AN UNKNOWN UNKNOWN MADE KNOWN KNOWN

Former Defense Secretary Donald Rumsfeld who authorized torture under the Bush administration, passed away today at age 88. *spit*

THE TIMING OF THE WHITE PAPER

I'm going to do a longer timeline on targeted killing authorizations, but first I wanted to address a more narrow issue: When did DOJ give the (as received) undated white paper released by NBC to Congress?

Michael Isikoff says Congress got the memo in June, 2012.

> It was provided to members of the Senate Intelligence and Judiciary committees in June by administration officials on the condition that it be kept confidential and not discussed publicly.

That actually contradicts the implication made by Pat Leahy in August of last year, who said it was shared as part of his initial request for the DOJ memos.

> Leahy: The five minutes is expired, but I would note that each of the Senators has been provided with a white paper we received back as an initial part of the request I made of this administration.

On November 8, 2011, Pat Leahy complained about

the Administration's previous refusal to turn over the memos. That would put his initial request some time in 2011. He renewed that request on March 8 and June 12, 2012. So if the memo dates to June 2012, it would date to one of Leahy's subsequent attempts to pry it out of the Administration.

But I think Isikoff's reporting is likely correct here (and not just because Leahy has wavered between covering for the Administration and trying to get the memos from the start).

If DOJ gave Congress the memo in June 2012, then Ron Wyden would have gotten it between the time he wrote his February 2012 letter demanding the memos and the time he wrote his January 2013 letter. As I laid out in this post, the questions Wyden posed in those two letters are remarkably similar.

These are the three questions that appear in the second letter but in the first. Both ask some version of these questions (these are from the first letter):

- How much evidence does the President need to decide that a particular American is part of a terrorist group?'
- Does the President have to provide individual Americans with an opportunity to surrender before using lethal force against them?'
- Is the President's authority to kill Americans based on authorization from Congress or his own authority as Commander-in-Chief?
- Can the President order intelligence agencies to

kill an American who is inside the United States?
- What other limitations or boundaries apply to this authority?'

Here are the questions that show up only in the page-long list attached to his second letter.

- What standard is used to determine whether it is feasible to capture a particular American.
- What is the rationale for applying Ex Parte Quirin, Hamdi v. Rumsfeld, and Mathews v. Eldridge to the question of when the President may legally kill an American?
- What impact does Holder's reference to the use of lethal force "outside the hot battlefield in Afghanistan" have on the applicable legal principles of due process laid out in Hamdi?

The capture question, in particular, seems like a likely response to reading the white paper. After all, in spite of the fact that feasibility of capture is one of three main tests in the white paper, here's all it says about feasibility.

> Second, regarding the feasibility of capture, capture would not be feasible if it could not be physically effectuated during the relevant window of opportunity or if the relevant

> country were to decline to consent to a capture operation. Other factors such as undue risk to U.S. personnel conducting a potential capture operation also could be relevant. Feasibility would be a highly fact-specific and potentially time-sensitive inquiry.

Note, too, Wyden uses the same word "feasible" as the white paper uses, when you'd think the true standard would be higher, whether capture was possible at all, not the much weaker "feasible."

And while Wyden refers to Holder's speech (he seems to have done so here and elsewhere to avoid relying on the white paper), his questions about case law seem to come directly from weaknesses in the white paper itself (the inapt use of Matthews v. Eldridge, for example, is one of the problems Jameel Jaffer points out).

Now, all that is speculative support for the timeline laid out by Isikoff.

But if it's correct, consider what it means. After asking for the targeted killing justification starting in February 2011 (actually he says he had already made inquiries by that point), followed by a written request posing very specific questions —such as whether they were relying on Article II or AUMF authority — in February 2012, all DOJ gave Wyden was this crappy white paper (which, I increasingly suspect, may be an amalgam of the memos they wrote, not just a summary of the June 2010 memo).

To give the Intelligence Committees this white paper — which was presumably written for that purpose specifically — without even answering one of the most basic questions in there (the Article II/AUMF question) should only have served to raise more questions.

Which is what it appears to have done.

RON WYDEN: THERE IS MORE THAN ONE TARGETED KILLING MEMO

I've been comparing Ron Wyden's February 2012 letter demanding the authorization the Administration uses to kill American citizens with the one he sent John Brennan last week.

