THE WORST PART OF THE SIGNING STATEMENT: SECTION 1024

As I explained here, Obama's signing statement on the defense authorization was about what I expected. He included squishy language so as to pretend he doesn't fully support indefinite detention. And he basically promised to ignore much of the language on presumptive military detention.

But there was one part of the signing statement I (naively) didn't expect. It's this:

> Sections 1023-1025 needlessly interfere with the executive branch's processes for reviewing the status of detainees. Going forward, consistent with congressional intent as detailed in the Conference Report, **my Administration will interpret section 1024 as granting the Secretary of Defense broad discretion to determine what detainee status determinations in Afghanistan are subject to the requirements of this section**. [my emphasis]

Section 1024, remember, requires the Defense Department to actually establish the provisions for status reviews that Obama has promised but not entirely delivered.

> SEC. 1024. PROCEDURES FOR STATUS DETERMINATIONS.
>
> (a) IN GENERAL.—Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the appropriate committees of Congress a report setting forth the procedures for determining the status of persons detained pursuant to the

> Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 1541 note) for purposes of section 1021.
>
> (b) ELEMENTS OF PROCEDURES.—The procedures required by this section shall provide for the following in the case of any unprivileged enemy belligerent who will be held in long-term detention under the law of war pursuant to the Authorization for Use of Military Force:
>
> (1) A military judge shall preside at proceedings for the determination of status of an unprivileged enemy belligerent.
>
> (2) An unprivileged enemy belligerent may, at the election of the belligerent, be represented by military counsel at proceedings for the determination of status of the belligerent.
>
> (c) APPLICABILITY.—The Secretary of Defense is not required to apply the procedures required by this section in the case of a person for whom habeas corpus review is available in a Federal court.

As I've noted, Lindsey Graham (and other bill supporters, both the right and left of Lindsey) repeatedly insisted on this review provision. Lindsey promised every detainee would get real review of his status.

> **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]

And yet, in spite of the fact that Section 1024 includes no exception for those detained at Bagram, Obama just invented such an exception.

Section 1024 was one of the few good parts of the detainee provisions in this bill, because it would have finally expanded the due process available to the thousands of detainees who are hidden away at Bagram now with no meaningful review.

But Obama just made that good part disappear.

Update: I'm still trying to figure out where Obama gets the Congressional intent to let the Defense Secretary pick and choose which detainees 1024 applies to. The managers' statement says this about 1024:

> The Senate amendment contained a provision (sec. 1036) that would require the Secretary of Defense to establish procedures for determining the status of persons captured in the course of hostilities authorized by the Authorization for Use of Military Force (Public Law 107-40), including access to a military judge and a military lawyer for an enemy belligerent who will be held in long-term detention.
>
> The House bill contained no similar provision.
>
> The House recedes with an amendment clarifying that the Secretary of Defense is not required to apply the procedures for long-term detention in the case of a person for whom habeas corpus review is available in federal court.
>
> Because this provision is prospective, the **Secretary of Defense is authorized to determine the extent, if any, to**

> **which such procedures will be applied to detainees for whom status determinations have already been made prior to the date of the enactment of this Act**.
>
> The conferees expect that the procedures issued by the Secretary of Defense will define what constitutes "long-term" detention for the purposes of subsection (b). The conferees understand that under current Department of Defense practice in Afghanistan, a detainee goes before a Detention Review Board for a status determination 60 days after capture, and again 6 months after that. The Department of Defense has considered extending the period of time before a second review is required. **The conferees expect that the procedures required by subsection (b) would not be triggered by the first review, but could be triggered by the second review, in the discretion of the Secretary**. [my emphasis]

This seems to be saying two things. First, DOD doesn't have to go back and grant everyone they've given the inadequate review process currently in place a new review. The 3,000 detainees already in Bagram are just SOL.

In addition, this says DOD gets to decide how long new detainees will have to wait before they get a status review with an actual lawyer—and Congress is perfectly happy making them wait over six months before that time.

Obama seems to have taken that language and pushed it further still: stating that DOD will get broad discretion to decide which reviews will carry the requirement of a judge and a lawyer.

It sort of makes you wonder why the Obama Administration wants these men to be held for over six months with no meaningful review?

