

JEH JOHNSON ON THE “MILITARY’S DOMESTIC LEGAL AUTHORITY”

In addition to suggesting that the 16 year old American citizen Abdulrahman al-Awlaki was a legitimate military target, Jeh Johnson spoke yesterday about the “military’s domestic legal authority.” Now, rest assured, Johnson said the Administration does not rely on aggressive interpretations of such authority.

Against an unconventional enemy that observes no borders and does not play by the rules, we must guard against aggressive interpretations of our authorities that will discredit our efforts, provoke controversy and invite challenge.

He acknowledges that posse comitatus requires express authorization from Congress before extending the reach of the military onto US soil.

As I told the Heritage Foundation last October, over-reaching with military power can result in national security setbacks, not gains. Particularly **when we attempt to extend the reach of the military on to U.S. soil**, the courts resist, consistent with our core values and our American heritage – reflected, no less, in places such as the Declaration of Independence, the Federalist Papers, the Third Amendment, and in the 1878 federal criminal statute, still on the books today, which prohibits willfully using the military as a posse comitatus **unless expressly authorized by Congress or the Constitution**. [my emphasis]

Then he proceeds directly from describing the

express authorization required from Congress to a discussion of the AUMF—as the basis for the **“military’s domestic legal authority.”**

Second: in the conflict against al Qaeda and associated forces, **the bedrock of the military’s domestic legal authority continues to be the Authorization for the Use of Military Force** passed by the Congress one week after 9/11.[2] “The AUMF,” as it is often called, is Congress’ authorization to the President 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.

Ten years later, the AUMF remains on the books, and it is still a viable authorization today. [my emphasis]

Then Johnson describes how the Administration—with no express authority from Congress until the NDAA—stretched an authorization limited to those people and groups with ties to 9/11 to include those “associated with” such groups. And, again with no express authorization from Congress, expanded it to include those who “engaged in hostilities” with coalition partners.

In the detention context, we in the Obama Administration have interpreted this authority to include:

those persons who were part of, or substantially supported, Taliban or al-Qaeda forces or associated forces

that are engaged in hostilities against the United States or its coalition partners.[3]

This interpretation of our statutory authority has been adopted by the courts in the habeas cases brought by Guantanamo detainees,[4] and in 2011 Congress joined the Executive and Judicial branches of government in embracing this interpretation when it codified it almost word-for-word in Section 1021 of this year's National Defense Authorization Act, 10 years after enactment of the original AUMF.[5] (A point worth noting here: contrary to some reports, neither Section 1021 nor any other detainee-related provision in this year's Defense Authorization Act creates or expands upon the authority for the military to detain a U.S. citizen.)

Johnson doesn't mention, of course, that the government is using the same interpretation to extend the military's domestic legal authority to non-detention areas. Those applications are secret, you see.

Note, in this passage, how Johnson gracefully re-specifies that he's talking about the 2001 AUMF, and not the 2002 AUMF, which also remains in effect?

But, the AUMF, the statutory authorization from 2001, is not open-ended. It does not authorize military force against anyone the Executive labels a "terrorist." Rather, it encompasses only those groups or people with a link to the terrorist attacks on 9/11, or associated forces.

That's important because the government at least used to—and presumably still does (otherwise they wouldn't have panicked when Congress

considered repealing the AUMF authorizing a war that is supposed to be over)—rely on the Iraq AUMF to target “anyone the Executive labels a ‘terrorist.’”

Given that the Iraq AUMF has been used to go beyond the definitions in the 2001 AUMF, I’ll skip the paragraphs where Johnson talks about how narrow the government’s interpretation of “associated forces” is.

Particularly because this paragraph is my very favorite bit in this entirely disingenuous speech.

Third: there is nothing in the wording of the 2001 AUMF or its legislative history that restricts this statutory authority to the “hot” battlefields of Afghanistan. Afghanistan was plainly the focus when the authorization was enacted in September 2001, but the AUMF authorized the use of necessary and appropriate force against the organizations and persons connected to the September 11th attacks – al Qaeda and the Taliban – without a geographic limitation.

Pretty comprehensive, huh, Jeh? Neither the wording of the AUMF or the legislative history limits the AUMF, right?

That of course leaves out what Tom Daschle has said explicitly.

Just before the Senate acted on this compromise [AUMF] resolution, the White House sought one last change. Literally minutes before the Senate cast its vote, the administration sought to add the words “in the United States and” after “appropriate force” in the agreed-upon text. This last-minute change would have given the president broad authority to exercise expansive powers not just overseas – where we all understood he

wanted authority to act – but right here in the United States, potentially against American citizens. I could see no justification for Congress to accede to this extraordinary request for additional authority. I refused.

Jeh Johnson, you see, admits that the military needs express authority from Congress to operate within the US. Congress expressly refused to grant that authority. Johnson knows that, surely. Nevertheless, there he was yesterday, laying out the “military’s domestic legal authority” that Congress never expressly authorized.

Remember, “domestic legal authority,” he’s talking about, not—or not just—international legal authority. Which is why this passage is so funny.

The legal point is important because, in fact, over the last 10 years al Qaeda has not only become more decentralized, it has also, for the most part, migrated away from Afghanistan to other places where it can find safe haven.

However, this legal conclusion too has its limits. It should not be interpreted to mean that we believe we are in any “Global War on Terror,” **or that we can use military force whenever we want, wherever we want.**

International legal principles, including respect for a state’s sovereignty and the laws of war, impose important limits on our ability to act unilaterally, and on the way in which we can use force in foreign territories.
[my emphasis]

In the context of talking about the military’s domestic legal authority, Jeh Johnson says that state sovereignty will protect us. Not the Tenth Amendment, mind you, but the sovereign right of

other states to keep the US out.

But who will keep the US out of the US?