It's striking how similar the letters are, particularly given the Administration's drone publicity tour last year, between the time Wyden wrote the two letters. Wyden dismisses the value of the publicity tour in his latest letter.

> Both you and the Attorney General gave public speeches on this topic early last year, and these speeches were a welcome step in the direction of more transparency and openness, but as I noted at the time, these speeches left a larger number of important questions unanswered. A federal judge recently noted in a Freedom of Information Act case that "no lawyer worth his salt would equate Mr. Holder's statements with the sort of robust analysis that one finds in a properly constructed legal opinion," and I assume that Attorney General Holder would agree that this was not his intent.

And in fact, what's most striking is how similar some key features of the letters are.

For example, the list of questions Wyden appends to his later letter largely repeats and expands on questions Wyden poses in his earlier letter; the only new questions are (these are my summaries):

- What standard is used to determine whether it is feasible to capture a particular American.
- What is the rationale for applying Ex Parte Quirin, Hamdi v. Rumsfeld, and Mathews v. Eldridge to the question of when the President may legally kill an American?
- What impact does Holder's reference to the use of lethal force "outside the hot battlefield in Afghanistan" have on the applicable legal principles of due process laid out in Hamdi?

And given my contention that Judge Colleen McMahon, in her opinion denying ACLU and NYT's request for the drone killing opinion, suggested there were multiple opinions, some of them pertaining solely to CIA, and potentially invoked the Gloves Come Off Memorandum of Notification, I'm especially interested in these two details that remained consistent over the two Wyden letters.

First, in both letters Wyden refers to legal opinions—in the plural. Here's the first letter.

> Senior intelligence officials have said publicly that they have the authority to knowingly use lethal force against Americans in the course of counterterrorism operations, and have indicated that there are secret legal opinions that explain the basis for this authority.
>
> [snip]

> The Director indicated that he would have liked to be responsive to my request, but he told me that he did not have the authority to provide formal written opinions of the Department of Justice's Office of Legal Counsel to Congress.
>
> So, as you will remember, I called you in April 2011 and asked you to ensure that the secret Justice Department opinions that apparently outline the official interpretation of this lethal authority were provided to Congress.
>
> [snip]
>
> For the executive branch to claim that intelligence agencies have the authority to knowingly kill American citizens (subject to publicly unspecified limitations) while at the same time refusing to provide Congress with any and all legal opinions that delineate the executive branch's understanding of this authority represents an indefensible assertion of executive prerogative, and I expected better from the Obama Administration.
>
> [snip]
>
> So I request, again, that you provide me with any and all legal opinions regarding the authority of the President, or individual intelligence agencies, to kill Americans in the course of counterterrorism operations. [my emphasis]

And here's the Brennan letter.

> I have asked repeatedly over the past two years to see the secret legal opinions that contain the executive branch's understanding of the President's authority to kill American

> citizens in the course of counterterrorism operations.
>
> Senior intelligence officials have said publicly that they have authority to knowingly use lethal force against Americans in the course of counterterrorism operations, and have indicated that there are secret legal opinions issued by the Justice Department's Office of Legal Counsel that explain the basis for this authority. I have asked repeatedly to see these opinions, and I have been provided with some relevant information on the topic, but I have yet to see the opinions themselves.
>
> [snip]
>
> As I have said before, this situation is unacceptable. For the executive branch to claim that intelligence agencies have the authority to knowingly kill American citizens but refuse to provide Congress with any and all legal opinions that explain the executive branch's understanding of this authority represents an alarming and indefensible assertion of executive prerogative. [my emphasis]

I'm especially intrigued by Wyden's repetition of "any and all," as if he suspects the Administration might hide the existence of one by revealing the existence of only one more respectable one—a suggestion I myself have made.

And given that Wyden seems certain there are more than one opinions authorizing the President to kill American citizens, I find this question—raised in both letters—very provocative.

> Is the legal basis for the intelligence community's lethal counterterrorism operations the 2001 Congressional Authorization for the Use of Military

> Force, or the President's Commander-in-Chief authority?

