

BACHMANN WAS ALMOST RIGHT: THE ACLU IS IN CAHOOTS WITH THE CIA

As I have puzzled over the civil liberties and human rights communities' stance on the NDAA Detainee Provisions, I've come to the unfortunate conclusion that Michelle Bachmann was not far off when she claimed, "Barack Obama ... has essentially handed over our interrogation of terrorists to the ACLU. He has outsourced it to them."

After all, in the guise of "fixing" some of what I agree are problems with the Detainee Provisions—the laws regarding detention and interrogation of detainees—the ACLU is telling its members to lobby for the Udall Amendment to the NDAA.

But there is a way to stop this dangerous legislation. Sen. Mark Udall (D-Colo.) is offering the Udall Amendment that will delete the harmful provisions and replace them with a requirement for an orderly Congressional review of detention power. The Udall Amendment will make sure that the bill matches up with American values.

In support of this harmful bill, Sen. Lindsey Graham (R-S.C.) explained that the bill will "basically say in law for the first time that the homeland is part of the battlefield" and people can be imprisoned without charge or trial "American citizen or not." Another supporter, Sen. Kelly Ayotte (R-N.H.) also declared that the bill is needed because "America is part of the battlefield."

The solution is the Udall Amendment; a way for the Senate to say no to

indefinite detention without charge or trial anywhere in the world where any president decides to use the military. Instead of simply going along with a bill that was drafted in secret and is being jammed through the Senate, the Udall Amendment deletes the provisions and sets up an orderly review of detention power. It tries to take the politics out and put American values back in.

As a threshold matter, the ACLU's support of the Udall Amendment appears to put them on the same side of the debate as—among others—former CIA exec John Brennan and the former Director of the CIA, Leon Panetta. (Current CIA Director and outspoken detention authority while still at DOD, General David Petraeus, has been eerily quiet over the last several weeks.)

And I do agree with the ACLU that the Udall Amendment sets up an orderly review of detention power.

But, as I've noted, there's one aspect of the Detainee Provisions that Udall doesn't leave for orderly review: the scope of the language describing a "covered person." Instead, Udall's Amendment says covered people should be those "whose detention ... is consistent with the laws of war and based on authority provided by" the 9/11 and Iraq AUMFs, as well as "any other statutory or constitutional authority."

(b) *Covered Persons.*—A covered person under this section is any person, other than a member of the Armed Forces of the United States, whose detention or prosecution by the Armed Forces of the United States is consistent with the laws of war and based on authority provided by any of the following:

(1) The Authorization for Use of Military Force (Public Law 107-40).

(2) The Authorization for Use of

Military Force Against Iraq Resolution
2002 (Public Law 107-243).

(3) Any other statutory or constitutional authority for use of military force.

Udall pretty much unilaterally reasserts the application of the AUMFs (plural) and other vaguely defined legal bases to detention (and, because that's how OLC has built up Executive Power over the last decade, a bunch of other things), in an effort to defeat SASC's language that limits such detention authority to those tied directly to 9/11 or "who [were] part of or substantially supported al-Qaeda, the Taliban, or associated forces." Udall's Amendment may give SSCI and SJC another shot at this law, but it dictates that detention authority apply to a far broader group of people than the SASC language describes.

Hey, Mark. See that calendar? We're not going to pass and sign this bill before December 1. We're due to pull our troops out of Iraq by the end of that month. Are you telling me we need to include that language for less than 31 days? Or just to provide a bubble during which the Administration can do whatever it wants with Ali Mussa Daqduq, the alleged Hezbollah agent in US custody presenting so many legal dilemmas for us in Iraq? Or are you instead applying the AUMF for a war that is effectively over to grant the President authority to hold a much broader category of "terrorist" than the 9/11 AUMF authorized? Why, at this late date, are you including the Iraq AUMF?

Given your "based on authority provided" language, I assume it is the latter, meaning this attempt to do an orderly review of detention authority also mandates that that detention authority be applied as if the Iraq war were not ending.

And all that's before you consider the "any other statutory or constitutional authority for

use of military force," which seems to say that in any circumstance in which Congress has authorized some use of military force, Udall's Amendment also piggybacks detention authority ... and whatever else (like assassination and wiretap authority) gets built off of detention authority in secret by the OLC.

The Udall Amendment, while giving the Senate Intelligence and Senate Judiciary Committees an opportunity to weigh in on what the President must and can do with detainees, goes far beyond the language in the SASC version of 1031, which reaffirmed the war on terrorists, but only on terrorists who have anything directly to do with, or are associated with, 9/11.

I may be badly misreading this. But as I understand it, the ACLU is basically lobbying to codify a vastly-expanded AUMF that will serve to legitimize many of the intelligence community's most egregious civil liberties abuses, not just on detention, but on a range of other "war powers," like wiretapping and assassination.

And while that may not be the same as outsourcing interrogation to the ACLU—as Bachmann described it—it does amount to using the ACLU to give sanction to a broad expansion of Executive war and surveillance powers the likes of which the CIA loves to exploit.