I guess Johnson was relying on the kids at Yale Law being credulous when he said the Administration “guard[s] against aggressive interpretations of our authorities”?

DOJ ONCE AGAIN SUCCEEDS WHERE DOD HAS FAILED

Umar Farouk Abdulmutallab?

Going to prison for life—Florence SuperMax in CO, which is a much tougher prison than Gitmo.

He has been in custody for 2 years and 53 days.

Abd al Rahim al-Nashiri? He has been in custody for roughly 9 years, 3 months, and 15 days, for a crime committed over 11 years ago. His trial process is only beginning.

Khalid Sheikh Mohammed? He has been in custody for just short of 9 years, for a crime he committed 10 years, 5 months, and 5 days ago. His trial won't begin this year.

This sending terrorists to jail for the rest of their life isn't that hard. It's only hard when you try to invent an entirely new legal system to do the job, rather than using the perfectly functional legal system that has proven its ability to do this over and over before.

Update: Adam Serwer talks about how Abdulmutallab made us so scared we passed the NDAA. I would add, he also made us all subject to gate grope.

GOVERNMENT AWARDS \$35 MILLION CONTRACT TO EXPAND PARWAN PRISON

The Obama Administration insists that it wants to close Gitmo, but Congress is preventing them from doing so.

They rarely talk about the other big detainee prison—the one with significantly less transparency and due process than exists at Gitmo: Parwan prison in Bagram.

Perhaps that's because we've just awarded a \$35 million contract to expand that prison for the second time in Obama's Administration, this time to add 2,000 beds.

The U.S. Army Corps of Engineer (USACE) Middle East District has a requirement to construct detainee housing capability for approximately 2000 detainees in Parwan, Bagram Airfield, Afghanistan. Primary facilities include detainee housing, guard towers, administrative facility and Vehicle/Personnel Access Control Gates, security surveillance and restricted access systems. Primary power will be tie into the Bagram electrical distribution grid. Backup power will be provided by generators. Supporting facilities include site preparation, utilities, sidewalks, access road, lighting, and information systems. Anti-terrorism/Force Protection measures will be included. The project will be delivered using a design-build approach. All work identified in the Scope of Work shall be completed within 369 calendar days from award.

And remember: Obama's NDAA signing statement suggested that the Administration would push the requirement under Section 1024 to give detainees meaningful reviews of their detention (the Administration suggests it will hold detainees for more than 6 months before giving such a meaningful review).

So yes, it is nice the Administration intends to close Gitmo. But I'd prefer if it stopped expanding our prison capacity in general.

THE FALSE REPORT OF BANNED BOOKS IN TUCSON: THE TEMPEST IN THE ARIZONA TEAPOT

Last
Friday
afternoon,
author
Jeff
Biggers
published
an article
at Salon
entitled



Who's Afraid of "The Tempest"? The cognitive lede, and framing for the article as a whole, is contained in the first sentence:

As part of the state-mandated termination of its ethnic studies program, the Tucson Unified School District released an initial list of books to be banned from its schools today.

Biggers goes on to report and discuss on a litany of books and textbooks – even

Shakespeare's *The Tempest* – that were removed from Tucson Unified School District (TUSD) classrooms:

Other banned books include "Pedagogy of the Oppressed" by famed Brazilian educator Paulo Freire and "Occupied America: A History of Chicanos" by Rodolfo Acuña, two books often singled out by Arizona state superintendent of public instruction John Huppenthal, who campaigned in 2010 on the promise to "stop la raza(sic).

It is a rather stunning, and alarming, report fashioned by Mr. Biggers and, little wonder, it swept like fire across the progressive internet, and social media like Twitter and Facebook over the King Holiday weekend. Biggers' Salon article served as the basis for reportage of the banning of books, including Shakespeare's *The Tempest*, in a plethora of media sources from such internet venues as AlterNet, to mainstream media like The Tucson Citizen, New York Daily News, and The Wall Street Journal.

There is only one problem with this story. It is categorically and materially false. No books have been banned in Tucson by the TUSD, much less Shakespeare's classic, *The Tempest*.

Sensing that Biggers' story did not sound correct, nor comport with my understanding of the law in this subject area here in Arizona, I was able to make contact with officials at TUSD over the Martin Luther King extended holiday weekend and spoke with an official on Monday, even though the school system was officially closed. It is an understatement to say they were dismayed and concerned; it is "disingenuous to say 'banned'" said Cara Rene, Communications Director for the TUSD.

Indeed, upon returning to their offices Tuesday, the TUSD put out, through Ms. Rene, an official News Release stating:

Tucson Unified School District has not banned any books as has been widely and incorrectly reported.

Seven books that were used as supporting materials for curriculum in Mexican American Studies classes have been moved to the district storage facility because the classes have been suspended as per the ruling by Arizona Superintendent for Public Instruction John Huppenthal. Superintendent Huppenthal upheld an Office of Administration Hearings' ruling that the classes were in violation of state law ARS 15-112.

The books are:

Critical Race Theory by Richard Delgado
500 Years of Chicano History in Pictures
edited by Elizabeth Martinez
Message to AZTLAN by Rodolfo Corky
Gonzales
Chicano! The History of the Mexican
Civil Rights Movement by Arturo Rosales
Occupied America: A History of Chicanos
by Rodolfo Acuna
Pedagogy of the Oppressed by Paulo
Freire
Rethinking Columbus: The Next 500 Years
by Bill Bigelow

NONE of the above books have been banned by TUSD. Each book has been boxed and stored as part of the process of suspending the classes. The books listed above were cited in the ruling that found the classes out of compliance with state law.

Every one of the books listed above is still available to students through several school libraries. Many of the schools where Mexican American Studies classes were taught have the books available in their libraries. Also, all students throughout the district may reserve the books through the library system.