I assume "President's Commander-in-Chief authority"—which is the formulation Stephen Preston used in his speech on targeted killing, in contradistinction to the formulation Holder and everyone else used—is shorthand for "authorized under the National Security Act." That is, I assume "President's Commander-in-Chief authority" is a polite way to invoke covert operations.

Here you have a member of the Senate Intelligence Committee—the members of which according to the same law that permits the President to unilaterally authorize covert operations must be briefed on those covert operations—revealing complete ignorance as to whether the President's execution of US citizens was done as a covert op or a legally military one.

Along with a bunch of other troubling things, these details from Wyden's letters reveal something else. The Obama Administration is playing the same shell game with the authorization to kill American citizens that the Bush Administration played with the illegal wiretap program: waving the AUMF around as purported Congressional sanction all the while insisting that the President could—and appears to have, in this case, given the strong hints in McMahon's opinion—unilaterally approve such actions without Congressional sanction.

The evidence is building that the Administration believes it can—and did, in the case of Anwar al-Awlaki—simply kill an American based solely on the President's say-so, under the National Security Act.

APPEALS COURT TREATS COMMISSARY GATORADE SUPPLIES AS A "CLEAR AND PRESENT DANGER"

Navy v. Egan—the SCOTUS case Executive Branch officials always point to to claim unlimited powers over classification authority—just got bigger.

Berry v. Conyers extends the national security employment veto over commissary jobs

The original 1988 case pertained to Thomas Egan, who lost his job as a laborer at a naval base when he was denied a security clearance. He appealed his dismissal to the Merit Systems Protection Board, which then had to determine whether it had authority to review the decision to fire him based on the security clearance denial. Ultimately, SCOTUS held that MSPB could not review the decision of the officer who first fired Egan.

> The grant or denial of security clearance to a particular employee is a sensitive and inherently discretionary judgment call that is committed by law to the appropriate Executive Branch agency having the necessary expertise in protecting classified information. It is not reasonably possible for an outside, nonexpert body to review the substance of such a judgment, and such review cannot be presumed merely because the statute does not expressly preclude it.

Unlike Egan, the plaintiffs in this case did not have jobs that required they have access to classified information. Nevertheless, plaintiffs Rhonda Conyers (who was an accounting clerk whose "security threat" pertained to personal

debt) and Devon Haughton Northover (who worked in a commissary and also charged discrimination) were suspended and demoted, respectively, when the government deemed them a security risk.

In a decision written by Evan Wallach and joined by Alan Lourie, the Federal Circuit held that the Egan precedent,

> require[s] that courts refrain from second-guessing Executive Branch agencies' national security determinations concerning eligibility of an individual to occupy a sensitive position, which may not necessarily involve access to classified information.

That is, the Federal government can fire you in the name of national security if you have a "sensitive" job, whether or not you actually have access to classified information.

As Timothy Dyk's dissent notes, the effect of this ruling is to dramatically limit civil service protections for any position the government deems sensitive, both within DOD—where both Conyers and Northover work—and outside it.

> Under the majority's expansive holding, where an employee's position is designated as a national security position, see 5 C.F.R. § 732.201(a), the Board lacks jurisdiction to review the underlying merits of any removal, suspension, demotion, or other adverse employment action covered by 5 U.S.C. § 7512.
>
> [snip]
>
> As OPM recognizes, under the rule adopted by the majority, "[t]he Board's review . . . is limited to determining whether [the agency] followed necessary procedures . . . [and] the merits of the national security determinations are not

> subject to review."

In doing so, the dissent continues, it would gut protection against whistleblower retaliation and discrimination.

> As the Board points out, the principle adopted by the majority not only precludes review of the merits of adverse actions, it would also "preclude Board and judicial review of whistleblower retaliation and a whole host of other constitutional and statutory violations for federal employees subjected to otherwise appealable removals and other adverse actions." Board Br. at 35. This effect is explicitly conceded by OPM, which agrees that the agency's "liability for damages for alleged discrimination or retaliation" would not be subject to review. OPM Br. at 25. OPM's concession is grounded in existing law since the majority expands Egan to cover all "national security" positions, and Egan has been held to foreclose whistleblower, discrimination, and other constitutional claims.

Tracking Gatorade supplies can now represent a "clear and present danger"

There are a couple of particularly troubling details about how Wallach came to his decision. In a footnote trying to sustain the claim that a commissary employee might be a national security threat, Wallach argues that Northover could represent a threat in the commissary by observing how much rehydration products and sunglasses service members were buying.

