

ERIC HOLDER, INDEFINITELY DETAINED BY DOD?

The most shocking phrase in the Senate's Defense Authorization detainee provisions to me was not the language affirming indefinite detention. That language simply affirms and possibly narrows the status quo. Rather, it was this language purporting to strike a "balance" between military and civilian detention for alleged terrorists by offering the Secretary of Defense the option of waiving military custody for terrorist detainees.

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

The presumption of military detention is bad enough. But to codify that the Defense Secretary would not even consult with DOJ on this front was shocking. After all, there is no reason any of these people—Defense Secretary, DNI, or Secretary of State—would know about a terrorist suspect captured in the US. They certainly wouldn't know the investigation and prosecution strategies. Yet, the language passed last Thursday would not only allow the Defense Secretary to bypass DOJ as a default, but wouldn't even require the Defense Secretary to ask whether it's a good idea to move a suspect into DOD custody.

It effectively makes civilian prosecutors supplicants to the military bureaucracy to be allowed to do their work. And it's particularly

troubling given all the Bush-era instances in which FBI's experts on al Qaeda were prevented from using that expertise to question detainees so Cheney's torturers could torture them instead.

And the language in the Senate bill is actually more restrictive than the equivalent language in the House equivalent, which simply gives the Secretary of Defense input on civilian prosecution decisions.

SEC. 1042. REQUIREMENT FOR DEPARTMENT OF JUSTICE CONSULTATION REGARDING PROSECUTION OF TERRORISTS.

(a) IN GENERAL.—Before any officer or employee of the Department of Justice institutes any prosecution of an alien in a United States district court for a terrorist offense, the Attorney General, Deputy Attorney General, or Assistant Attorney General for the Criminal Division, shall consult with the Director of National Intelligence and the Secretary of Defense about—

(1) whether the prosecution should take place in a United States district court or before a military commission under chapter 47A of title 10, United States Code; and

(2) whether the individual should be transferred into military custody for purposes of intelligence interviews.

Whereas in May, crazy House Republicans wanted to give the Secretary of Defense veto power over civilian prosecutions, on Thursday the Senate voted to take the Attorney General out of discussions over whether civilian prosecutions are better than military detention altogether.

And yet, of all the Administration complaints about these provisions—John Brennan, David Petraeus, James Clapper, Leon Panetta—Robert Mueller is the only one who spoke from DOJ

[Update: National Security Division head Lisa Monaco spoke at the ABA National Security conference]. Unless I missed it, Eric Holder didn't issue a statement. And it was only after the bill passed the Senate that some anonymous DOJ official released a comprehensive explanation of why this is such a bad idea (click through for the whole explanation, but here's the part on the Defense Secretary getting to decide).

To be sure, the bill contains a waiver provision under which the Secretary of Defense may waive mandatory military custody after consulting with the Secretary of State and the Director of National Intelligence. But the Secretaries of Defense and State and the Director of National Intelligence are not those primarily responsible for investigating and responding to acts of terrorism on U.S. soil; this responsibility has been assigned for many years – by Presidents of both political parties – to the FBI. In many circumstances, it may not be possible to arrange briefings, secure the necessary concurrences, and execute a waiver in the time frame needed to meet operational needs. Moreover, it is no answer to the acute operational problems the proposed provision creates for terrorism investigations to say that it can be waived. The law enforcement professionals on the front lines who are charged with protecting the country from terrorist threats on U.S. soil need a predictable, stable, and time-tested framework of rules within which to operate, not a complex system of exceptions and waivers that will inevitably sow confusion and result in operational errors.

In the middle of a debate over whether we should basically upend the most successful means we've

had to pursue terrorists in this country, only Robert Mueller and—belatedly and not entirely effectively, Dianne Feinstein—made a case for how stupid this is.

Of course, Eric Holder is rather distracted of late, trying to keep his job in the face of the expanding Fast and Furious investigations.

And that may well be the point. For better or worse, Republicans have teed up on Holder the way they did against Clinton, making him unable to defend civilian law more generally. (Remember when Republicans claimed Clinton tried to take out Osama bin Laden's camps in Afghanistan solely to distract from Monica Lewinsky? This feels familiar.)

But that leaves a void, a void the Administration has not filled.

Obama claims he's still going to veto the Defense Authorization because of these detainee provisions. Good. I think he should. But if he really plans to do so, someone needs to be fear-mongering 24/7 about how much less safe these provisions will make us (and they will).

Obama seems to want to make every political conversation about the economy right now. But when he prepares to veto this bill, the militarists will rightly point out there's a lot of money attached to this bill, too. So to lay the groundwork for why this is important even in spite of the financial hit a delay in reauthorization will cause, someone needs to make it clear that the military presumption will make us all less safe.

LINDSEY GRAHAM'S

INDEPENDENT REVIEW FOR ALL DETAINEES IN US PRISONS

As I've said before, I think Carl Levin's assurances that habeas corpus will prevent the Executive from holding people without cause under his new detainee provisions (and, frankly, under the status quo) is dangerously naive, because it ignores how badly the DC Circuit has gutted habeas.

