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 it 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 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.

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.

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

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

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

> But there is a way to stop this dangerous legislation. Sen. Mark Udall (D-Colo.) is offering the Udall Amendment that will delete the harmful

> provisions and replace them with a requirement for an orderly Congressional review of detention power. The Udall Amendment will make sure that the bill matches up with American values.
>
> In support of this harmful bill, Sen. Lindsey Graham (R-S.C.) explained that the bill will "basically say in law for the first time that the homeland is part of the battlefield" and people can be imprisoned without charge or trial "American citizen or not." Another supporter, Sen. Kelly Ayotte (R-N.H.) also declared that the bill is needed because "America is part of the battlefield."
>
> The solution is the Udall Amendment; a way for the Senate to say no to indefinite detention without charge or trial anywhere in the world where any president decides to use the military. Instead of simply going along with a bill that was drafted in secret and is being jammed through the Senate, the Udall Amendment deletes the provisions and sets up an orderly review of detention power. It tries to take the politics out and put American values back in.

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

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

But, as I've noted, there's one aspect of the Detainee Provisions that Udall **doesn't** leave for

orderly review: the scope of the language describing a "covered person." Instead, Udall's Amendment says covered people should be those "whose detention … is consistent with the laws of war and based on authority provided by" the 9/11 **and Iraq AUMFs**, as well as "any other statutory or constitutional authority."

> (b) *Covered Persons*.—A covered person under this section is any person, other than a member of the Armed Forces of the United States, whose detention or prosecution by the Armed Forces of the United States is consistent with the laws of war and based on authority provided by any of the following:
>
> (1) The Authorization for Use of Military Force (Public Law 107-40).
>
> (2) The Authorization for Use of Military Force Against Iraq Resolution 2002 (Public Law 107-243).
>
> (3) Any other statutory or constitutional authority for use of military force.

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

Hey, Mark. See that calendar? We're not going to pass and sign this bill before December 1. We're due to pull our troops out of Iraq by the end of that month. Are you telling me we need to include that language for less than 31 days? Or

just to provide a bubble during which the Administration can do whatever it wants with Ali Mussa Daqduq, the alleged Hezbollah agent in US custody presenting so many legal dilemmas for us in Iraq? Or are you instead applying the AUMF for **a war that is effectively over** to grant the President authority to hold a much broader category of "terrorist" than the 9/11 AUMF authorized? **Why, at this late date, are you including the Iraq AUMF?**

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

And all that's before you consider the "any other statutory or constitutional authority for use of military force," which seems to say that in any circumstance in which Congress has authorized some use of military force, Udall's Amendment also piggybacks detention authority … and whatever else (like assassination and wiretap authority) gets built off of detention authority in secret by the OLC.

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

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

And while that may not be the same as outsourcing interrogation to the ACLU—as Bachmann described it—it does amount to using

the ACLU to give sanction to a broad expansion of Executive war and surveillance powers the likes of which the CIA loves to exploit.

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.

GITMO: THE SAME OLD NEW OPAQUE TRANSPARENCY

Last week we wondered what the appointment of the "new and improved" Gitmo Commander, Army Brig. Gen. Mark Martins, would mean for the military commission system and upcoming big terror trials for the likes of al-Nashiri and KSM, and what it meant for the press coverage. Well, predictably, it appears to be rendering the same old same old.

Carol Rosenberg brings us the latest:

> The website was unveiled last month to rehabilitate the reputation of the Guantanamo war court. So far it's a hodgepodge of secrecy _ and still a work in progress, according to Defense Department officials, while clerks, lawyers and the intelligence community haggle behind the scenes over what the public can see.
>
> It's been more than a year in the making and the Pentagon has yet to reveal its cost. Every screen bears the slogan "fairness, transparency, justice."
>
> But a review of the content has found that it pointedly leaves out some of the key controversies that have bedeviled the war crimes trials, from allegations of torture to a comparison of the Seminole Indian tribe to al Qaida.