EMPTYWHEEL'S CHRISTMAS EVE MEGA FOOTBALL TRASH TALK

[Okay, for the most sacred honor and ritual, yes the meet and greet of Halas' Bears and Lambeau's Packers on the hallowed Tundra, I have cavalierly re-upped Trash Talk to the top of the totem pole pecking order until the conclusion of the sacred event]

Hey there Wheelies and Wheelettes, it's Christmas Eve Day!! And that can mean only one thing; yep, Emptywheel's Christmas Eve Mega Football Trash Talk!

Since the NFL decided to move all but one of its Christmas Day normal Sunday slate of games up a day to give most in the league Christmas off and with their families, we have a full schedule of games today. And, unless The Most Transparent President In The History Of The Universe decides to autopen the NDAA and spring the big kahuna of signing statements today, there is not a heck of a lot else going on. So, to the Game Cave Batman!

The biggest game of the weekend, by just a slight margin, is the battle of the New Yorks which, of course, takes place in New Jersey. Marcy and her family are already in a passionate discussion over whether this means Bad Eli Manning and Mistake Mark Sanchez share the same locker and pass notes to each other. This is a huge game though; the winner likely goes to the playoff, and the loser likely stays home. And it *really* is for bragging rights in New York City. It is a grudge match, and it does count. Big time; one of these teams is going to be eaten alive in the tabloids. I think it comes down to Eli versus Revis Island and Bart Scott and the Jet bruisers. If the Jets get hard pressure on

Eli, Jets win; if not they don’t. No clue who comes out of this alive.

The other game nearly as big is Eagles and Cowboys. Iggles are starting to get healthy and gel, even if it is almost surely too late. They are technically still in the playoff hunt though, have pride on their mind and hate the Cowboys. So, another NFC East grudge match. DeMarco Murray is done for the year, and Felix Jones will play, but is hurting. Other than Jones, Dallas has Sammy Morris. If they do not generate a solid running game, Philly is gonna win this. Even though the game is in at Jerry’s House in Big D, I think the Iggles win it.

ATTENTION! Update: Oh my. My ears were hot, burning if you will, whilst I was away at brunch. I think I have discovered why! It doth seem I neglected to cover the big Kitties versus Bolts clash in Motown. I have thus shat upon both Marcy AND Randiego. Not good. so, here we go: Uh, the Bolts are visiting Matthew Stafford, Megatron and Suh, Suh, Suhshie at Ford Field. This is indeed a top shelf game; the Kitties have a ton of young, if somewhat undisciplined, talent trying to keep the ship righted and sailing for the playoffs after last week’s win over the Rayduhs. They need a win in their last two games to get there, but have to go to Lambeau next week. The Bolts are, improbably, making yet another save Norval’s ass surge in December. With the TeDonks getting circled up in Boofalo, the Chargers would be in the thick of the hunt in the AFC West with a win. A lot on the line, and two exciting offenses. That makes for a great game. Ryan Matthews is on a roll for the Chargers, but the Lions are down to a wounded Kevin Smith at running back. That is the difference. Kitties gonna have to win on the Tundra methinks.

It will not be on national TeeVee, but the Niners-Squawks game may turn out to be very good. Seattle has really come on hard down the stretch, and shockingly Tavaris Jackson is playing at a very high level lately. San Fran

defense probably too tough, but this may approach a toss up since it is in the Emerald City. And, of course, we have another week of Tebowmania. This week, Baby Jesus and the Donkos visit the suddenly hapless Bills. Don't think the wagons can get circled enough to stop the Tebow train, but Brian Dawkins is likely out, and he is the real glue for the Denver defense. That makes it a real ballgame; a toss-up if you will.

The other two first class matchups are on Sunday Night and Monday Night Football respectively. First up for SNF on NBC is the most famous rivalry in football history, yep it's the Bears and Packers on the Frozen Tundra at Lambeau. Really, what more could a football fan want for Christmas than Bears/Packers on a winter night, with steam coming out of the facemasks like dragons, from the Shrine in titletown? If you look up football in the dictionary, that is what they got. I would say Da Bears might make this an upset if they had Cutler and Matt Forte, but they do not and I doubt the Cheese is going to sleep two weeks in a row. Not to say the Pack does not have issue though, their two most critical O-linemen are out, as is Greg Jennings. Still, hard to see GB losing this.