> The Board goes too far by comparing a government position at a military base commissary to one in a "Seven Eleven across the street."
>
> [snip]

> Commissary employees do not merely observe "[g]rocery store stock levels" or other-wise publicly observable information. Resp'ts' Br. 20. In fact, commissary stock levels of a particular unclassified item – sunglasses, for example, with shatterproof lenses, or rehydration products – might well hint at deployment orders to a particular region for an identifiable unit. Such troop movements are inherently secret. Cf. Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931) ("When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right . . . . No one would question but that a government might prevent actual obstruction to its recruiting service or the *publication of the sailing dates of transports or the number and location of troops*.") (citing Schenck v. United States, 294 U.S. 47, 52 (1919)) (emphasis added). This is not mere speculation, because, as OPM contends, numbers and locations could very well be derived by a skilled intelligence analyst from military commissary stock levels.

I love how every time these judges uphold the principle that the Executive is uniquely qualified to make these decisions, they always engage in this kind of (their argument would hold, completely incompetent) hypothetical explanation to prove the Executive's claims aren't totally bogus. (The government appears to have cued up the concept of commissary intelligence mapping—but not the Gatorade spying itself—in oral argument.)

And this one is a particularly lovely example, relying as it does not just on the proposition

that how much Gatorade (or more advanced rehydration products) service members purchase is a national security issue, but also citing Near v. Minnesota (a key First Amendment case that established prior restraint) to get to Schenck v US (the regrettable decision upholding the Espionage Act that introduced the concept of "clear and present danger"). That is, ultimately Wallach invokes "clear and present danger" to describe how a commissary employee could hurt our country.

Then Wallach goes on to invoke the due process standard from Hamdi—the same one Eric Holder says was used to kill Anwar al-Awlaki.

> The Board and Respondents must recognize that those instances are the result of balancing competing interests as was the case in Egan and as is the case here. See Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) ("[T]he process due in any given instance is determined by weighing the 'private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process.") (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

Effectively Wallach argues that federal employees must be subject to the kind of justice socialists were—until the Red Scare showed how unreasonable that was—and enemy combatants are, all in the name of national security.

Accounting clerks can now be treated to the same kind of justice as Khalid Sheikh Mohammed.

This decision extends the Executive's arbitrary secrecy regime over more Federal employees

In addition to the whistleblower concerns Dyk laid out in his dissent—which the Government Accountability Project addresses here—this decision exposes large numbers of federal

employees to the arbitrary system that has been expanding—and Congress wants to expand still further—among those with security clearances. The clearance process is already an arbitrary one, which exposes people to the asymmetric authority of the Executive Branch to decide who can work and who can't. But here there's not even a formal review process: once a supervisor deems someone a threat to national security, that decision is largely unreviewable. Thus—as the language of clear and present danger was used before to sow fear and paranoia among government employees—this could be used for political persecution and petty retaliation.

Given past use of Navy v. Egan this decision might expand claims to Executive secrecy, too

I said above that Navy v. Egan is the SCOTUS case Executive Branch officials point to when making vast claims about the Executive's unlimited power over classification issues. David Addington pointed to it to justify insta-declassifying the NIE (and presumably Valerie Plame's covert identity). DOJ lawyers pointed to it to argue that they could prevent al-Haramain from litigating its FISA claim by denying its lawyers had the "need to know" information pertaining to the case. As Steven Aftergood notes, these claims are suspect, but no Court has judged them so yet.

I fear this decision extends this (mis)application of Navy v. Egan, too.

To be clear, this decision only expands the original meaning Navy v. Egan; it doesn't affirm the more expansive readings of it, as pertains to classification, from recent years. Formally, it just means "sensitive" government employees are now subject to the same kind of national security veto that employees with security clearances have been.

Furthermore, this is just a Circuit decision, not a SCOTUS one.

That said, it relies on the language that the expansive readings of Egan also rely on. such as

this passage:

> Affording such discretion to agencies, according to Egan, is based on the President's "authority to classify and control access to information bearing on national security and to determine" who gets access, which "flows primarily from [the Commander in Chief Clause] and exists quite apart from any explicit congressional grant."