Other books have also been falsely reported as being banned by TUSD. It has been incorrectly reported that William Shakespeare's "The Tempest" is not allowed for instruction. Teachers may continue to use materials in their classrooms as appropriate for the course curriculum. "The Tempest" and other books approved for curriculum are still viable options for instructors.

Oh, my, that is fundamentally and materially different than what Mr. Biggers both stated, and inferred, isn't it? It was excessive and inflammatory hyperbole, and that is not a good thing as it paints the TUSD, and the Arizona school and educational system in a false, and prejudicially negative, light. I know many teachers and administrators in the Phoenix area, and they were outraged. "Banning of books" is an extremely negative concept both emotionally and legally; it is an extremely serious allegation, and *not* one to be made lightly or inaccurately.

There are a LOT of very good people in the State of Arizona, and the bad that is going on here (and there IS plenty of bad too) should be painted large and loud for what it is, but not in brush strokes so big and hyperbolic as to give a false picture of the story and state. I dislike the existence and effect of HB 2281, the law that has created this controversy over ethnic studies, every bit as much as Mr. Biggers honestly seems to; but do not want that to be used as a whipping post to make Arizona an ogre in ways it truly does not deserve. And that was the effect of his January 13, 2012 article in Salon.

You would probably think this particular story, and my report on it, ends here for now. It does not and, for once, that is a very positive thing. Over the King Holiday weekend, in addition to contacting the TUSD, I also contacted Salon regarding my concerns. They were, under the circumstances, both cordial and professional. Early this afternoon a notice of

correction was placed at the bottom of the original story, and a new report by Jeff Biggers, far more accurately portraying the facts on the ground in Tucson, was published by Salon. Salon, and its editors, are to be commended and applauded for their willingness to listen and act responsibly.

Which brings us to the bigger picture.

Demagoguery and hyperbole are something that all of us do who write on emotional hot button issues; which are about the only kind of issues we do here at Emptywheel. I have noticed the same phenomenon in the progressive blogosphere and media acutely prevalent on torture, Bradley Manning, Occupy Wall Street and, just recently, the NDAA. Emotion and illustration are good; facts and truth are better.

WHO WILL REDACT OUR NEXT BIG CONSTITUTIONAL DEBATE?

As Latif's
—as so often
occurs in the game of telephone
And so,
may have become
may have transformed
may have turned
into
just as
became
Indeed, my colleagues
nowhere disagree that all of the

In her
Gitmo
anniversar
y piece,
Dahlia
Lithwick,
piggybacki
ng on Adam
Liptak's
earlier
report,
used the
extensive
redactions
in the DC

Circuit Opinion overturning Adnan Latif's habeas

petition to illustrate how little the courts are telling us about his fate, our detention program, and its impact on the most basic right in this country, habeas corpus.

But in the spirit of the day, I urge you to stop for a moment and look at the decision itself, so heavily redacted that page after page is blacked out completely. The court, in evaluating a secret report on Latif, can tell us very little about the report and thus the whole opinion becomes an exercise in advanced Kafka: The dissent, for instance notes that “As this court acknowledges, “the [district] court cited problems with the report itself including [REDACTED]. ... And according to the report there is too high a [REDACTED] in the report for it to have resulted from [REDACTED].” Liptak describes all this as an exercise in “Mad Libs, Gitmo Edition.” But in the end, it’s also an exercise in turning the legal process of assessing the claims of these prisoners at Guantanamo Bay into something that replaces one legal black hole with another: pages and pages of black lines that obscure in words what has been obscured in fact. Americans will never know or care what was done at the camp and why if the legal process that might have transparently corrected errors happens behind blacked-out pages.

Latif’s classified petition for cert has just been filed.

We won’t get to see that petition, though, until after the court redacts it, at which point it will presumably look just like the Circuit Opinion—page after page of black lines.

It’s worth asking who will get to redact that petition, which is after all an important effort not only to free a man cleared for release years

ago, but also to restore separation of powers and prevent detainees and Americans alike from being held solely on the basis of an inaccurate intelligence report.

That's important because, thus far, the existing court documents in this case have been redacted inconsistently.

We know that because the dissent in the Circuit Opinion quotes language from Judge Henry Kennedy's ruling, yet that language doesn't appear anywhere in the unredacted sections of his ruling itself. For example, David Tatel refers to the "factual errors" Kennedy described (21; PDF 88) and cites Kennedy's repetition of Latif's explanation for having lost his passport—he "gave it to Ibrahim [Alawi] to use in arranging his stay at a hospital." (37; PDF 104) Yet the appearances of these phrases have been entirely redacted from Kennedy's opinion (there are many more fragments for which the same is true, supporting general claims about the inaccuracy of the report, but they are less specific).

Indeed, the Circuit Opinion itself is internally inconsistent, as Tatel's citations to Janice Rogers Brown's admission that the district court "cited problems with the report itself" (23; PDF 93), one of which she agreed was an "obvious mistake" (22; PDF 89) appear unredacted in his dissent, but not in the majority opinion itself (indeed, the citations to it are redacted in Tatel's opinion).

Further, I would bet that one of the obvious errors in the report described by all these opinions pertains to Latif's nationality. As I lay out in more detail here, the public Factual Return makes it clear that the government recorded Latif's nationality as Bangladeshi up until March 6, 2002, a month and a half after he arrived at Gitmo.