Lastly, the MNF game has some post Christmas firepower on tap for us. Dirty Birds at Saints in Nawlins. Matt Ryan and the Falcons need one more win to lock up a wildcard spot; the Saints are playing for a possible first round bye. And Drew Breeeeeees is closing in on Marino's yardage record and Brady's TD record for a season. That and home field will prove too much for the Falcons.

Let the games and Christmas cheer begin!

From Me, Marcy and Jim White, Merry Christmas to one an all, and thanks to one and all for your support and participation here at the Emptywheel blog. You are the best gifts of all.

THE HOLIDAY FRIDAY DOCUMENT DUMP SIGNING STATEMENT

The Administration has, as expected, buried its signing statement for ~~the Defense Authorization in a holiday Friday document dump.~~

Correction: As DDay corrects me, this is not yet the NDAA signing statement, which is still coming.

I'm actually fascinated by the way they've suggested that they consider some of the detainee provisions to violate separation of powers. They couch their objections in language explicitly referring to the restrictions on transferring Gitmo detainees. They then say there are other "similar" provisions to which they also object. But they don't name those provisions!

> I have previously announced that it is the policy of my Administration, and **in the interests of promoting transparency** in Government, to indicate when a bill presented for Presidential signature includes provisions that are subject to well-founded constitutional objections. The Department of Justice has advised that a small number of provisions of H.R. 2055 raise constitutional concerns.
>
> In this bill, the Congress has once again included provisions that would bar the use of appropriated funds for transfers of Guantanamo detainees into the United States (section 8119 of Division A), as well as transfers to the custody or effective control of foreign countries unless specified conditions are met (section 8120 of Division A). **These provisions are similar to others**

> **found in the National Defense Authorization Act for Fiscal Year 2012**. My Administration has repeatedly communicated my objections to these provisions, including my view that they could, under certain circumstances, violate constitutional separation of powers principles. In approving this bill, **I reiterate the objections my Administration has raised regarding these provisions, my intent to interpret and apply them in a manner that avoids constitutional conflicts**, and the promise that my Administration will continue to work towards their repeal. [my emphasis]

~~Now, in its~~ veto threat capitulation~~, the Administration emphasized the uncertainty the bill (now law) presents for counterterrorism professionals.~~

> While we remain concerned about the uncertainty that this law will create for our counterterrorism professionals, the most recent changes give the President additional discretion in determining how the law will be implemented, consistent with our values and the rule of law, which are at the heart of our country's strength.
>
> [snip]
>
> As a result of these changes, we have concluded that the language does not challenge or constrain the President's ability to collect intelligence, incapacitate dangerous terrorists, and protect the American people, and the President's senior advisors will not recommend a veto. However, if in the process of implementing this law we determine that it will negatively impact our counterterrorism professionals and undercut our commitment to the rule of

> law, we expect that the authors of these provisions will work quickly and tirelessly to correct these problems.

And frankly, I think the Administration is absolutely right to be concerned about the way these provisions—particularly, the presumptive military detention for some alleged terrorists—will screw up FBI's efforts to investigate and capture terrorists.

But rather than explicitly focusing on this problem in the signing statement in the same way they did in the veto threat withdrawal, they simply invoke provisions similar to the Gitmo transfer restrictions, without naming them.

~~Not only is this a missed opportunity to make a strong defense of our civilian counterterrorism efforts—which have been far more successful than military commissions.~~ But it leaves open the possibility that the Administration's biggest objection isn't about presumptive military detention but other limits on executive power.

It is par for the course for the Administration to keep secret which provisions it intends to "apply in a manner that avoids constitutional conflicts" even while celebrating its own "transparency."

OBAMA APOLOGISTS IGNORING THE ROTTING CORPSE OF ANWAR AL-AWLAKI

It's been amusing to see how Obama apologists have taken Lawfare's very helpful explainer on the NDAA's detainee provisions to pretend that their president isn't signing a bill that he

believes authorizes the indefinite detention of American citizens.