Moreover, it does something with national security information that the government has already been trying to do, most notably in Espionage cases like Thomas Drake's, where they tried to prosecute him for retaining information that wasn't even classified, or shouldn't have been.

This kind of language from Wallach's opinion is precisely the kind of argument the government has been trying to make of late.

> In fact, Egan's core focus is on "national security information," not just "classified information." 484 U.S. at 527 (recognizing the government's "compelling interest in withholding national security information") (emphasis added).
>
> [snip]
>
> Egan therefore is predicated on broad national security concerns, which may or may not include issues of access to classified information.

Read expansively (as Egan already has been), this is the kind of language the government might use to justify prosecuting someone for talking about critical infrastructure—problems with bridges or PEPCO's pathetic electrical grid or the Keystone pipeline. Applied the way Navy v. Egan already is, it would extend the Executive Branch's authority to police any

information it wants to call national security related.

The government has been trying to assert its control over information that is not even classified in recent years. While this decision could only be used to supplement these efforts, I wouldn't be surprised if it were.

When managing Gatorade supplies can make a guy a "clear and present danger," such an eventuality no longer seems a stretch.

IT'S THE ZENITH-LIMITING WAR DECLARATION, NOT THE DETAINEE RESTRICTIONS, OBAMA WANTS TO VETO

A bit of a parlor game has broken out over whether Obama really means his veto threat over the detainee provisions of the Defense Authorization. Josh Gerstein weighed in here, including a quote from John McCain accusing the Administration of ratcheting up the stakes.

> It's also clear that, whether for political reasons or due to some complex internal dynamics, the administration seems at this point willing to put up more of a public fight over detainee-related strictures than it has in the past. However, whether that will ultimately translate to a willingness to blow up the defense bill with a veto is unclear. At least some lawmakers seem to view the threats as bluster, in light of the president's track record.

> As McCain said Thursday: “The administration ratcheted up the stakes…with a threat of a veto. I hope they are not serious about it. There is too much in this bill that is important to this Nation’s defense.”

The veto threat is probably tied to the new AUMF language

But I think Gerstein has the dynamic wrong—and his claim that this veto threat represents more public fight than he has shown in the past is flat out wrong. You see, Gerstein’s making the claim based on the assertion that the fight is over the Administration’s authority to move and try detainees as it sees necessary.

> In the past three years, President Barack Obama’s administration has been in numerous public skirmishes with Congressional Republicans over legislation intended to limit Obama’s power to release Al Qaeda prisoners, move them to the U.S. and decide where they should face trial.
>
> [snip]
>
> A couple of thoughts on the dust-up: Obama has already signed legislation putting limits on releases of detainees. While officials said at the time that the White House would oppose similar proposals in the future, it is clear that as a practical matter those limits have now become the baseline for those in Congress. [my emphasis]

Gerstein’s right that Obama stopped short of vetoing the Defense Authorization last year, which had those limits, instead issuing a signing statement.

> Despite my strong objection to these provisions, which my Administration has consistently opposed, I have signed this

> Act because of the importance of authorizing appropriations for, among other things, our military activities in 2011.
>
> Nevertheless, my Administration will work with the Congress to seek repeal of these restrictions, will seek to mitigate their effects, and will oppose any attempt to extend or expand them in the future.

And Obama didn't issue a veto threat on similar restrictions place on DHS funding.

But Obama has issued a veto threat on "detainee and related issues" before—on Buck McKeon's version of the Defense Authorization in May. That version added a couple of things to last year's Defense Authorization: More limits on when the government can use civilian courts to try terrorists, limits on the detainee review system beyond what Obama laid out in an Executive Order last year.

And this language:

> 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 bill is less harsh on several counts than McKeon's language: it includes a series of waivers to bypass military detention and lets the Administration write procedures for determining who qualifies as a terrorist. While these loopholes require the Administration to do more paperwork, they still allow it to achieve the status quo if it does use those loopholes.

But it still includes very similar to McKeon's defining this war.

> Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107-40) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war.
>
> COVERED PERSONS—A covered person under this section is any person as follows:
>
> (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
>
> (2) A person who was part of or

> substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or who has supported such hostilities in aid of such enemy forces.
>
> [snip]
>
> (d) CONSTRUCTION.—. Nothing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force.