Disappointing, to say the least, but par for the course for the Gitmo experience. And, let's be clear, it is not that they just haven't had time to "work the kinks out" as this project has been underway for well over a year. And there is

fantastic experience to draw from in the way of the Federal Court system's PACER system. There are simply not that many detainees in total, much less defendants, to be entered into the system. The still dysfunctional and unusable system is the result of indifference, if not outright intent. As there will be no trials until next year at the earliest, maybe the situation can be remedied in time; but that will require the actual intent to do so. And that seems in short supply.

What I suspected would be the case has now been confirmed, namely that the "broadcast" of the commission trials will be a restricted joke. Again from Carol and the Miami Herald:

> Pohl, the chief military commissions judge, assigned himself to the case, according to Defense Department sources, and chose the late October date to give the government time to finish a close-circuit feed site at Fort Meade, Md., outside Washington, D.C.
>
> Up to 100 reporters could watch the Guantánamo arraignment on a 40-second delay under the new Fort Meade hook-up being inaugurated with the Cole trial to ease demand on a crude media tent city at the remote Navy base in southeast Cuba, which can accommodate 60 journalists.

There also will reportedly be a feed for a select few of the victims' families. But zilch for the broader press, and nothing for the public. Just as with the suggested benefits and propriety of transparency on the targeting of American citizens for assassination, it would place the United States on a higher moral plane and demonstrate resolve and ethics to demonstrate to its citizens, and those of the world, that it is indeed providing a fair and just trial process for the detainees.

Necessary steps can easily enough shield that

which must be, there is no reason not to show what this country stands for. Open and public justice is the best justice. Unless, that is, what we really stand for is not particularly just.

THE COST OF $100 MILLION PRISON EXPANSIONS AND OTHER "CIVILIAN-LED" BLOWBACK

In addition to green-lighting debt collection calls to cell phones, another of the deficit plans Obama rolled out today is basically claiming credit for military withdrawals.

> The plan also realizes more than $1 trillion in savings over the next 10 years from our drawdowns in Afghanistan and Iraq.

As DDay notes, these "cuts" are scheduled to happen anyway. It's just funny accounting, particularly since the foreverwar hawks will fight some of these changes in any case.

But there's another reason I think this is funny accounting. We're not withdrawing, we're switching to "civilian-led" efforts in these places. And Obama is not measuring the costs of these civilian-led efforts.

Such as the $100 million expansion we're making to habeas-free Parwan prison in Afghanistan.

> The U.S. Army Corps of Engineer (USACE) Middle East District intends to solicit names of construction firms or joint ventures experienced in working in the Middle East region who are interested in submitting a firm-fixed price offer for this

> project. To be considered a construction firm, the firm must perform construction as a significant portion of its business. This announcement is for the construction of Detention Facility in Parwan (DFIP), Bagram, Afghanistan. The contractor shall comply with all base security requirements. Defense Base Act Insurance and Construction surety will be required. **The estimated cost of the project is between $25,000,000 to $100,000,000**.
>
> PROJECT SCOPE: **The scope of the Project includes construct detainee housing capability for approximately 2000 detainees**. [my emphasis]

Glenn Greenwald hits much of what needs to be said about this expansion:

> Budgetary madness to the side, this is going to be yet another addition to what Human Rights First recently documented is the oppressive, due-process-free prison regime the U.S. continues to maintain around the world:
>
> > Ten years after the September 11 attacks, few Americans realize that the United States is **still imprisoning more than 2800 men outside the United States without charge or trial.** Sprawling U.S. military prisons have become part of the post-9/11 landscape, and the concept of "indefinite detention" — previously foreign to our system of government — has meant that such prisons, and their captives, could remain a legacy of the 9/11 attacks and the "war on terror" for the indefinite future. . . . .
> >
> > The secrecy surrounding the U.S. prison in Afghanistan makes it impossible for the public to judge whether those imprisoned there deserve to be there. What's more, because much of the military's evidence against them is classified, the detainees themselves

> have no right to see it. So although detainees at Bagram are now entitled to hearings at the prison every six months, they're often not allowed to confront the evidence against them. As a result, they have no real opportunity to contest it.