Take this example from Karoli.

Here's how she claims that Lawfare proves that the bill doesn't authorize indefinite detention of American citizens.

> Key point rebutting the contention that the indefinite detention provisions apply to United States citizens:
>
> > Section 1022 purports not merely to authorize but to require military custody for a subset of those who are subject to detention under Section 1021. In particular, it requires that the military hold "a covered person" pending disposition under the law of war if that person is "a member of, or part of, al-Qaeda or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda" and is participating in an attack against the United States or its coalition partners. The president is allowed to waive this requirement for national security reasons. **The provision exempts U.S. citizens entirely, and it applies to lawful permanent resident aliens for conduct within the United States to whatever extent the Constitution permits.** It requires the administration to promulgate procedures to make sure its requirements do not interfere with basic law enforcement functions in counterterrorism cases. And it insists that "Nothing in this section shall be construed to affect the existing criminal enforcement and national

> > security authorities of the Federal Bureau of Investigation or any other domestic law enforcement agency with regard to a covered person, regardless whether such covered person is held in military custody." [emhasis original]

Of course, Karoli can only make this claim by pretending that section 1022—the section that makes military detention presumptive for non-citizens but doesn't foreclose military detention of US citizens—is section 1021—the section that affirms the President's authority to indefinitely detain people generally. And she can also make this claim only by ignoring the section where Lawfare answers her question directly.

> ## *Does the NDAA authorize the indefinite detention of citizens?*
>
> No, though it does not foreclose the possibility either.

The NDAA doesn't do anything to exempt Americans from indefinite detention. And the reason it doesn't—at least according to the unrebutted claims of Carl Levin that I reported on over a month ago—is because the Administration asked the Senate Armed Services Committee to take out language that would have specifically exempted Americans from indefinite detention.

> > The initial bill reported by the committee included language expressly precluding "the detention of citizens or lawful resident aliens of the United States on the basis of conduct taking

> place within the United States, except to the extent permitted by the Constitution of the United States." **The Administration asked that this language be removed from the bill**. [my emphasis]

So the effect is that (as Lawfare describes in detail) the bill remains unclear about whether Americans can be detained indefinitely and so we're left arguing about what the law is until such time as a plaintiff gets beyond the Executive Branch's state secrets invocations to actually decide the issue in court.

But what's not unclear is what Obama believes about the bill he's signing. That's true not just because (again, according to the unrebutted statement of Carl Levin) the Administration specifically made sure that the detention provisions could include Americans, but because the Administration used a bunch of laws about detention to justify the killing of American citizen Anwar al-Awlaki.

> And, as Charlie Savage has reported, the legal justification the Administration invented for killing an American citizen in a premeditated drone strike consists of largely the same legal justification at issue in the NDAA detainee provisions.
>
> > - *The 2001 AUMF, which purportedly defined who our enemies are (though the NDAA more logically includes AQAP in its scope than the 2001 AUMF)*
> > - *Hamdi, which held the President*

> > *could hold an American citizen in military detention under the 2001 AUMF*
> > - *Ex Parte Quirin, which held that an American citizen who had joined the enemy's forces could be tried in a military commission*
> > - *Scott v. Harris (and Tennessee v. Garner), which held that authorities could use deadly force in the course of attempting to detain American citizens if that person posed an imminent threat of injury or death to others*

In other words, Obama relied on substantially the same legal argument supporters of the NDAA detainee provisions made to argue that indefinite detention of American citizens was legal, with the addition of Scott v. Harris to turn the use of deadly force into an unfortunate side-effect of attempted detention. [original typos

> corrected]

We don’t have to guess about what the Administration believes the law says about detention and its unfortunate premeditated side effect of death because we have the dead body of Anwar al-Awlaki to make it clear that the Administration thinks Hamdi gives the Executive expansive war powers that apply even to American citizens.

You don’t get to the targeted killing of American citizens (which, after all, doesn’t offer the possibility of a habeas corpus review) without first believing you’ve got the power to indefinitely detain Americans (with habeas review).