Given that the waivers and procedures get around many of the worst parts of the McKeon version of this bill, I'd suggest it's this language, effectively restating the AUMF and affirming the ability to detain people based on that authority, and not limits on what he can do with detainees, that Obama finds so troublesome.

The new AUMF language threatens OLC interpretations of Youngstown used since 2004

Which is why I find it interesting that Jack Goldsmith has now weighed in, goading Obama to carry through on his veto threat.

> But failing to veto the bill after threatening one will hardly make the left happy; it is more likely to confirm its belief that he is spineless on detention issues.

Goldsmith's language repeats Gerstein's focus on detainee restrictions.

> Is the president really going to expose himself, in an election cycle, to the charge (fair or not) that he jeopardized the nation's defenses in order to vindicate the principle of presidential discretion to release terrorists from GTMO or to bring them to the United

> States to try them in civilian courts? It is the right principle, but it is a generally unpopular one that the president has not to date fought for.

But that's not really his baby like it is for his co-bloggers Robert Chesney and Benjamin Wittes. Or rather, just the presidential discretion part is. And Goldsmith, as much as anyone out there, knows well how that discretion has been built up over the years, in total secrecy, in OLC opinions that claim Presidential authorization for certain things—detention, certainly, but also wiretapping and assassination—based on the vaguely worded version of the AUMF passed in 2001. That's because he authored a particularly seminal version of that argument when he shifted the justification for Bush's illegal wiretap program from raw Article II authority to authorization rooted in the AUMF.

> The [AUMF] functions as precisely such legislation [that overrides FISA]: it is emergency legislation passed to address a specific armed conflict and expressly designed to authorize whatever military actions the Executive deems appropriate to safeguard the United States. In it the Executive sought and received a blanket authorization from Congress for all uses of the military against al Qaeda that might be necessary to prevent future terrorist attacks against the United States. There mere fact that the Authorization does not expressly amend FISA is not material. By its plain terms it gives clear authorization for "all necessary and appropriate force" against al Qaeda that the President deems required "to protect United States citizens both at home and abroad from those (including al Qaeda) who "planned, authorized, committed, or aided" the September 11 attacks. [citation omitted] It is perfectly natural that Congress

> did not attempt to single out into subcategories every aspect of the use of the armed forces it was authorizing, for as the Supreme Court has recognized, even in normal times outside the context of a crisis "Congress cannot anticipate and legislate with regard to every posible action the President may find it necessary to take." [my emphasis]

After Hamdi, this assertion that the AUMF authorized fairly broad use of Presidential discretion became more closely tied to the President's detention authority, as that was the one example where SCOTUS had affirmed that broad "uses of the military" were included in the AUMF. Here's how it got translated in the White Paper purportedly authorizing limited parts of Bush's illegal wiretapping program.

> The Supreme Court's interpretation of the AUMF in Hamdi v. Rumsfeld, 542 U.S. 507 (2004), confirms that Congress in the AUMF gave its express approval to the military conflict against al Qaeda and its allies and thereby to the President's use of all traditional and accepted incidents of force in this current military conflict—including warrantless electronic surveillance to intercept enemy communications both at home and abroad. This understanding of the AUMF demonstrates Congress's support for the President's authority to protect the Nation and, at the same time, adheres to Justice O'Connor's admonition that "a state of war is not a blank check for the President," Hamdi, 542 U.S. at 536 (plurality opinion), particularly in view of the narrow scope of the NSA activities.
> [snip]
>
> Although Congress's war powers under Article I, Section 8 of the Constitution empower Congress to legislate regarding the raising, regulation, and material

> support of the Armed Forces and related matters, rather than the prosecution of military campaigns, the AUMF indicates Congress's endorsement of the President's use of his constitutional war powers. This authorization transforms the struggle against al Qaeda and related terrorist organizations from what Justice Jackson called "a zone of twilight," in which the President and the Congress may have concurrent powers whose "distribution is uncertain," Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring), into a situation in which the President's authority is at is maximum because "it includes all that he possesses in his own right plus all that Congress can delegate," id. at 635. With regard to these fundamental tools of warfare—and, as demonstrated below, warrantless electronic surveillance against the declared enemy is one such tool—the AUMF places the President's authority at its zenith under Youngstown.