That said, maybe this colloquy between Lindsey Graham and Carl Levin might help. (h/t to Lawfare for making transcripts available)

Mr. GRAHAM. If someone is picked up as a suspected enemy combatant under this narrow window, not only does the executive branch get to determine how best to do that—do you agree with me that, in this war, that every person picked up as an enemy combatant—citizen or not—here in the United States goes before a Federal judge, and our government has to prove to an independent judiciary outside the executive branch by a preponderance of the evidence that you are who we say you are and that you have fit in this narrow window? That if you are worried about some abuse of this, we have got a check and balance where the judiciary, under the law that we have created, has an independent review obligation to determine whether the executive branch has abused their power, and that decision can be appealed all the way to the Supreme Court?

Mr. LEVIN. That guarantee is called habeas corpus. It has been in our law. It is untouched by anything in this bill. Quite the opposite; we actually enhance the procedures here.

[snip]

Mr. GRAHAM. In this case where somebody is worried about being picked up by a rogue executive branch because they went to the wrong political rally, they don't have to worry very long, because **our Federal courts have the right and the obligation to make sure the government proves their case that you are a member of al-Qaida** and didn't go to a political rally. That has never happened in any other war. That is a check and balance here in this war. And let me tell you why it is necessary.

This is a war without end. There will never be a surrender ceremony signing on the USS Missouri. So what we have done, knowing that an enemy combatant determination could be a de facto life sentence, is **we are requiring the courts to look over the military's shoulder to create checks and balances**. Quite frankly, I think that is a good accommodation.

[snip]

I want to be able to tell anybody who is interested that no person in an American prison—civilian or military—held as a suspected member of al-Qaida will be held without independent judicial review. We are not allowing the executive branch to make that decision unchecked. For the first time in the history of American warfare, every American combatant held by the executive branch will have their day in Federal court, and **the government has to prove by a preponderance of the evidence you are in fact part of the enemy force.** [my emphasis]

Not only does Graham insist the standard in habeas cases must be a “preponderance of the evidence” standard—something the DC Circuit has

threatened to chip away at. But the language about courts having an obligation to make sure the government proves its case and courts looking over the shoulder sure implies a stronger review than Janice Rogers Brown understands it.

Furthermore, while Graham speaks explicitly at times about people caught in the US, his aspiration that “no person in an American prison ... will be held without independent judicial review” would sure sound good to the detainees in the American prison at Bagram, particularly taken in conjunction with Section 1036, which seems to suggest they get a review too.

Of course, passing a law stating that habeas corpus must consist of something more than a Circuit Court Judge rubber-stamping the government’s inaccurate intelligence files would be far better. But this language, showing legislative intent that habeas review remain real, is about all we get these days.

WHY THE IRAQ AUMF STILL MATTERS

The big headline that came out of yesterday’s American Bar Association National Security panels is that DOD General Counsel Jeh Johnson and CIA General Counsel Stephen Preston warned that US citizens could be targeted as military targets if the Executive Branch deemed them to be enemies.

U.S. citizens are legitimate military targets when they take up arms with al-Qaida, top national security lawyers in the Obama administration said Thursday.

[snip]

Johnson said only the executive branch,

not the courts, is equipped to make military battlefield targeting decisions about who qualifies as an enemy.

We knew that. Still, it's useful to have the Constitutional Lawyer President's top aides reconfirm that's how they function.

But I want to point to a few other data points from yesterday's panels (thanks to Daphne Eviatar for her great live-tweeting).

First, Johnson also said (in the context of discussions on cyberspace, I think),

Jeh Johnson: interrupting the enemy's ability to communicate is a traditionally military activity.

Sure, it is not news that the government (or its British allies) have hacked terrorist "communications," as when they replaced the AQAP propaganda website, "Insight," with a cupcake recipe (never mind whether it's effective to delay the publication of something like this for just one week).

But note what formula Johnson is using: they've justified blocking speech by calling it the communication of the enemy. And then apparently using Jack Goldsmith's formulation, they have said the AUMF gives them war powers that trump existing domestic law, interrupting enemy communications is a traditional war power, and therefore the government can block the communications of anyone under one of our active AUMFs.

Johnson also scoffed at the distinction between the battlefield and the non-battlefield.

Jeh Johnson: the limits of "battlefield v. Non battlefield is a distinction that is growing stale." But then, it's not a global war. ?

Again, this kind of argument gets used in OLC

opinions to authorize the government targeting “enemies” in our own country. On the question of “interrupting enemy communication,” for example, it would seem to rationalize shutting down US based servers.

Then, later in the day Marty Lederman (who of course has written OLC opinions broadly interpreting AUMF authorities based on the earlier Jack Goldsmith ones) acknowledged that Americans aren’t even allowed to know everyone the US considers an enemy.

Lederman: b/c of classification, “we’re in armed conflicts with some groups the American public doesn’t know we’re in armed conflict with.”

Now, as I’ve noted, one of the innovations with the Defense Authorization passed yesterday is a requirement that the Executive Branch actually brief Congress on who we’re at war with, which I take to suggest that Congress doesn’t yet necessarily know everyone who we’re in “armed conflict” with.

Which brings us to how Jack Goldsmith defined the “terrorists” whom the government could wiretap without a warrant.

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;**

It's possible the definition of our enemy has expanded still further since the time Goldsmith wrote this in 2004. Note Mark Udall's ominous invocation of "Any other statutory or constitutional authority for use of military force" that the Administration might use to authorize detaining someone. But we know that, at a minimum, the Executive Branch used the invocations of terrorists in the Iraq AUMF—which are much more generalized than the already vague definition of terrorist in the 9/11 AUMF—to say the President could use war powers against people he calls terrorists who have nothing to do with 9/11 or al Qaeda.