> In one of the first moves signalling just how closely the Obama administration intended to track its predecessor in these areas, it won the right to hold Bagram prisoners without any habeas corpus rights, successfully arguing that the Supreme Court's *Boumediene* decision – which candidate Obama cheered because it guaranteed habeas rights to Guantanamo detainees – was inapplicable to Bagram. Numerous groups doing field work in Afghanistan have documented that the maintenance of these prisons is a leading recruitment tool for the Taliban and a prime source of anti-American hatred. Despite that fact – or, more accurately (as usual), because of it – the U.S. is now going to build a brand new, enormous prison there.

And then there's the expansion we're doing to the "Embassy" in Baghdad. Dan Froomkin lays this out.

> U.S. diplomats, military advisers and other officials are planning to fall back to the gargantuan embassy in Baghdad – a heavily fortified, self-contained compound the size of Vatican City.
>
> The embassy compound is by far the largest the world has ever seen, at one and a half square miles, big enough for 94 football fields. It cost three quarters of a billion dollars to build (coming in about $150 million over budget). Inside its high walls, guard towers and machine-gun emplacements lie not just the embassy itself, but more than 20 other buildings, including residential quarters, a gym and swimming

> pool, commercial facilities, a power station and a water-treatment plant.
>
> [snip]
>
> The number of personnel under the authority of the U.S. ambassador to Iraq will swell from 8,000 to about 16,000 as the troop presence is drawn down, a State Department official told The Huffington Post. “About 10 percent would be core programmatic staff, 10 percent management and aviation, 30 percent life support contractors — and 50 percent security,” he said.
>
> [snip]
>
> As the Department of Defense pulls out and its spending drops, the State Department is expecting its costs to skyrocket. State asked Congress for $2.7 billion for its Iraqi operations in fiscal year 2011, and got $2.1 billion. It wants $6.2 billion for next year. The Senate Foreign Relations Committee estimates that State’s plans will cost $25 to $30 billion over the next five years.

I use scarequotes for the word “Embassy” because I think it’s time we set aside the fiction that this is a State Department operation. Froomkin notes, for example, that the $6 billion a year State will be spending on this “Embassy” adds to the only $14 billion State spends, in total, right now.

It’s not just the actual spending I’m objecting to—the $100 million here, the $30 billion there—though Glenn’s point, that we refuse to spend a fraction of $100 million to fix CA’s prison overcrowding, is an important one.

It’s that in one of our colonies we’re doubling the size of our replacement Gitmo, right there in plain view of the people it will antagonize (though the expansion does raise questions about whether we’ll fill the prison with detainees from other countries, too).

And in another of our colonies we're expanding our giant concrete intelligence bunker (I am open to suggestions for better names for this monstrosity), replete with numbers equal to the numbers of troops Nuri al-Maliki can't publicly approve. Will the fact that intelligence and contractor personnel are watching over our colony be any less incendiary to the Moqtada al-Sadrs of Iraq than men and women we explicitly called troops? Isn't this stupid fiction—with the legal fiction it exploits—be in a number of ways worse?

Call it a crazy suspicion. But our non-withdrawal withdrawals from our colonies seems ripe for blowback in a very very big (and expensive) way.

Of course that's precisely the kind of cost even the deficit hawks refuse to count, so we'll never see it accounted for in any budget.

DOJ: CALLING OUT GOVERNMENT LIES WOULD ENDANGER NATIONAL SECURITY

No matter how you look at this attempt to suppress and ignore the WikiLeaks material, it is bizarre and somewhat comical. The WikiLeaks Gitmo Detainee files genie is out of the bottle; it would behoove the US government to join the battle and arguments on the merits and facts instead of trying to cram the genie back in and play hide the bottle.

GITMO DETAINEE FILES WORKING THREAD

A working thread for the Gitmo detainee files release.

MR. PJ CROWLEY, OBAMA & FIREDOGLAKE

Bald faced craven comedy AND a dedicated shout out to Firedoglake during our membership drive, what else could you ask for from a Torturer-in-Chief?

CALIFORNIA SUPREME COURT TO HEAR PERRY PROP 8 QUESTION

The breaking news out of the California Supreme Court is that they WILL entertain a full merits consideration of the question certified to them by the 9th Circuit in the Perry v. Schwarzenegger.