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). [¶7 PDF 8]

Since, as the dissent makes clear, the report on which the government primarily relies was "produced in the fog of war," it must have been produced before Latif arrived at Gitmo (we have every reason to believe it was an intake document reflecting interrogations from when he was picked up in Pakistan). This in turn means it is likely that the report, like the first Gitmo documents, recorded Latif's country of origin as Bangladesh. And if it does, it would be shocking for that detail to be unmentioned in the legal discussion, particularly since the majority opinion defines the presumption of regularity to mean "the government official accurately identified the source and accurately summarized his statement." If the report is an interrogation report of Latif himself, identification of him as Bangladeshi would go right to the heart of the presumption of regularity. Just as importantly, both the majority and the dissent describe problems with the report potentially introduced in the translation and transcription. If the government didn't even know that Latif was Yemeni, not Bangladeshi, it would be centrally important to translation questions. So the government's errors about Latif's nationality would seem to be an issue that goes to the heart of the legal discussion about the accuracy of the report. And yet, while Court Security Officers reviewing the Factual Return didn't find the government's misidentification of Latif as Bangladeshi to be classified when they redacted that document, it seems likely similar mentions got redacted in

all the opinions.

Is the government hiding behind redactions that they're holding someone indefinitely based on a report that didn't even get his nationality right?

Finally, if I'm right that the report in question is TD-314/00684-02, we'll probably be re-entering the Kafkaesque world in which our government asserts that documents released by WikiLeaks remain "classified."

When I first wrote about the report, it went from the grey area of publication in WikiLeaks and McClatchy's databases into the public domain. While Chief Justice John Roberts' censors might not consider my humble blog part of the public domain, Benjamin Wittes cited from my original post on that CIA cable (and the NYT's Adam Liptak linked to it). It would be hard to dismiss Wittes's writing at Lawfare as that of a Dirty Fucking Hippie blogger given that both the majority and dissent opinions in this case cite a paper on evidentiary standards in Gitmo cases by him and Robert Chesney. Mind you, I fully expect that if the report **is** TD-314/00684-02, the courts will continue to redact its serial number, even though it has repeatedly been referred to in reporting on this case. But that, by itself, would say significant things about the transparency of our constitutional processes.

Whether SCOTUS grants Latif cert or not is an incredibly important legal question (with the codification of indefinite detention in the NDAA, these are issues that affect all Americans). We know that one of the only documents that claims Latif had ties to the Taliban was some kind of intake report tied to the processing of 195 detainees captured by Pakistan. We know our government had Latif in custody for months before they figured out he was Yemeni, not Bangladeshi, and the document they claim justifies his continued detention probably repeats that mistake. We know that there are "factual errors" in the report, one of

which even Janice Rogers Brown considers an “obvious mistake.” We know that Latif offered what Henry Kennedy considered a plausible explanation for why he didn’t have his passport when he was picked up, a detail that the government claims tends to implicate him.

All of these details suggest the government has an incredibly shoddy case against Latif.

But the government has hidden the shoddiness of its case behind great black walls of redaction. And, just as damning for the government, the government has also hidden these details behind arbitrary redaction practices that don’t even remain consistent over the same document, much less from court to court.

SCOTUS may well deny Latif cert, in which case a man the government cleared for release will continue to be held indefinitely, perhaps for another decade. But if they’re going to do so, they owe it to the American people to show just how shoddy the case they’re deciding on really is.

THIS GITMO ANNIVERSARY NEEDS TO BE ABOUT BAGRAM, TOO

On a near daily basis in the last week or so, Jason Leopold has tweeted some quote from the daily White House press briefing in which a journalist asks Jay Carney a question about detention, to which Carney responds by insisting the Administration still intends to close Gitmo.

Q One other topic. Wednesday is apparently the 10th anniversary of the prison in Guantanamo Bay, and I’m wondering what the White House says now to critics who point to this as a pretty

clear broken promise. The President had wanted to close that within a year. That hasn't happened for a lot of the history that you know of. And now it's like there's really no end in sight. How do you respond to the criticism that this is just a big, broken promise?

MR. CARNEY: Well, the commitment that the President has to closing Guantanamo Bay is as firm today as it was during the campaign. We all are aware of the obstacles to getting that done as quickly as the President wanted to get it done, what they were and the fact that they continued to persist. But the President's commitment hasn't changed at all. And it's the right thing to do for our national security interests.

That has been an opinion shared not just by this President or members of this administration, but senior members of the military as well as this President's predecessor and the man he ran against for this office in the general election. So we will continue to abide by that commitment and work towards its fulfillment.

And that response usually succeeds in shutting the journalist up.

No one has, as far as I know, asked the more general question: "does the Administration plan to get out of the due process-free indefinite detention business?" That question would be a lot harder for Carney to answer—though the answer, of course, is "no, the Administration has no intention of stopping the practice of holding significant numbers of detainees without adequate review." Rather than reversing the practice started by the Bush Administration, Obama has continued it, even re-accelerated it, expanding our prison at Bagram several times.

That question seems to be absent from

discussions about Gitmo's anniversary, too. Take this debate from the NYT.

Deborah Pearlstein takes solace in her assessment that Gitmo has gotten better over the last decade.

In 2002, detention conditions at the base were often abusive, and for some, torturous. Today, prisoners are generally housed in conditions that meet international standards, and the prison operates under an executive order that appears to have succeeded in prohibiting torture and cruelty. In 2002, the U.S. president asserted exclusive control over the prison, denying the applicability of fundamental laws that would afford its residents even the most basic humanitarian and procedural protections, and rejecting the notion that the courts had any power to constrain executive discretion. Today, all three branches of government are engaged in applying the laws that recognize legal rights in the detainees. Guantánamo once housed close to 800 prisoners, and most outside observers were barred from the base. Today, it holds 171, and independent lawyers, among others, have met with most detainees many times.

But she doesn't mention that the Administration still operates a prison alleged to be abusive, even torturous, still rejects the notion that courts have any power to constrain executive discretion over that prison. And that prison holds over 3,000 men in it!

Sure, Gitmo has gotten better, but that only serves to distract from the fact that our detention **practices**—except for the notable fact that we claim to have ended the most physical forms of torture—have not.