So consider what this legal house of cards is built on. Largely because the Bush Administration sent Ibn Sheikh al-Libi to our Egyptian allies to torture, it got to include terrorism language in an AUMF against a country that had no tie to terrorism. It then used that language on terrorism to justify ignoring domestic laws like FISA. Given Lederman's language, we can assume the Administration is still using the Iraq AUMF in the same way Goldsmith did. And yet, in spite of the fact that the war is ending, we refuse to repeal the AUMF used to authorize this big power grab.

ADMINISTRATION HAS MEANS TO SUSTAIN CIVILIAN PRIMACY WITHOUT VETO

As we all wait to see whether Obama will follow through on his veto threat tied to the detainee provisions in the Defense Authorization, I want to make an observation.

The Obama Administration has the means—short of

a veto—to sustain civilian law primacy even if this bill is passed. But they will not use it.

As Lindsey Graham and Carl Levin repeat over and over when defending the detainee provisions—the detainee provisions require the Executive Branch to come up with procedures to determine whether someone qualifies as a covered person.

Not later than 60 days after the date of the enactment of this Act, the President shall issue, and submit to Congress, procedures for implementing this section.

The procedures for implementing this section shall include, but not be limited to, procedures as follows:

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

With (a)(2) being whether or not the detainee was a Covered Person:

The requirement [for military detention] shall apply to any person whose detention is authorized under 1031 who is determined—

(A) to be a member of, or part of, al-Qaeda or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda; and

(B) to have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners.

Nothing in the bill allows Congress to override the procedures developed by the Administration; it only requires that Congress get a copy of them.

Which would seem to permit the Administration to issue the following procedures:

1. The persons authorized to make determinations whether or not someone is a “Covered Person” are Article III jurors and/or jurists.
2. The process by which it will be determined whether or not someone is a “Covered Person” will be a civilian trial.

That would seem to render the effect of the most noxious part of the detainee provisions minimal: rather than imprisoning convicted terrorists at Florence SuperMax, those terrorists will be detained at Leavenworth. But they won’t be transferred to military custody until after they get a civilian trial.

They won’t do this, mind you, not just because it would make the Republicans go apeshit and would tie their hands. But they like the power that comes from the ability to make up this shit as they go along, and would never put in writing that courts must be involved. (Indeed, today Jeh Johnson repeated the Administration’s prior assertion that courts are not authorized to review the Administration’s targeting decisions.

But it would be a way to dispense with this crappy bill.

EFFORTS TO COMBAT LEVIN-MCCAIN DON’T DO

ANYTHING TO PROHIBIT INDEFINITE DETENTION OF AMERICANS

When he gets defensive, Carl Levin can be tremendously cantankerous (sometimes that's a good thing, but not when he's pushing terrible law like the detainee provisions in the Defense Authorization).

That cantankerous Carl Levin of late started repeatedly invoking Hamdi in response to claims the Levin-McCain language newly subjects American citizens to indefinite detention.

Now, in terms of constitutional provisions, the ultimate authority on the constitution of the United States is the Supreme Court of the United States, and here is what they have said. In the Hamdi case about the issue which both our friends have raised about American citizens being subject to the law of war. **"A citizen," the Supreme Court said in 2004, "no less than an alien, can be part of supporting forces hostile to the United States and engage in armed conflict against the United States. Such a citizen,"** referring to an American citizen, **"if released would pose the same threat of returning to the front during the ongoing conflict."** And here is the bottom line for the Supreme Court. If we just take this one line out of this whole debate, it would be a breath of fresh air to cut through some of the words that have been used here this morning, one line. **"There is no bar to this nation's holding one of its own citizens as an enemy combatant."** Okay? That's not me, that's not Senator Graham, that's not Senator McCain. That's the Supreme Court of the United States recently. **"There is no bar to this nation's holding one of its own**

citizens as an enemy combatant.” [my emphasis]

He’s being insufferable, but when I see claims that the new AUMF language—which actually may impose new limits on the use of the AUMF from the current known usage—is what makes it legal to indefinitely detain US citizens, I’m sympathetic to his stubborn repetition.

This law doesn’t codify indefinite detention. SCOTUS already did that in Hamdi.

I’m sympathetic to Levin’s cantankerous repetition because of what I see as the real problem with those attacking the detainee provisions because they purportedly codify indefinite detention of Americans (as opposed to a range of other superb reasons to oppose the language). None of the supposed fixes to the detainee provisions—neither defeat of the provisions outright nor the Udall Amendment—does a damn thing to limit the indefinite detention of American citizens. On the contrary, both simply allow the President—whether it be President Obama or a future President (say) Gingrich—to continue interpreting the AUMF as he or she sees fit (though Udall’s amendment might—if if the Administration cooperated where they’ve refused to in the past—provide transparency to such interpretations).

And that’s important. Because the only thing that has prevented the Executive from holding American citizens indefinitely in the past—it did hold Jose Padilla for a time, after all, after capturing him in the US—is the threat that courts might override that decision in a habeas review. But since the time when both Administrations moved people into DOJ custody to avoid such a review, habeas corpus has been gutted by the DC Circuit. No Administration would have to worry about holding a Padilla indefinitely based on Abu Zubadayh’s torture-tainted testimony, after all, because Janice Rogers Brown has decided that judges should not question the Executive’s intelligence reports,

not even if they're obviously flawed.