In other words, for years the Executive Branch has used the vague wording of the AUMF to claim all the laws limiting the Executive Branch didn't apply, because the AUMF trumped those laws. Their assertion the AUMF authorized detention authority became a cornerstone of that argument because in Hamdi, they claimed, SCOTUS affirmed that broad reading of the AUMF. But with the language in the Defense Authorization (both McKeon's earlier version and the one that will pass the Senate today), Congress asserts its authority to define the Executive Branch's authority, which ought to, at least, put limits to the areas in which the Executive can be claiming to acting at the zenith of its power.

The Executive Branch has already claimed authority to exceed the plain language of the new AUMF language

And while the language of the section—which purports to define the war in the same way the Administration already has in secret—and the Construction language, intending neither "to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force" (as well as the Administration's successful attempt to get SASC to take out language limiting the application of this definition to US citizens), might seem to achieve a status quo, I suspect that's not really the case.

That's because the Executive has already exceeded the terms of the newly-defined AUMF (or at least claimed the authority to do so). Here's how Goldsmith defined the application of the war on terror in 2004 (probably because he needed to apply it to the way Bush's illegal wiretap program had already been used).

> the authority to intercept the content of international communications "for which, based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are reasonable grounds to believe … [that] a party to such communication is a group engaged in international terrorism, or activities in preparation therefor, or any agent of such a group," as long as that group is al Qaeda, an affiliate of al Qaeda or another international terrorist group that the President has determined both (a) is in armed conflict with the United States and (b) poses a threat of hostile actions within the United States; [my emphasis]

This definition would seem to permit the use of the President's war on terror authority against groups like FARC or Hezbollah, not to mention—particularly in the wake of the Scary Iran Plot—al Quds. The language in the Defense Authorization limits the target of the President's counterterrorism authorities to

"associated forces," which probably doesn't include FARC or the Quds Force.

In other words, by deigning to define the war on terror, Congress not only threatens that entire "AUMF puts the President at the zenith of his power" argument on which things like wiretapping and, presumably, geolocation and assassination authorities rely. But it has done so in terms that are more narrow than the Executive has already claimed in its OLC opinions.

Administration language opposes this limit on its claimed authority

And this focus—a concern that the explicit restatement of AUMF actually limits the Executive Branch's authority—shows up in Administration objections to it. Here's what they said in May:

> The Administration strongly objects to section 1034 which, in purporting to affirm the conflict, would effectively recharacterize its scope and would risk creating confusion regarding applicable standards.

Here's what they said last week:

> Section 1031 attempts to expressly codify the detention authority that exists under the Authorization for Use of Military Force (Public Law 107-40) (the "AUMF"). The authorities granted by the AUMF, including the detention authority, are essential to our ability to protect the American people from the threat posed by al-Qa'ida and its associated forces, and have enabled us to confront the full range of threats this country faces from those organizations and individuals. Because the authorities codified in this section already exist, the Administration does not believe codification is necessary and poses some risk. After a decade of settled jurisprudence on detention

> authority, Congress must be careful not to open a whole new series of legal questions that will distract from our efforts to protect the country. While the current language minimizes many of those risks, future legislative action must ensure that the codification in statute of express military detention authority does not carry unintended consequences that could compromise our ability to protect the American people.

And the language of one of Gerstein's anonymous Administration officials can certainly be read to include flexibility both on questions about where you hold detainees but also on whether they can assassinate a US citizen affiliated with a group that didn't exist on 9/11.

> "The President's record in dealing effectively and forcefully with the terrorist threat is second to none," a senior administration official said. "The very idea that some members of Congress think we will be better off if they limit the flexibility of our counterterrorism professionals, micromanage their operational activities, and further restrict our ability to deal with terrorists currently or prospectively in our custody is utterly absurd."

The Administration—and Goldsmith—are ultimately talking about unchecked Executive Branch discretion. Sometimes the Administration has used that discretion to do things human rights supporters would prefer it did, such as trying detainees in civilian courts. But just as frequently, the Administration has done things that human rights supporters abhor, such as killing a US citizen with no due process or data mining and geolocating completely innocent citizens. The authority to do all of those things, good and bad, come from the claims about the AUMF that rely on its vague wording.