David Cole scolds those in Congress who “don't

seem troubled at all about keeping men locked up who the military has said could be released, or about keeping open an institution that jeopardizes our security," yet doesn't mention that Bagram does the same. Nor does he note the part of the Administration's NDAA signing statement that suggested Congress' salutary effort to expand detainee review would not necessarily apply to Bagram. How can it all be Congress' fault when Obama isn't fulfilling the letter of the law providing more meaningful review to those we're holding at Bagram?

Even the brilliant Vince Warren focuses on the "legal black hole" that is Gitmo, without mentioning the bigger legal black hole that is Bagram.

Among the four participants in the debate, only Eric Posner even mentions Bagram, suggesting that that's one less optimal alternative to keeping prisoners at Gitmo.

To be sure, there are other options. Detainees could be placed in prison camps on foreign territory controlled by the U.S. military, where they lack access to U.S. courts and security is less certain.

But then Posner misconstrues the issue.

Some critics believe that the whole idea of a war on terror is misconceived, that Congress could not have lawfully declared war on Al Qaeda, and that therefore suspected members of Al Qaeda cannot be detained indefinitely like enemy soldiers but must either be charged in a court or released. This position has been rejected repeatedly by the courts, but even if it were correct, Guantánamo would remain a legitimate place to detain enemy soldiers picked up on "hot" battlefields wherever they may be now or in the future – places like Afghanistan, Iraq, Libya and maybe soon

Iran, to name a few.

There's a difference between what is legal under international law developed for very different wars and what is just or what is the best way to conduct that war. And the problem with Gitmo (mitigated somewhat over the decade)—and the problem with Bagram, still—is that we're spending unbelievable amounts of money to detain and abuse people that we haven't even adequately reviewed to make sure we need to detain them. That's not a smart way to conduct a war, particularly not one its backers insist will never end, particularly one that depends on our ability to win support among Afghans and other Muslims.

The only thing that was and is problematic about Gitmo that is not also problematic about Bagram is the publicity surrounding it (presumably, though, just here and in Europe—I imagine Afghans, Pakistanis, and al Qaeda members know as much about Bagram as they do about Gitmo). That is, by treating—and allowing the Administration to treat—Gitmo as the problem, rather than due process-free and possibly abusive indefinite detention generally, we're all acting as if the problem is that **people know** we're conducting due process-free indefinite detention, not that we're doing it at all. We're letting the Administration off easy with its claims that mean old Congress has prevented it from closing Gitmo, when Bagram offers proof that it wants to do so not for the right reasons—because it is wrong, because it damages our ability to claim to offer something better than corrupt regimes—but because what America has become and intends to stay is embarrassing, politically inconvenient.

I understand that this anniversary will attract general attention to Gitmo. I'm thrilled that, for once, people are listening to the reporters and activists and lawyers and guards and especially the detainees who have fought to close it. But by allowing the myth that Gitmo is the problem to go unchallenged, and not our due

process-free indefinite detention generally, we're simply pretending that unjust and stupid actions that occur outside of the glare of the press don't matter as much as those that make the news.

THE UPSIDE OF EVIDENCE-FREE NUKE ACCUSATIONS AGAINST IRAN? WE CAN DECLARE VICTORY!

One would think that, within a month of the US finally withdrawing its troops (leaving behind a vast mercenary force) from the nearly nine year nightmare in Iraq that was launched on the basis of evidence-free accusations, and only days after President Obama signed into permanency his ability to detain citizens forever without providing a shred of evidence, the Washington Post would refrain from giving Joby Warrick a chance to yammer again from the basis of unsupportable allegations that Iran is actively pursuing nuclear weapons. But this is the Post we're talking about, and the same bill that gave Obama indefinite detention powers also tightened the screws on Iran, so it was necessary to bring Warrick out to put forth the latest transcribed version of US spin.

Warrick's piece, at the time of this writing, is occupying the most prominent position on the home page of the Post's website, where it has the teaser headline "Iran fears worst as West steps up pressure". Clicking through to the article gives the headline "As currency crisis and feud with West deepen, Iranians brace for war". The overall spin that the US is projecting through this transcription is that both the

Iranian government and Iranian citizens are feeling the almighty power of the US sanctions and that they are in a state of depressed resignation to the inevitability of war, while the US government is seeing that its brilliant moves are paying off and we just might not need to proceed to the point of an overt attack. I guess that is the upside of moving forward with public sanctions (and covert actions that already constitute a full-on war) based on manufactured evidence: it is also possible to manufacture evidence that allows us to declare victory and (hopefully) move on.

There is, of course, a flip side to that same argument. As commenter Dan succinctly put it in my post from yesterday where we were discussing the risk of all-out war stemming from the US sanctions:

All this risk to punish a country for something no one has proven it has done.

With that as background, here is how the Post article opens:

TEHRAN – At a time when U.S. officials are increasingly confident that economic and political pressure alone may succeed in curbing Iran’s nuclear ambitions, the mood here has turned bleak and belligerent as Iranians prepare grimly for a period of prolonged hardship and, they fear, war.

A bit further along, we get the US gloating on its “successful” approach:

The sense of impending confrontation is not shared in Washington and other Western capitals, where government officials and analysts expressed cautious satisfaction that their policies are working.

Former and current U.S. government officials did not dismiss the

possibility of a military confrontation but said they saw recent threats by Iranian leaders – including warning a U.S. aircraft carrier this week not to return to the crucial Strait of Hormuz – mainly as signs of rising frustration. U.S. officials say this amounts to vindication of a years-long policy of increasing pressure, including through clandestine operations, on Iran’s clerical rulers without provoking war.

Yes, Iran did threaten the US not to put a carrier back into the Persian Gulf yesterday and also even announced that now the Revolutionary Guard will hold wargames in the Gulf, but Warrick’s administration controllers did not pass on to him the fact that Iran also is offering to return to the multinational talks aimed at diffusing the nuclear issue:

Iran’s Foreign Minister Ali Akbar Salehi says Tehran is ready to resume talks with the six world powers as soon as both sides agree on a venue and date for negotiation.

