has gotten little notice: the way it requires the Administration to create a paper trail that would prevent it from ghosting—disappearing—detainees. In many ways, this paper trail aspect of the detainee provisions seems like a justifiable response to the Administration's treatment of Ahmed Abdulkadir Warsame.

The Administration unilaterally expanded detention authorities in its treatment of Warsame

As you recall, Ahmed Abdulkadir Warsame is a Somali alleged to be a member of al-Shabab with ties with Al Qaeda in the Arabian Peninsula. When the Administration detained Warsame, al-Shabab was not understood to fall under the 2001 AUMF language. The Administration effectively admitted as much, anonymously, after he was captured.

> While Mr. Warsame is accused of being a member of the Shabab, which is focused on a parochial insurgency in Somalia, the administration decided he could be lawfully detained as a wartime prisoner under Congress's authorization to use military force against the perpetrators

> of the Sept. 11, 2001, attacks, according to several officials who spoke on the condition of anonymity to discuss security matters.
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> But the administration does not consider the United States to be at war with every member of the Shabab, officials said. Rather, the government decided that Mr. Warsame and a handful of other individual Shabab leaders could be made targets or detained because they were integrated with Al Qaeda or its Yemen branch and were said to be looking beyond the internal Somali conflict.

And while he had no problem extending the AUMF to include al-Shabab in the war on terror detention authorities, one of the big SASC champions of these detainee provisions, Lindsey Graham, clearly believed Warsame was not included in existing detention authorities.

> Senator Lindsey Graham, Republican of South Carolina, said in an interview that he would offer amendments to a pending bill that would expand tribunal jurisdiction and declare that the Shabab are covered by the authorization to use military force against Al Qaeda.

So to begin with, Warsame was detained under AUMF authority that one loud-mouthed, hawkish member of the SASC didn't believe was actually included under it.

And then there's the way the Administration ghosted Warsame for 2 months.

The US captured Warsame on April 19, then whisked him away to the amphibious assault ship, the Boxer, where he was interrogated by members of the High Value Detainee Interrogation Group (which, remember, includes DOJ, Intelligence, and military members) for two months. Around about June 19, the government gave him a 4-day break and told the Red Cross they had him. Then

they had the FBI interrogate him for about a week; each day, they gave Warsame a Miranda warning. Finally, on June 30, Warsame was indicted (based on his confession to the FBI) and formally "arrested" on July 3. When he was assigned a judge, the prosecutors submitted a very broad request that Warsame's indictment and related documents be sealed "until the defendant is sentenced or further Order of the Court." The judge did sign the request, but by the end of that same day, his indictment was unsealed.

So the US captured this guy, floated around in a boat interrogating him long beyond the time—14-days—when we have agreed to give the Red Cross ~~access to~~ notice we have detainees [corrected per Charlie Savage—he also thinks ICRC did get notice w/Warsame]. When we finally brought him to the US, the Administration at least **considered** keeping his capture secret until such time as he was convicted.

That's the kind of thing the Administration has been doing more and more of, of late, hiding dockets and civilian detainees. Which means in some ways it might be easier to ghost a detainee in civilian custody than in military custody.

In a statement echoing a lot of the language she has used in the last week to oppose the detainee provisions, Dianne Feinstein made it clear the Administration told her they had Warsame floating around on a ship being interrogated (or at least they told her about the intelligence they were getting from him).

> The Senate Intelligence Committee has been kept informed on the intelligence being produced by Warsame's interrogation since his capture.
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> Warsame has provided valuable and actionable intelligence in response to interrogation consistent with the Army Field Manual, and the Administration's national security team has determined that a federal criminal court is the best venue in which to prosecute

> Warsame. He will be charged with nine separate counts that can mean a mandatory sentence of life in prison.
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> I have been in favor of allowing the President to make these decisions on a case by case basis, and there is good reason to support the decision of the executive branch in this case.

And while he seemed to have no complaint about the treatment of Warsame—even going so far as arguing the earlier version of the SASC detainee provisions would accommodate his treatment—Carl Levin didn't say that he had been briefed.

It appears likely, incidentally, that then-JSOC head and now SOCOM Commander William McRaven knew about Warsame. He testified **while Warsame was floating around secretly** that that was the plan for important detainees, to float them around secretly while they were being interrogated.