Now, to Obama’s, um, credit, I don’t think he actually **wants** to indefinitely detain Americans. He seems to have figured out that the civilian legal system is far more effective—and plenty flexible—for detaining terrorists for long (and usually life, in the case of actual terrorist attackers) sentences. He doesn’t necessarily want to use the power of indefinite detention he believes he has, but (as the unrebutted claims of Carl Levin make clear) he wants to be able to continue to claim he has it, probably because a bunch of other claimed authorities—demonstrably, targeted killing, and probably some kinds of domestic surveillance—depend on it.

But that doesn’t excuse what he will do by signing the bill into law. He’s signing a bill that grants the executive broad powers of detention that he believes to include American citizens. And while he may not want to detain Americans, that’s no guarantee that President Newt won’t want to.

DRONE WAR SECRECY AND KILL OR CAPTURE

As we stand on the doorstep of President Obama signing into law the new NDAA and its dreaded controversial provisions, there are two new articles out of interest this morning. The first is an incredibly useful, and pretty thorough, synopsis at Lawfare of the new NDAA entitled "NDAA FAQ: A Guide for the Perplexed". It is co-written by Ben Wittes and Bobby Chesney and, though I may differ slightly in a couple of areas, it is not by much and their primer is extremely useful. I suggest it highly, and it has condensed a lot of material into an easily digestible blog length post.

The second is a long read from the Washington Post on how secrecy defines Obama's drone wars:

> The administration has said that its covert, targeted killings with remote-controlled aircraft in Pakistan, Yemen, Somalia and potentially beyond are proper under both domestic and international law. It has said that the targets are chosen under strict criteria, with rigorous internal oversight.
>
> ….
>
> "They've based it on the personal legitimacy of [President] Obama – the 'trust me' concept," Anderson said. "That's not a viable concept for a president going forward."

The article goes on to state how the CIA, and the majority of voices in the White House, are fighting tooth and nail for continued utmost secrecy lest any of our enemies somehow discover we are blowing them to bits with our drones. This is, of course, entirely predictable, especially now that the former head of the CIA leads the military and the former military chief for the greater Af/Pak theater which has long been ground zero for the drone kill program, Petraeus, is the head of the CIA.

But then the Post piece brings up our old friend, the OLC:

> The Justice Department's Office of Legal Counsel has opposed the declassification of any portion of its opinion justifying the targeted killing of U.S. citizen Anwar al-Awlaki in Yemen this year. Awlaki, a propagandist for the Yemen-based al-Qaeda affiliate whom Obama identified as its "external operations" chief, was the first American known to have been the main target of a drone strike. While officials say they did not require special permission to kill him, the administration apparently felt it would be prudent to spell out its legal rationale.
> ….
> Under domestic law, the administration considers all three to be covered by the Authorization for Use of Military Force that Congress passed days after the Sept. 11, 2001, attacks. In two key sentences that have no expiration date, the AUMF gives the president sole power to use "all necessary and appropriate force" against nations, groups or persons who committed or aided the attacks, and to prevent future attacks.
>
> The CIA has separate legal authority to conduct counterterrorism operations under a secret presidential order, or finding, first signed by President

> Ronald Reagan more than two decades ago. In 1998, President Bill Clinton signed an amendment, called a Memorandum of Notification, overriding a long-standing ban on CIA assassinations overseas and allowing “lethal” counterterrorism actions against a short list of named targets, including Osama bin Laden and his top lieutenants. Killing was approved only if capture was not deemed “feasible.”
>
> A week after the Sept. 11 attacks, the Bush administration amended the finding again, dropping the list of named targets and the caveat on “feasible” capture.
>
> “All of that conditional language was not included,” said a former Bush administration official involved in those decisions. “This was straight-out legal authority. . . . By design, it was written as broadly as possible.”

This brings us back to the notable October 8, 2011 article by the New York Times’ Charlie Savage on his viewing of the Awlaki targeting memo relied on by the Obama White House for the extrajudicial execution of Anwar al-Awlaki. Marcy, at the time discussed the incongruity of the collateral damage issue and the fact Samir Khan was also a kill in the targeted Awlaki strike.

I would like to delve into a second, and equally misleading, meme that has been created by the self serving and inconsistent secret law Obama has geometrically expanded from the already deplorable Bush/Cheney policy set: the false dichotomy in the kill or capture element of the Awlaki kill targeting.

