

AHMED WARSAME AND STUXNET

Back in November, I suggested one intended purpose of the detainee provisions in the Defense Authorization is to require a paper trail that would make it a little harder for the Administration to disappear detainees on floating prisons. The bill:

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

These are imperfect controls, certainly. But they do seem like efforts to bureaucratize the existing, arbitrary, detention regime, in which the President just makes shit up and tells big parts of Congress—including the Armed Services Committees, who presumably have an interest in making sure the President doesn't make the military break the law—after the fact.

I suggested this effort to impose bureaucratic controls was, in part, a reaction to the Ahmed Warsame treatment, *in which it appears that the Armed Services Committees learned Obama had declared war against parts of al-Shabaab and used that declaration as justification to float Warsame around on a ship for two months. (It appears that the Intelligence Committees, but not the Armed Services Committees, got briefed*

in this case, though Admiral McRaven was testifying about floating prisons as it was happening). [Update: I may be mistaken about what Lindsey Graham's language about making sure the AUMF covered this action meant, so italicized language may be incorrect.]

This is not to say the ASCs are going to limit what the President does—just make sure they know about it and make sure the military has legal cover for what they're doing.

With that in mind, take a look at Robert Chesney's review of the new cyberwar authorization in the Defense Authorization, which reads:

SEC. 954. MILITARY ACTIVITIES IN CYBERSPACE.

Congress affirms that the Department of Defense has the capability, and upon direction by the President may conduct offensive operations in cyberspace to defend our Nation, Allies and interests, subject to—

(1) the policy principles and legal regimes that the Department follows for kinetic capabilities, including the law of armed conflict; and

(2) the War Powers Resolution (50 U.S.C. 1541 et seq.).

Chesney's interpretation of this troubling language is that by requiring a Presidential statement in some cases, it will force interagency consultation before, say, DOD launches a cyberwar on Iran. (Oh wait, too late.)

Second, the utility of insisting upon presidential authorization, as opposed to just SecDef authorization or that of a commander, is that it makes it likely if not certain that there would be interagency screening of the proposed OCO (or set thereof) under the auspices

of the NSC staff process, with more than just DOD weighing in on the question. For example, the State Department – which institutional equities disposing it to perhaps pay more attention to collateral/unintended consequences that an operation might have on other countries – might well have more of a voice as a proposal for a particular operation makes its way up the chain to the President. In this respect, I should emphasize at this point that the public record reveals that there has been a fairly long-running fight over just these sorts of issues within the executive branch over the past couple of years. Ellen Nakashima's story last week is highly relevant here, and there also is relevant material in the Schmitt & Shanker book Counterstrike. Hard to tell from the outside if section 954 is a codification of what has been worked out, or if instead it will break some sort of logjam.

At least as Chesney reads it (and you should click through for the full post), this is about imposing the same kind of inadequate bureaucratic controls that the detainee provisions appear at least partly to impose.

Both, in other words, seem to be an effort to stop the Executive Branch from just launching wars unilaterally without a paper trail and adequate review.

Now, I suggested the detainee provisions were, in part, a response to Warsame's treatment. If so, is StuxNet (and Duqu) the reason behind the cyberwar provision? Is it the proposed Libyan cyberattack, which was reportedly called off? Or did the Administration launch another cyberwar, one that hasn't broken in the press yet?

In any case, it's not like Congress is telling the President to stop launching wars. Just to do so in some organized bureaucratic fashion.