It seems fairly clear. The veto threat is about that discretion, not just detainee issues. And it's only when the underlying basis for Executive Branch discretion became threatened that the Administration issued a veto threat.

FIRST GITMO HABEAS CASE MAKES WAY TO SCOTUS

First Gitmo Habeas Case Makes Way To SCOTUS and it will be an important bellwether to see if the Court accepts cert and, if so, what they do with the case.

GOVERNMENT CONTINUES ITS FIGHT FOR INDEFINITE DETENTION

The government appealed its loss in the habeas petition of Mohamedou Ould Salahi Friday.

It's worth reviewing what this appeal is about. At the District level, Judge James Robertson ruled that while Salahi had clearly been an al Qaeda sympathizer and, before al Qaeda declared war on the US had been a sworn member of al Qaeda, the government had presented no admissible evidence (the most damning evidence submitted was gotten by torturing Salahi) that he was working under the orders of al Qaeda when they detained him in 2001.

His ruling is important—and damaging for the

government's hopes to indefinitely detain those who it can't charge—for two reasons. First, because he hewed very closely to the terms of the AUMF.

> If the government has any authority to detain Salahi without charging him with a crime, its source is the Authorization for Use of Military Force, Pub. L. 107-04, 115 Stat. 224 (2001).
>
> > "The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force, Pub. L. 107-04, 115 Stat. 224 (2001).
>
> That purpose, the "prevent [ion of] any future acts of international terrorism," has the Supreme Court's seal of approval, see Boumediene, 128 S.Ct. at 2277 ("The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.") those who, as the government argued in Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2639 (2004), were "part of or supporting forces hostile to the United States or coalition partners . . and who engaged in an armed conflict against the United States." (internal quotations omitted) .

And based on the AUMF's reference to those who attacked us on 9/11, Robertson ruled that a suspicion that Salahi might one day return to al

Qaeda—even if he had not been part of al Qaeda in 2001 when it attacked the US and had not taken up hostilities against the US—was not enough to detain him indefinitely.

> The government's problem is that its proof that Salahi gave material support to terrorists is so attenuated, or so tainted by coercion and mistreatment, or so classified, that it cannot support a successful criminal prosecution. Nevertheless, the government wants to hold Salahi indefinitely, because of its concern that he might renew his oath to al-Qaida and become a terrorist upon his release. That concern may indeed be well-founded. Salahi fought with al-Qaida in Afghanistan (twenty years ago) , associated with at least a half-dozen known al-Qaida members and terrorists, and somehow found and lived among or with al-Qaida cell members in Montreal. But a habeas court may not permit a man to be held indefinitely upon suspicion, or because of the government's prediction that he may do unlawful acts in the future -any more than a habeas court may rely upon its prediction that a man will not be dangerous in the future and order his release if he was lawfully detained in the first place. The question, upon which the government had the burden of proof, was whether, at the time of his capture, Salahi was a "part of" al-Qaida. On the record before me, I cannot find that he was. [emphasis original]

And of course, given that both sides admit much of the evidence is inadmissible because it was coerced, this raises questions of what happens to those we're holding because they incriminated themselves under coercion.

“AND IT DOES NOT EMPLOY THE PHRASE ‘ENEMY COMBATANT'”

Barack Obama’s DOJ finished it’s homework assignment: to tell the Courts how it will deal with all the men Bush detained. But it basically amounts to renaming the same authorities and powers Bush claimed.

RECYCLING TORTURE TIMELINES

Per Jeff’s suggestion, I took a closer look at Zelikow’s memo on how the CIA stiffed the 9/11 Commission on evidence relating to interrogations of Abu Zubaydah and al-Nashiri. I’ll come back and comment on it in more detail—but I was struck by how closely the requests coincided with the beginnings of the Abu Ghraib scandal and Tenet’s resignation.

ABU GHRAIB, HAMDI, AND RATHER

I’ve been meaning to go back to compare the chronology laid out by Dan Rather in his complaint as it pertains to Abu Ghraib with the chronology of the Taguba investigation and the Hamdi case. Two things stick out. First, Myers pretended to be ignorant of the details of the

abuse on May 6, several weeks after he called Dan Rather personally to spike—or delay—the story.