It has become an article of faith that Awlaki could neither have been brought to justice in Yemen nor, more importantly, captured in Yemen and brought to justice in an appropriate forum

by the United States. It has been a central point made in the press; here is the New York Time's Scott Shane in early October:

> The administration's legal argument in the case of Mr. Awlaki appeared to have three elements. First, he posed an imminent threat to the lives of Americans, having participated in plots to blow up a Detroit-bound airliner in 2009 and to bomb two cargo planes last year. Second, he was fighting alongside the enemy in the armed conflict with Al Qaeda. **And finally, in the chaos of Yemen, there was no feasible way to arrest him.** (emphasis added)

Shane was relying on Bobby Chesney, a University of Texas law professor, and granted an expert in the field who also is a principal at Lawfare Blog. It is the same meme propounded by not only other reporters, but by other leading experts. Here is Ben Wittes in Lawfare stating the assumption as a given fact. Here is Jack Goldsmith (also of Lawfare) espousing the same in a widely read Times Editorial. Here is Peter Finn and the venerable Washington Post doing the same.

Just how does this meme set in and become the common wisdom and fact of such wise men (and I mean that term literally; these are smart people)? Because, of course, that is what the US government tells them, as well as us. With nothing but the self-serving, selective dribble leaking by the Administration of supposedly classified information, there is no specific factual basis from which to dissect the truth. And that is the way the Administration likes it; it always gets messy when citizens actually *know* what their government is doing in their name.

On the Awlaki targeted execution, it was not only desirable for people to believe the government's stated basis, it was critical. Because the house of cards falls otherwise without the necessity element, and it becomes no

more than a convenience kill wherein Mr. Obama was too lazy and hamstrung by his own political considerations to do otherwise. Here is how Charlie Savage describes the predicate element in the Awlaki OLC memo in his, so far, seminal report:

> The Obama administration's secret legal memorandum that opened the door to the killing of Anwar al-Awlaki, the American-born radical Muslim cleric hiding in Yemen, found that it would be lawful only if it were not feasible to take him alive, according to people who have read the document.
>
> …
>
> **The [OLC] lawyers were also told that capturing him alive among hostile armed allies might not be feasible if and when he were located**. (emphasis added)

In fairness to Mr. Savage, he more than touches on the import of the issue by including a question from Samir Khan's father:

> "Was this style of execution the only solution?" the Khan family asked in its statement. "Why couldn't there have been a capture and trial?"

And Charlie himself posits the following:

> The memorandum is said to declare that in the case of a citizen, it is legally required to capture the militant if feasible — raising a question: was capturing Mr. Awlaki in fact feasible?
>
> It is possible that officials decided last month that it was not feasible to attempt to capture him because of factors like the risk it could pose to American commandos and the diplomatic problems that could arise from putting ground forces on Yemeni soil. Still, the raid on Osama bin Laden's compound in Pakistan demonstrates that officials

> have deemed such operations feasible at times.

So Obama Administration "officials decided last month that it was not feasible to attempt to capture" Awlaki. Most everybody has taken that on faith, but should they? The US had had Awlaki under intense surveillance for quite some time. The US also claims to be strong strategic partners with Pakistan. It is doubtful Yemen really cared all that much about Awlaki, as he was a noisy American. Who says there was no way between the combined capabilities of the US and Yemen Awlaki could not at least be attempted to be captured?

Now, I am not saying it is clear Awlaki could have been captured and brought to trial, just that it is not a given that it was impossible. Who makes those decisions, and on what exact basis and criteria? Anwar Awlaki, for everything you want to say about him, had *never* been charged with a crime, much less convicted of one, and he retained Fourth, Fifth and Sixth Amendment rights as a US citizen. If the precedent for extrajudicial execution of American citizens is being set at the whim of the President, then American citizens should know how and why.

So, hats off to Charlie Savage for having raised the critical question on necessity; problem is, however, it was only a question. There was, and is, no more specific information for him, or us, to go on from the Administration. Which leaves the remainder of the citizenry and chattering classes effectively working off of the glittering generalities and assumptions propounded by the government. And, in case you did not notice, there was effectively no discussion of the kill or capture paradigm in all the hubbub of the recent NDAA discussion. So, we are no further along in this regard than we were when Awlaki was terminated with prejudice. I will likely come back to the kill or capture paradigm at a later date, because it is a fascinating discussion in terms of history

and protocols.