Sure, Presidents might still avoid military detention because it risks alarming Americans. It might avoid military detention because it has established so much flexibility within the DOJ system itself that military detention offers no advantage. But the reasons it would or would not use military detention have become more and more about politics, in light of habeas developments since that time.

Nothing stops the President from arresting an American and holding him in military custody except for habeas corpus. Nothing **has** stopped the President from doing so. No legislative efforts to guard the President's "flexibility" on these issues will change that. And now that habeas has been gutted, that bar is even lower. But that fact is true independent of Levin-McCain.

But there are, presumably, things Congress could do to rein in the President's authority to hold Americans indefinitely. For example, it could explicitly exempt American citizens from military detention (as SASC originally did, until the Administration asked them to take language out).

Or it could simply end the endless wars that legally justify military detention. The most concrete effort yesterday to rein in the President's authority to detain Americans indefinitely yesterday was not the Udall Amendment, but the Paul Amendment attempting to repeal the Iraq War AUMF. That's because OLC has used the Iraq AUMF to expand the definition of "terrorist" beyond those with a concrete tie to al Qaeda. By repealing the Iraq War AUMF, you would at least limit the types of alleged terrorists the Administration could detain. Oddly, Udall's Amendment reaffirmed the Iraq AUMF language, even though he did vote in favor of Paul's repeal. And at least 12 Democrats—people like Blumenthal, Coons, Kerry, Mikulski, and Schumer—who voted for the Udall Amendment voted against the Paul Amendment.

Congress could also pass language reaffirming real judicial review of habeas petitions—basically reversing Janice Rogers Brown’s crappy opinion. Presumably, Presidents would be less likely to use indefinite military detention if habeas offered a real prospect of review.

But I’m not aware of anyone screaming about indefinite detention who has proposed these things (though it’s possible someone did as an amendment).

Update: I take that back. This DiFi Amendment would do that:

SA 1126. Mrs. FEINSTEIN (for herself, Mr. Leahy, Mr. Durbin, and Mr. Udall of Colorado) submitted an amendment intended to be proposed by her to the bill S. 1867,

[snip]

On page 360, between lines 21 and 22, insert the following:

(e) *Applicability to Citizens.*—The authority described in this section for the Armed Forces of the United States to detain a person does not include the authority to detain a citizen of the United States without trial until the end of the hostilities.

One “benefit” of Levin-McCain, at least, is that it has raised awareness of what is, in fact, the case already. The President has long claimed the authority, backed by Hamdi, to hold American citizens in military detention, though with exceptions like Padilla, both Bush and Obama have largely applied that authority to do different things, like wiretap everyone or kill Anwar al-Awlaki. Eliminating the threat of indefinite detention (and along with it, the targeted killing of American citizens) will require affirmative legislation, not the passivity or (worse) defense of unchecked

executive power currently embraced by Democrats. It will take civil libertarians using the same heavy hand with Executive Power as Republicans (with Levin) have used to enshrine presumptive military detention.

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.

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.

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.

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?

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...

...

SENATOR GRAHAM: What's the longest we can keep somebody on the ship?

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.

SENATOR GRAHAM: What if you can't do either one of those?

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.

UDALL AMENDMENT FAILS 37-61

In the battle of two wrong sides, the Democrats lost, with the Udall Amendment failing 37-61. The vote is interesting, first of all, as a read of Obama's ability to sustain a veto. Right now, the militarists do not have a two-thirds majority to override.

Also of interest are some of the Democrats voting against the Udall Amendment, most notably Sheldon Whitehouse.

Rand Paul and Mark Kirk are the only two Republicans to vote in favor of Udall.

I'll have a more complete discussion of the vote count shortly.

Update: Here's the roll call. The Dems voting against are:

- Casey
- Conrad
- Hagan*
- Inouye
- Kohl
- Landrieu
- Levin*
- Lieberman*
- Manchin*
- McCaskill*
- Menendez
- Bad Nelson*
- Pryor
- Reed*
- Shaheen*
- Stabenow
- Whitehouse

I'm interested in the way the Dem SASC members voted. I've put asterisks next to those people

above; SASC members voting for Udall's Amendment are Udall himself, Akaka, Webb, Gillibrand, and Blumenthal. Begich did not vote.

Update: Ron Paul corrected to Rand per skinla.

MARK UDALL'S UNSATISFACTORY SOLUTION TO THE DETAINEE PROVISIONS

As I have repeatedly described, I have very mixed feelings about the debate over Detainee Provisions set to pass the Senate tonight or tomorrow. I view it as a fight between advocates of martial law and advocates of relatively unchecked Presidential power. And as I've pointed out, the SASC compromise language actually limits Presidential power as it has been interpreted in a series of secret OLC opinions.

Which is why I'm no happier with Mark Udall's amendment than I am with any of the other options here.

On its face, Udall's amendment looks like a reset: A request that the Executive Branch describe precisely how it sees the military should be used in detention.

SEC. 1031. REVIEW OF AUTHORITY OF THE ARMED FORCES OF THE UNITED STATES TO DETAIN COVERED PERSONS PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE.