“We are prepared for negotiations and we hope talks would be held in a venue agreed upon by both sides,” Salehi said at a joint press conference with his Turkish counterpart Ahmet Davutoglu on Thursday.

/snip/

Tehran says it is ready to continue negotiations based on common ground, adding, however, that it has no intention of backing down from its nuclear rights.

The United States, Israel and some of their allies accuse Tehran of pursuing military objectives in its nuclear program and have used this pretext to impose four rounds of sanctions against the Islamic Republic.

Iran has refuted the allegations, arguing that as a signatory to the Nuclear Non-Proliferation Treaty and a member of the International Atomic Energy Agency, Tehran has a right to use nuclear technology for peaceful use.

Warrick's article would have us believe that the new sanctions (which, as I pointed out in yesterday's post, have not yet been fully implemented) are a tremendous breakthrough:

"The reasons you're seeing the bluster now is because they're feeling it," said Dennis Ross, who was one of the White House's chief advisers on Iran before stepping down late last year. With even tougher sanctions poised to take effect in weeks, the White House had succeeded in dramatically raising the costs of Iran's nuclear program, he said.

And then we have the most important bit of transcription of all in the very next paragraph:

"The measure, in the end, is, 'Do they change their behavior?' " Ross said.

Remember, the "behavior" on which all of this posturing and counter-posturing is based has not been proven with evidence that can withstand public scrutiny. Despite that, we now are told that the key development will be whether Iran changes this "behavior". Presumably, since the behavior itself is not based on evidence, the US now is free to claim the behavior has improved and is no longer a threat. Let us hope that will be the outcome and that the multinational talks will resume, producing an outcome that allows the US and Iran to achieve a level of mutual transparency that diffuses tensions.

Note, I did say "hope"...

KARZAI AND US FIGHT OVER WHO GETS TO RUN THE ABUSIVE PRISONS

As I noted, President Obama reacted to the NDAA's requirement that DOD actually review detainees' cases to figure out if they should be held by claiming the authority to make our prison at Bagram largely exempt from the law.

At one level, having us hold detainees keeps them out of the Afghan prisons, where they'll be tortured. But of course, the Afghans have at least managed to do what we claim to be unable to do—give these men trials.

Now, Karzai is upping the ante: demanding that the US turn over Bagram and its 3,000+ detainees next month.

Afghan President Hamid Karzai ordered the transfer of the U.S.-run Bagram prison to his government's control within a month, citing human rights violations.

Karzai decided the transfer should be made after hearing a report on the prison from the Constitutional Oversight Commission that "details many cases of violations of the Afghan Constitution and other applicable laws of the country, the relevant international conventions and human rights," the president's office said yesterday in a statement.

And in response to Karzai's claims of abuses (which appear to be about nudity), State Department's spokesperson and former Cheney hack Victoria Nuland basically said the same thing the Bush Administration always said: Geneva

comply blah blah blah.

QUESTION: And what about his charges that – violation of human rights in these prisons?

MS. NULAND: Well, you know that we take seriously any charges or allegations of detainee abuse. We respect the rights of detainees who are in facilities that the United States manages, and we ensure that all detainees in U.S. custody are treated in accordance with international legal obligations, including Geneva Common Article III. Any specific allegations of detainee abuse are investigated fully by the Department of Defense and by ISAF.

Coming from Nuland, such reassurances are little comfort.

But then, this is basically a pissing contest over who can run abusive prisons, so it's not comforting in any case.

“CRACKPOTS DON'T MAKE GOOD MESSENGERS”

For the record, I have no intention of voting for Ron Paul in the General election (though depending on how the GOP primary rolls out, I might consider crossing over to vote for Paul in the MI primary, for similar reasons as I voted for John McCain in the 2000 primary: because I knew my vote wouldn't matter in the Democratic primary and I hoped a McCain win might slow down George Bush's momentum and focus some attention on campaign finance reform, McCain's signature issue at the time).

I don't want Ron Paul to be President and, for all my complaints with Obama, he is a less bad presidential candidate than Paul.

But that's an entirely different question than the one Kevin Drum purports to address with this post:

Should we lefties be happy he's in the presidential race, giving non-interventionism a voice, even if he has other beliefs we find less agreeable? Should we be happy that his non-mainstream positions are finally getting a public hearing?

Drum doesn't actually assess the value of having a non-interventionist in the race, or even having a civil libertarian in the race (which he largely dodges by treating it as opposition to the drug war rather than opposition to unchecked executive power), or having a Fed opponent in the race.

Instead, he spends his post talking about what a "crackpot" Paul is, noting (among other things), that Paul thinks climate change is a hoax, thinks the UN wants to confiscate our guns, and is a racist.

Views, mind you, that Paul shares in significant part with at least some of the other crackpots running for the GOP nomination.

Of course, Paul does have views that none of the other Republicans allowed in Presidential debates share. And that's what Drum would need to assess if he were genuinely trying to answer his own question: given a field of crackpots, several of whom are explicit racists, several of whom make claims about cherished government programs being unconstitutional, most of whom claim to believe climate change doesn't exist, is it useful that one of the candidates departs from the otherwise universal support for expanded capitulation to banks, authoritarianism, and imperialism? Is it useful to do so leading up to a General election with a

Democrat who has been weak against banks, expanded executive authority, and found new Muslim countries to launch drone strikes against?

Before I get into the reasons why it is, let me address a completely false claim Drum makes.

Ron Paul has never once done any of his causes any good.

Paul, of course, succeeded in getting a limited audit of the Fed's bailout done. That hasn't resulted in the elimination of the Fed, but it has educated a lot of people about the vast power of the Fed and showed how far government efforts to prop up the banks really went in 2008 and 2009. Of course, he did so in partnership with Alan Grayson, someone who doesn't embrace all of Paul's views but nevertheless demonstrates why Drum's advice that those who share some views with Paul, "should run, not walk, as fast as you can to keep your distance from Ron Paul" is bad advice. We live in a democracy, and it's far easier to get laws passed if members of both parties support them.