> SENATOR GRAHAM: … If you caught someone tomorrow in Yemen, Somalia, you name the theater, outside of Afghanistan, where would you detain that person?
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> ADMIRAL MCRAVEN: Sir, right now, as you're well aware, that is always a difficult issue for us. When we conduct an operation outside the major theaters of war in Iraq or Afghanistan, we put forth – we – and again I'll defer to my time as a JSOC commander – we put forth a concept of operation. The concept of operation goes up through the chain of command – military chain of command and is eventually vetted through the interagency, and the decision by the president is made for us to conduct a particular operation. Always as part of that CONOP are options for detention. No two cases seem to be alike. As you know, there are certain individuals that are under the AUMF, the use of military

> force, and those are easier to deal with than folks that may not have been under the authority for AUMF. In many cases, we will put them on a naval vessel and we will hold them until we can either get a case to prosecute them in U.S. court or…
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> …
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> SENATOR GRAHAM: What's the longest we can keep somebody on the ship?
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> ADMIRAL MCRAVEN: Sir, I think it depends on whether or not we think we can prosecute that individual in a U.S. court or we can return him to a third party country.
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> SENATOR GRAHAM: What if you can't do either one of those?
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> ADMIRAL MCRAVEN: Sir, it – again, if we can't do either one of those, then we'll release that individual and that becomes the – the unenviable option, but it is an option.

Note, there are several reasons why the Administration needed to prosecute Warsame in civilian court. He is charged with material support, which has a much sounder basis in civilian law than military law. He appears to be working under a cooperation agreement (which is one reason for the secrecy); military detention has no accommodation for that. And, as Charlie Savage describes (though to some degree this sounds like the Admin hiding its unilateral expansion of the AUMF behind secrecy) to justify including Warsame under existing military commission authority would require disclosing classified information.

The paper trail the detainee provisions would impose on the Warsame treatment

Regardless of who was surprised by this treatment and who wasn't, the detainee provisions would make it harder for anyone to be

similarly surprised in the future.

It would do so in three ways:

- Require written procedures outlining how the Administration decides who counts as a terrorist
- Require regular briefings on which groups and individuals the Administration considers to be covered by the AUMF
- Require the Administration submit waivers whenever it deviates from presumptive military detention

The detainee provisions give the Administration 60 days to put together—and share with Congress—some coherent procedures on how they decide whether someone is covered under the presumptive military detention category. As part of that, the Administration will need to make clear who gets to decide whether someone is a terrorist or not.

> Procedures designating the persons authorized to make the determinations under subsection (a)(2) and the process by which such determinations are to be made.

We don't really know how these decisions were made with Warsame, or at what level. But if and when the Administration writes such procedures, they give Congress some standards to audit to. At the very least, such procedures would make it hard for some cowboy JSOC member to start collecting detainees as terrorists and hiding them for months at a time on their own say-so.

In addition, the defense authorization requires the Administration keep Congress apprised of who it considers to be covered under detainee

authorities.

> The Secretary of Defense shall regularly brief Congress regarding the application of the authority described in this section, including the organizations, entities, and individuals considered to be "covered persons" for purposes of subsection (b)(2).

It's not entirely clear who counts as "Congress" here, but later provisions require notice of detainee transfers to the Armed Services Committees, the Appropriations Committees, and the Intelligence Committees—I guess suggesting the Judiciary Committees have no jurisdiction over things like the law.

This provision, IMO, is long overdue. It prevents the Administration from just making up shit in secret OLC memos that it will then hide under using State Secrets. And it would presumably make it impossible for Lindsey Graham to first learn we had declared war on al Shabab—at least for the purposes of detention—only when the Administration revealed they had been floating an al Shabab member around as a ghost detainee for two months.

Finally, there are the written waivers the Administration must seek when it chooses some course aside from military detention.

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

Now, I'm actually not sure when the Administration would have had to give Congress a waiver in this case, though it's clear they would have. At the very least, when they brought in the FBI Clean Team 2 months into his

detention, the Administration had made the decision to try him in a civilian court, so presumably that's when the waiver would be required.

Perhaps the goal of this language is to prevent the 2-month ghosting to happen in the first place, which would be a good thing. The military presumably gets exposed to all sorts of legal trouble serving as the instrument of the President's disappearances.

But one thing the waiver system would prevent is the secret transfer of someone like Warsame to civilian custody and continued secret detention—as it appears the Administration considered doing—without at least notifying Congress (or at least some committees in Congress).

All that is admittedly weak tea, an inadequate exchange for making military detention the default for such ill-defined categories as terrorists.

But in important ways these provisions—particularly the mandatory briefing on who exactly the Administration believes falls under these provisions—are a huge improvement over the secret unilateral decisions the Executive has been allowed to make for a decade.