(a) *In General.*—Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense shall, in consultation with appropriate officials in the Executive Office of the President, the Director of National

Intelligence, the Secretary of State, the Secretary of Homeland Security, and the Attorney General, submit to the appropriate committees of Congress a report setting forth the following:

(1) A statement of the position of the Executive Branch on the appropriate role for the Armed Forces of the United States in the detention and prosecution of covered persons (as defined in subsection (b)).

(2) A statement and assessment of the legal authority asserted by the Executive Branch for such detention and prosecution.

(3) A statement of any existing deficiencies or anticipated deficiencies in the legal authority for such detention and prosecution.

On one hand, this seems like a fair compromise. The Republicans want something in writing, Carl Levin claims SASC met just about every demand the Administration made in its attempt to codify the authority, but in response the President still issued a veto threat. So why not ask the President to provide language codifying the authority himself?

And after the President submits such language, then all three committees with equities on this issue—not just SASC, but also SJC and SSCI—can propose legislation to codify those authorities (note, Udall is a member of SASC and SSCI, but not SJC).

(c) *Congressional Action.*—Each of the appropriate committees of Congress may, not later than 45 days after receipt of the report required by subsection (a), hold a hearing on the report, and shall, within 45 days of such hearings, report to Congress legislation, if such committee determines legislation is appropriate and advisable, modifying or

expanding the authority of the Executive Branch to carry out detention and prosecution of covered persons.

(d) Appropriate Committees of Congress Defined.—In this section, the term “appropriate committees of Congress” means—

(1) the Committee on Armed Services, the Committee on the Judiciary, and the Select Committee on Intelligence of the Senate; and

(2) the Committee on Armed Services, the Committee on the Judiciary, and the Permanent Select Committee on Intelligence of the House of Representatives.

So far so good—in the face of bad legislation, a legislative punt, one that requires the President to reveal to everyone how he uses and wants to use his Commander in Chief power.

My complaint with Udall’s amendment, however, is that it—like the default of doing nothing—equates to an expansion on the way the 2001 AUMF is understood to be used (though it no doubt reflects the war powers the Executive currently claims to have). That’s because Udall situates the definition of “covered persons”—those who can be detained, but also, because of the way OLC has built its opinions off of the AUMF and Hamdi, those who can be wiretapped or assassinated and probably a bunch of other things—not just in our war against al Qaeda (as the SASC language does), but also in the Iraq War and “Any other statutory or constitutional authority for use of military force.”

(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.

Now, I assume the “other statutory authority” is meant to cover things like FISA Amendment Acts and the Military Commissions Acts—though I’d bet there are some breathtaking interpretations hiding behind that “constitutional authority” bit. Also keep in mind that statutory authority does things like authorize the use of drones on the border.

And as I showed earlier this year, Jack Goldsmith used the Iraq War authorization language to expand the definition of “terrorists” against whom the President could direct his Commander in Chief authorities beyond just those tied to 9/11.

I’ll have much more to say about this. But note that Goldsmith’s limit here [in his May 2004 OLC memo authorizing warrantless wiretapping] does not match the terms of the **Afghan AUMF**, which is limited to those who were directly tied to 9/11.

That 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. [my emphasis]

In other words, while the requirement that the program collect **content** only from those with a tie to a terrorist may be a new limit imposed in 2004, it also seems to exceed the very AUMF that Goldsmith was newly relying upon to authorize the program.

Goldsmith does have one out for that problem. As he notes elsewhere, the Afghan AUMF language on terrorism is repeated (and actually expanded) in the Iraq AUMF.

Whereas Congress has taken steps to pursue vigorously the war on terrorism through the provision of authorities and funding requested by the President to take the necessary actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such persons or organizations;

Whereas the President and Congress are determined to continue to take all appropriate actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or

harbored such persons or organizations;

Did you know that the Iraq AUMF mentions “terrorist” or “terrorism” two more times—19—than it mentions “weapon”—17?

In other words, we know OLC (and therefore, the President) has, over the years, used language **in the Iraq AUMF** to expand the target of the GWOT from just terrorists tied to 9/11 to terrorists more generally. And Udall’s amendment would codify that move.

Besides, **why the fuck** are we adhering to language in the Iraq AUMF when that war ends next month?

And none of this, of course, prevents the use of this authority against American citizens.

So while Udall offers a way to reconsider a crappy bill, it does so on terms that start by expanding the scope of the AUMF language included in the SASC bill.

I seem to be one of the few people that cares about this. But the reason the Administration has issued a veto threat is not because it wants to close Gitmo. Rather, it is increasingly clear the Administration has threatened to veto any language that does not codify the fairly limitless claims the Executive Branch has, over the last decade (and especially since 2004) greatly expanded the application of the AUMF as a way to ignore laws on the books.

There is, IMO, just one real advantage to the Udall Amendment: it would remove this debate from the Defense Authorization, which prevents either side from fear-mongering to push through their favored solution. Aside from that, though, Democrats and the Administration sure do seem intent on a really vast codification of Commander in Chief power.

LATIF: THE ADMINISTRATION BLEW UP HABEAS WITH A DETAINEE THEY DETERMINED COULD BE TRANSFERRED

There are a few more details that need to be readily available about Adnan Farhan Abd al Latif, the Yemeni Gitmo detainee whose habeas corpus petition led DC Circuit Judges Janice Rogers Brown and Karen Henderson to gut habeas. Most importantly, almost two years before the Administration used an unreliable intelligence report to justify his detention, the Bush Administration had determined he could be transferred out of DOD control.