And it's not just the Fed. By providing space to support civil liberties and oppose the war on the right, Paul slowed the steam roll in support of the PATRIOT Act, SOPA, the detainee provisions of the NDAA, and the wars. In these areas, he may not have had the limited but notable success he had with the Fed, but if—for example—Dianne Feinstein's effort to specifically exclude Americans from indefinite military detention has any success, it will in part be because Paul and his son mobilized opposition to indefinite detention on the right.

But all that explains why it has been useful to have Paul—bolstered by his 2008 campaign, which seems to disprove Drum's promise that, "in a couple of months he'll disappear back into the obscurity he so richly deserves"—in the House. That doesn't explain why it is useful to have him polling at almost 20% in the GOP race in IA.

Because that is, after all, what we're talking about. So when Drum scoffs at those who have, "somehow convinced yourself that non-interventionism has no other significant voices except Ron Paul," **when we're talking about the Presidential race**, I want to know what race he's been watching? While Gary Johnson supports non-interventionism, he's not a significant voice. In this presidential race, which is what Drum purports to be talking about, there are no other significant voices supporting non-interventionism or championing civil liberties.

And without a such a candidate—without someone playing the role Obama sort of did until July 9, 2008—then the focus of the billion-dollar political debate in the next 11 months will focus primarily on who will more aggressively crack down on Iran and how many more civil liberties the President must dissolve to wage war against significantly weakened terrorists. Ron Paul's presence in the race not only exposes voters to commonsense but otherwise impermissible observations—such as that the detainees we're holding are, with just a handful of exceptions, suspects, never proven to be terrorists in a trial. But his presence also raises the cost for Obama for not addressing his past claims and promises on civil liberties.

And then, of course, we lefties are supposed to be trying to defeat these right wing nutjobs. Drum may think Paul toxic, but his views are equally toxic to the rich donors paying for these Republican candidates. And while Paul doesn't threaten to become a viable anti-Mitt, he can (and did, in 2008) stay in this race long enough to be an annoyance to GOP claims to unity. All the time by differentiating himself with issues—anti-imperialism, civil libertarianism, and anti-banksterism—for which Paul is the only significant voice in this election. Twelve years ago, my support for a policy that I supported, championed by a flawed messenger, contributed in a small way to making Bush spend more money and reveal his loathsome (if transactional) racism in South Carolina.

That didn't make Al Gore the winner, but it didn't hurt. Why would we categorically oppose something similar to happen to Mitt Romney?

As Drum himself notes, there's no danger that by calling out those areas where Paul is good, he's going to be elected President and implement his more loathsome ideas. "Ron Paul is not a major candidate for president." But for those guarding the DC common sense, support for Paul in these areas does seem to present real danger.

It's telling, ultimately, that Drum's piece, which doesn't prove what it purports to (that having Paul in the Presidential race is bad for lefties) but does call him a crackpot crackpot crackpot, is a near mirror image to this Michael Gerson column, which points towards the very same repulsive stances—as well as some downright commonsense ones—as Drum to call Paul a scandal.

No other recent candidate hailing from the party of Lincoln has accused Abraham Lincoln of causing a "senseless" war and ruling with an "iron fist." Or regarded Ronald Reagan's presidency a "dramatic failure." Or proposed the legalization of prostitution and heroin use. Or called America the most "aggressive, extended and expansionist" empire in world history. Or promised to abolish the CIA, depart NATO and withdraw military protection from South Korea. Or blamed terrorism on American militarism, since "they're terrorists because we're occupiers." Or accused the American government of a Sept. 11 "coverup" and called for an investigation headed by Dennis Kucinich. Or described the killing of Osama bin Laden as "absolutely not necessary." Or affirmed that he would not have sent American troops to Europe to end the Holocaust. Or excused Iranian nuclear ambitions as "natural," while dismissing evidence of those ambitions as "war propaganda." Or published a newsletter stating that the

1993 World Trade Center attack might have been “a setup by the Israeli Mossad,” and defending former Ku Klux Klan Grand Wizard David Duke and criticizing the “evil of forced integration.”

Each of these is a disqualifying scandal. Taken together, a kind of grandeur creeps in.

Neither wants to deal with the downright logic (and deserved widespread support) of some of Paul’s views. They both seem to want to, instead, suggest that any deviation from the DC consensus is lunacy (and lunacy of a kind not exhibited by Bachmann, Perry, Newt, and Santorum).

The question of whether it is good to have Paul audibly in the Presidential race—which is fundamentally different from whether we want him to be President—is ultimately a question of whether it is good to have a diversity of views expressed in our democratic debates. Neither Drum nor Gerson object here to the lunacy espoused by the other GOP candidates, per se—the ones that espouse lunacy embraced by the DC consensus, what Drum approvingly calls the “mainstream.” So what is so dangerous in having Paul’s ideas—both sound and repulsive—expressed?

I’m perfectly comfortable having Paul exposed—as he has been—as a racist over the course of this race. Why are Drum and Gerson so upset that the other candidates might be exposed as authoritarians and imperialists in turn?

AS US-IRAN THREAT

EXCHANGE CONTINUES, PAKISTAN DETAINS THREE IRANIAN BORDER GUARDS

[youtube]http://www.youtube.com/watch?v=yaqllTm
cKc[/youtube]

Iran and the US continued to exchange threats over the long holiday weekend. On Saturday night, Barack Obama signed the NDAA, which put into place the ability to enact strong sanctions on banking institutions involved in the sale of Iranian oil. Substantial flexibility is built into the legislation to allow the US to exempt various players in the oil market, so it is still quite uncertain how the sanctions will be implemented. As the video here shows, Iran also test-fired two types of missiles over the weekend prior to the ending of the ten days of naval war games. However, the threats have not ceased, as Iran has now issued a vague warning to the US not to bring the aircraft carrier John C. Stennis, which exited the Persian Gulf on Tuesday, back into the Gulf.