DOD Recommended Transfer of Latif in 2006

Latif's Gitmo file makes that clear.

JTF-GTMO recommends this detainee for Transfer Out of DoD Control (TRO). JTF-GTMO previously recommended detainee for Transfer Out of DoD Control (TRO) on 18 December 2006.

So on December 18, 2006, DOD determined they should transfer of Latif. On January 17, 2008, they determined they should transfer of Latif. (This is a point Judge Henry Kennedy made in his ruling, citing slightly different documents.) Presumably in January 22, 2010, Latif was among the 30 Yemeni detainees the Gitmo Task Force determined designated for "conditional" detention:

30 detainees from Yemen were designated for "conditional" detention based on the

current security environment in that country. They are not approved for repatriation to Yemen at this time, but may be transferred to third countries, or repatriated to Yemen in the future if the current moratorium on transfers to Yemen is lifted and other security conditions are met.

The Bush Administration had designated 15 detainees for transfer; the Obama Administration transferred 6 of those in December 2009, before the UndieBomber attack, Mohammed Odaini got sent back in 2010 after winning his habeas petition, and one more Yemeni got transferred to a third country. Which suggests that Latif is among the unlucky 7 detainees whom both the Bush and Obama Administrations believe could be sent home, if it weren't for the security situation in Yemen.

In other words, Latif remains in Gitmo because our partner in Yemen, Ali Abdullah Saleh, doesn't control the country, and because Umar Farouk Abdulmutallab tried to blow up a plane, not because Latif himself represents a big threat.

Nevertheless, the Administration insisted on making a case, based on a dodgy intelligence report, to legitimize their continued detention of a man whom they had already decided could be transferred.

TD-314/00684-02 Is the Document Being Used to Hold Latif

As I laid out here, they did so primarily with an intelligence report from early 2002 that sorted through a large number of detainees turned over to the US by Pakistan in late 2001.

By comparing Latif's Factual Return to his Gitmo File, we can be almost certain that this report is the cable numbered TD-314/00684-02. Here are the files both documents—the Factual Return and the Gitmo File—reference in unredacted form, with the information cited to that document.

March 6, 2002, ISN 156 SIR: Said he was not Bangladeshi, lived in Ebb, some high school, odd jobs. Hadi took him to hospital in Jordan. Began traveling to Afghanistan summer 2001. Traveled Sanaa to Karachi to Quetta to Kandahar. Once in Kandahar went to mosque to find Ibrahim. Stayed with him 3 days. Captured traveling to Pakistani border in December 2001. Surrendered so as to be taken to Yemeni Embassy to go home. Used Al Jallil, Hady was medical person.

April 26, 2002, ISN 156 FD-302: Said born in Yemen around 1981. Used Al Galeel. 16 at time of accident. Had some high school, worked odd jobs.

May 29, 2002, ISN 156 FD-302: Indicated "Latif" was family name. Lived in Ebb. Lived with family in al-Udayn. Used Galeel as a name. Unable to afford further treatment in Jordan. Traveled from Sanaa to Karachi to Quetta to Kandahar. 14 at time of accident.

May 29, 2002, ISN 156 SIR: Lived in Ebb. "Lied" about being Bangladeshi in past. 16 at time of accident.

October 4, 2002, ISN 156 FD-302: Used Galeel.

May 18, 2003, ISN 156 FD-302: Denied being al Baydani (the name on a KSM-related register). Described who arranged trip to Jordan. Gave passport to Alawi so he could check him into hospital.

June 16, 2004, ISN 156 Assessment: Said something about passport.

July 25, 2005, ISN 156 Interrogation: Claimed Allal was name of someone else captured.

In addition to these documents, there's a February 2002 "Knowledgeability Brief," a January 9, 2004 report, and CSRT-related documents cited in his Factual Return, and a June 13, 2003 report and transcripts from a Yemeni delegation dated July 2, 2005. But the most cited reports—those listed above—appear in both Latif's Gitmo File and his Factual Return.

Save one document, references to which are redacted, said to include his admissions, and covering things like his birth, how he met Alawi, and presumably the bulk of the redacted paragraphs in the Factual Return.

We know the government claims to show Latif fought with the Taliban in those paragraphs. But as I have shown, all the information in Latif's Gitmo file relating to fighting with the Taliban derives entirely from TD-314/00684-02. So it's almost certain the Administration relied on the same document in the Factual Return they relied on in his Gitmo report.

Note, too, this is consistent with something Kennedy wrote in his ruling. He describes the kinds of evidence cited to support Latif's detention.

The evidence in this case includes Form 40s ("FM40s"), Summary Interrogation Reports ("SIRs"), Intelligence Information Reports ("IIRs"), Memoranda for Records ("MFRs"), Field Documents ("FD-302s"), and [redacted].

We've seen reports of all those types cited in unredacted form, so the last item in that series must be another type of report, as a TD cable would be.

TD-314/00684-02 Reported that Latif Was Bangladeshi

I noted this detail in this post, but the point deserves more attention. Latif's Factual Return notes that some of the records on him use an ISN indicating he is Bangladeshi.

Ala'dini's full ISN is ISN-US9BA-00156 (DP), in which the number 156 is Ala'dini's unique identifier and the BA designation indicates the nationality that Petitioner for a time had claimed. See ISN 156 Knowledgeability Brief (Feb. 2002); ISN 156 SRI (May 29, 2002) (indicating petitioner repeatedly lied

about his country of origin (Bangladesh) and gave a fake name in all past interviews). Petitioner Ala'dini, to be clear, has since claimed that he is a national of Yemen. E.g., ISN 156 ISN 156 SIR (March 6, 2002).

So Latif told the US he was Yemeni on March 6, 2002, which appears to be his first substantive interview of him after he arrived in Gitmo on January 17, 2002. We know TD-314/00684-02 precedes that because the Appeals Court Opinion describes that it was written in the "fog of war," whether in Pakistan or Kandahar. So the notion that Latif was Bangladeshi must derive from the interview that formed the basis for TD-314/00684-02.

Now, the government claimed Latif lied about his nationality. Though note that the report they cite for that claim is a DOD report written on May 29, 2002. An FBI 302 with the same date is not cited to support that claim. Did DOD and FBI interview Latif together? If so, why did the DOD interrogator conclude he was lying without the FBI Agent doing so (if that is the case)? (Note, the reports also have a seeming discrepancy on what age Latif was when he had his accident, though in his CSRT Latif makes clear he wasn't tracking these things in Western timeframes and even in his CSRT there was a confusion over timing due to his translator.) In addition, there's a redacted reference right after the Factual Return says Latif was born in Yemen. Is that redacted reference to TD-314/00684-02 as seems to be the case for most of these redacted references? If so, how could Latif have told interrogators he was born in Yemen and traveled from Sanaa, but have them record that he's Bangladeshi?

Now, it's possible someone would lie about being Bangladeshi as a way to explain foreignness in Pakistan without admitting to being an Arab (even assuming interrogators couldn't tell the difference based on appearance). But as the Gitmo File of Mubarak Hussain Bin Abul

Hashem—one of just two Bangladeshis ever held at Gitmo—makes clear, none of the other detainees captured with Latif were or appear to have claimed to be Bangladeshi.

In late 2001 and early 2002, a total of 195 detainees in Pakistani custody were interviewed in Peshawar and Kohat, PK, by teams composed of US interrogators. On 4 January 2001, the detainee [Hashem] was turned over to US custody. Out of the 195 detainees captured and turned over to US custody by Pakistani authorities, the detainee was the only one from Bangladesh. The rest were Arab mujahideen attempting to flee Afghanistan and US troops.

Moreover (and this is the part that boggles my mind), how could you conduct an interrogation, presumably in Arabic, believing the subject was from Bangladesh, and be credible? While it's possible a religiously educated Bangladeshi would speak Arabic, the language of the Quran (Hashem, who was trained in a madrassa and then a Quran school might be such a Bangladeshi), you'd still want to do the interview on secular issues in his native tongue, wouldn't you? Did they interview Latif in Urdu or Pashto (languages which it seems unlikely he'd speak, as a high school educated Yemeni who had spent just months in Afghanistan)? Or Arabic, his own language?

I just don't understand how it's possible to record that Latif was Bangladeshi and have the interview be treated as credible.

Now, I suspect that this issue is one of the three redacted things David Tatel's dissent lists as the obvious factual errors in the report. Indeed, the syntax would be consistent with him making the same observation I just did, that you couldn't record that Latif was born in Yemen and traveled from Sanaa and yet also conclude he was Bangladeshi (though given how extensive the redaction is, it could be any of a

number of things).

But it seems to me the Bangladeshi detail, whether a result of Latif lying or—more likely—a result of real confusion on the part of interrogators trying to sort through 195 detainees with no documentation, goes right to the heart of whether this document should be treated with a presumption of regularity. I simply can't think of any way an interrogator could record that Latif was Bangladeshi, for whatever reason, and at the same time have conducted a credible interview.

Yet, in spite of all that, the Administration argued they could detain Latif on the basis of this report alone. And Judge Janice Rogers Brown said they should be allowed to do so.

The writ of habeas corpus is being gutted in this country because the Administration holds a bunch of Yemenis against whom they don't have credible evidence, but also don't have a safe place to send them. This is not about evidence and the law, but about a civil war in one of our allies' countries. And for that we're dismantling the legal guarantees our Constitution guarantees.

WITH LATIF DECISION, SECTION 1031 AUTHORIZES INDEFINITELY DETAINING AMERICANS BASED ON GOSSIP

As I noted yesterday, both Dianne Feinstein and Carl Levin understand Section 1031 of the Defense Authorization to authorize the

indefinite detention of American citizens. Levin says we don't have to worry about that, though, because Americans would still have access to habeas corpus review.

Section 1031 makes no reference to habeas corpus, and places no limitation on habeas corpus review. Nor could it. Under the Constitution, habeas corpus review is available to any American citizen who is held in military custody, and to any non-citizen who is held in military custody inside the United States.

Even ignoring the case of Jose Padilla, which demonstrates how easily the government can make habeas unavailable to American citizens, there's another problem with Levin's assurances.

Habeas was gutted on October 14, when Janice Rogers Brown wrote a Circuit Court opinion holding that in habeas suits, judges must grant official government records the presumption of regularity.