With all of these events taking place, it would be easy to overlook a strange incident on the Iran-Pakistan border on Sunday. Both Iran and Pakistan now say that Pakistan has detained three Iranian border guards who crossed into Pakistan. The guards shot two men who were in a car they were chasing, and one of the men died. The shooting victims are Pakistani nationals.

One of the most detailed accounts appears in the Washington Post via AP:

Pakistani authorities have yet to decide what to do with three Iranian border guards who they say crossed into southwestern Pakistan while chasing after smugglers and killed one them, a government official said Monday.

The incident occurred Sunday in the Mazah Sar area of Baluchistan province, a desolate, unpopulated region where the border is not clearly marked.

Aalam Farez, a senior government official in Washuk district, where Mazah Sar is located, said the Iranians admitted to inadvertently crossing into Pakistan. But, he said, they claimed the two people they shot – one of whom died – were bystanders and that the people they were chasing escaped.

After the shooting, Pakistani border personnel chased the Iranians back across the border and detained them, Pakistani officials have said. They also seized the surviving gunshot victim and determined both of those who had been shot were petty smugglers.

The Express Tribune (via AFP) adds significant background on the region where this event took place:

The Iranians reached Mazan Sar Mashkail, in Washuk district, three kilometres (1.8miles) inside Pakistan where they opened fire on a vehicle they were chasing, according to officials in Balochistan.

“All three personnel of Iranian border security force were taken into custody for their penetration inside Pakistan and killing a Pakistani national on our soil”, Saeed Ahmad Jamali, Deputy Commissioner of Washuk district told AFP.

/snip/

Mazan Sar Mashkail is around 600 kilometres southwest of Quetta, the main town of insurgency hit Baluchistan province, which borders Iran’s Sistan-Baluchestan province.

Iranian embassy officials in Islamabad were unavailable for comment late Sunday but Iran in the past has blamed a Sunni extremist group, called Jundallah, for launching attacks inside Pakistan [sic] from Sistan-Balochistan.

Jundallah says it is fighting Tehran's Shiite rule to secure rights for Sunni Balochis who form a significant population in Sistan-Balochistan, which borders both Afghanistan and Pakistan.

Significantly, this AFP article makes no mention of smuggling, so the smuggling characterization appears only in the AP article, which Mehr News cites in its confirmation of the event. And despite the AP article not mentioning Jundallah, it is possible that both stories are correct, since in addition to its terrorism role, Jundallah also has been accused of drug smuggling. (It seems likely that the AFP article meant to say that Iran has blamed Jundallah for attacks inside Iran rather than Pakistan. Jundallah has claimed responsibility for several attacks, see below.)

The potential involvement of Jundallah is highly significant, as evidence has been presented that the Bush administration provided training and financial support. From ABC in 2007:

A Pakistani tribal militant group responsible for a series of deadly guerrilla raids inside Iran has been secretly encouraged and advised by American officials since 2005, U.S. and Pakistani intelligence sources tell ABC News. The group, called Jundallah, is made up of members of the Baluchi tribe and operates out of the Baluchistan province in Pakistan, just across the border from Iran. It has taken responsibility for the deaths and kidnappings of more than a dozen Iranian soldiers and officials.

The article went on to describe the group's leader (who was subsequently caught and executed by Iran) as "part drug smuggler.

Seymour Hersh added more in 2008:

The Administration may have been willing to rely on dissident organizations in Iran even when there was reason to believe that the groups had operated against American interests in the past. The use of Baluchi elements, for example, is problematic, Robert Baer, a former C.I.A. clandestine officer who worked for nearly two decades in South Asia and the Middle East, told me. "The Baluchis are Sunni fundamentalists who hate the regime in Tehran, but you can also describe them as Al Qaeda," Baer told me. "These are guys who cut off the heads of nonbelievers—in this case, it's Shiite Iranians. The irony is that we're once again working with Sunni fundamentalists, just as we did in Afghanistan in the nineteen-eighties." Ramzi Yousef, who was convicted for his role in the 1993 bombing of the World Trade Center, and Khalid Sheikh Mohammed, who is considered one of the leading planners of the September 11th attacks, are Baluchi Sunni fundamentalists.

One of the most active and violent anti-regime groups in Iran today is the Jundallah, also known as the Iranian People's Resistance Movement, which describes itself as a resistance force fighting for the rights of Sunnis in Iran. "This is a vicious Salafi organization whose followers attended the same madrassas as the Taliban and Pakistani extremists," Nasr told me. "They are suspected of having links to Al Qaeda and they are also thought to be tied to the drug culture." The Jundallah took responsibility for the bombing of a

busload of Revolutionary Guard soldiers in February, 2007. At least eleven Guard members were killed. According to Baer and to press reports, the Jundallah is among the groups in Iran that are benefitting from U.S. support.

Recall that the AP article describes the Iranian border guards as claiming that the men they shot were not the actual suspects they had been chasing but were bystanders and that it is the Pakistani border officials who claim the men shot were smugglers and presumably were the ones being chased. This situation is remarkably similar to the Raymond Davis incident, where Davis gunned down two Pakistani nationals and then claimed that they were trying to rob him while they were on motorcycles and he was in a car, even though the incident looked more like a "hit" on Davis which he managed to reverse. At the very least, by mentioning Jundallah as even potentially involved, AFP has raised the possibility that a group rumored to be backed by the US (even under Obama) would have been active in cross-border activity at a time of very high tension. The relatively short border region between Iran and Pakistan will bear further watching in the near future.