The habeas case of Adnan Farhan Abdul Latif largely focused on one report purporting to show that Latif fought with the Taliban. I suspect the report is an early 2002 CIA report, written during the period when the US was trying to sort through hundreds of detainees turned over (sometimes in exchange for a bounty) by the Pakistanis. The report I suspect is at issue summarizes the stories of at least 9 detainees, four of whom have already been transferred out of US custody. David Tatel's dissent makes it clear that there were clear inaccuracies in the report, and he describes Judge Henry Kennedy's judgment that this conditions under which this report was made—in the fog of war, the majority opinion agrees—increased the likelihood that the report was inaccurate. Of note, Latif's Factual Return reveals the government believed him to be Bangladeshi until March 6, 2002 (see paragraph 4); they blame this misunderstanding on him lying, but seeing as how the language of an

interrogation—whether Arabic or Bangladeshi—would either seem to make his Arab identity clear or beset the entire interrogation with language difficulties, it seems likely the misunderstanding came from the problem surrounding his early interrogations.

Beyond that report, the government relied on two things to claim that Latif had been appropriately detained: The claim that his travel facilitator, Ibrahim Alawi, is the same guy as an al Qaeda recruiter, Ibrahim Balawi (usually referred to as Abu Khulud), in spite of the fact that none of the 7 detainees recruited by Balawi have identified Latif. And the observation that Latif's travel to Afghanistan from Yemen and then out of Afghanistan to Pakistan traveled the same path as that of al Qaeda fighters (here, too, none of the fighters who traveled that same path identified Latif as part of their group).

In other words, the government used one intelligence report of dubious reliability and uncorroborated pattern analysis to argue that Latif had fought with the Taliban and therefore is legally being held at Gitmo.

And in spite of the problem with the report (and therefore the government's case), Judge Janice Rogers Brown held that unless Judge Kennedy finds Latif so credible as to rebut the government's argument, he is properly held. More troubling, Rogers Brown held that judges must presume that government evidence gathering—intelligence reports—are accurate as a default.

When the detainee's challenge is to the evidence-gathering process itself, should a presumption of regularity apply to the official government document that results ? We think the answer is yes.

Rogers Brown is arguing for a presumption of regularity, of course, for the same intelligence community that got us into Iraq on claims of

WMD; the report in question almost certainly dates to around the same period that CIA went 6 months without noticing an obvious forgery.

Rogers Brown's presumption of regularity is particularly troublesome given that raw intelligence is not meant to be definitive. It is the documentation of gossip and rumor that has not yet been vetted as to whether or not it is fact.

Here's what Sabin Willett—the lawyer for two Uighurs, Parhat and Kiyemba—says results from the Court's decision that judges must accept such reports as definitive.

It is not hyperventilation to say, as so many have said, that Latif guts *Boumediene*, because — trust me — every prisoner has an intelligence report.

Now the prisoner hasn't just lost his judicial remedy to *Kiyemba*; if those reports control, factfinding is over, too.

[snip]

I tried *Parhat*. He had an intelligence report too. We picked it apart, as I'm sure Latif's lawyers must have done with their report, and as Judge Garland did in the classified *Parhat* opinion. No one could make a straight-faced argument for a presumption after that was done.

You have to—I can't say this any other way, because *Parhat*'s documents remain classified—but you have to see an “intelligence report” to appreciate just how surreal the proposition is.

The trial lawyer would think this way: **if this tissue of hearsay, speculation, and gossip comes in evidence at all, the trial court must at least be allowed to weigh it. But when the circuit lays the thumb of presumption on the scale, there's no more judicial review — not even in the court of appeals. “Review” is in the anonymous DoD analyst who**

wrote the report.

Review was Judge Kennedy's job, and he did his job. Whether we agree or disagree with his weighing, the scale had always been his before. This idea, I think, lies at the bottom of Judge Tatel's thoughtful dissent. **Can the jailer's report trump the judicial officer, in civil cases that are supposed to be a check on the jailer itself?** There's not much evidence that anybody up at SCOTUS cares about the GTMO prisoners any more (whose imprisonments now treble WW2 detentions), but there may still be four of them who worry about trial judges.

[snip]

Pause a moment. A man sits in government prison for ten years and counting, on the strength of a secret document created by the jailer, in haste, from hearsay, which didn't persuade an experienced trial judge. Does that sound like the stuff of regimes we are prone to condemn?

And now with some version of 1031 set to pass Congress, this is the standard that courts will use not just with Uighurs and Yemenis picked up in Afghanistan, but potentially with young Muslim American men who sound off in chat rooms. With the presumption of regularity, intelligence reports based on paid informants' claims about what got said at a mosque will be enough to hold an American citizen indefinitely.

And it's not just the report. Rogers Brown accepts pattern analysis—which in Latif consisted of travel patterns but which in US-based counterterrorism usually tracks the patterns of the kinds of calls you make, your geolocation, which falafel joint you frequent—as the sole corroboration for the dicey intelligence report.

The way Rogers Brown treats such pattern analysis, in lieu of any real witnesses, as corroboration bodes particularly poorly for the US given how much pattern analysis the government is already doing on innocent Americans.

Carl Levin may well believe his compromise language carries no risk to Americans given the guarantee of habeas, but with Latif as precedent in war on terror habeas cases, he's wrong. As the senator representing one of the largest communities of Arab-Americans and Muslims in the country, his carelessness on this point is particularly troubling.

While it's not the primary goal, Levin's "compromise" language could put some of his constituents—guilty of nothing more than religion, proximity, and gossip—in indefinite detention, with little recourse. And he doesn't seem all that bothered by the possibility.