Which brings us back to where we started here. These are life and death matters for those, like Awlaki (and Samir Khan too, as it is quite likely the US had reason to know he was in Awlaki's "collateral damage" radius), that are placed on the President's kill list and, to the rest of us, are of rude foundational importance to the very existence of American rule of law and constitutional governance. For all the sturm and drang surrounding the release of the torture memos, the resulting discussion has been sober, intelligent, and important. The publication of the torture memos has provided a template not only showing how it can be done, but proving that it can and should be done.

The same as was the case with the OLC torture memos holds true in regards to the OLC kill list targeting memo for Anwar al-Alawki and the related memos the Obama Administration is relying on. The documents should be released by the Obama administration with no more than the absolute minimal redaction necessary to truly protect means and methods.

If the Obama administration insists on hiding such critical knowledge and information necessary for the knowing exercise of democracy within the United States, then Mr. Obama and his administration should have the intellectual consistency and honesty to investigate and prosecute those within his administration responsible for the serious leaks to Charlie Savage and the New York Times of classified information that has previously been deemed in court and under oath to be "state secrets". If you can prosecute Bradley Manning, surely there should be some effort to bring Savage's leaker to justice. Except there will be none of that, because it was almost certainly ordered by the White House as a selective propaganda ploy to bolster their extrajudicial killing program.

As hard as it is to believe, I, at the time, contacted the Obama Department of Justice and they oficially stated "no comment" when these

questions were propounded. In light of the fact the leak almost certainly came from extremely high up within the Obama administration, and was done with the express knowledge and consent of Mr. Obama himself to crow and take political advantage of his kill, it is hard to say that this is shocking. And, again, this is exactly the problem when the United States government plays self-serving games with its own classified information — the people, and the democracy they are tasked with guiding, all lose.

[The forever classic Emptywheel "Killer Drone" graphic is, of course by the one and only Darkblack]

OBAMA'S RE-ELECT STRATEGY: VOTE FOR ME, OR NEWT WILL HAVE AUTHORITY TO INDEFINITELY DETAIN YOU

Ken Gude, writing for the Democratic Party's house think tank, offers a thoroughly disgusting defense of Obama signing the Defense Authorization and its detainee provisions. In his first paragraph, he asserts that the detainee provisions don't establish indefinite military detention.

> Let me put this simply: The detainee provisions in the bill do not establish indefinite military detention authority for anyone captured in the United States.

Of course, that says nothing about what the

provisions do for the existing system of military detention that has already been established.

Just a few paragraphs later, Gude affirms the primacy of presidential discretion over things like indefinite detention, suggesting there is nothing Congress could do to limit or guide whatever authority was granted by the (doesn't Congress pass these things?) Authorization to Use Military Force.

> Any military detention authority contained in the AUMF occurs as an incident of the necessary and appropriate use of military force. Any such use of force is at the exclusive discretion of the president, subject of course to constitutional and international law constraints.

But don't worry about this breathtaking assertion of unlimited presidential authority, Gude suggests, because Obama's not a big military detention fan.

> The Obama administration in word and deed has made it very clear that the president does not believe it necessary or appropriate to use military detention authority in the United States. Both Omar Farouk Abdulmutallab and Faisal al-Shazaad were arrested after attempting mass casualty terrorist attacks inside the United States. In both instances, conservatives called for putting them in military detention, but in both instances, the Obama administration chose to use the criminal justice system.

There are just two problems with this (setting aside the grand claim that nothing can impinge on Presidential discretion on these matters).

First, we are less than one year from a Presidential election. In 389 days we'll have

another Presidential inauguration, whether of Obama again or someone else; Newt Gingrich currently leads GOP polls. It is absolutely irresponsible for Gude to assert that the codification of authority that Obama will sign into law doesn't raise the specter of how other Presidents will use that authority.

> Yes, a future president may interpret that authority differently, but that is both a fight for another day and one that will not hinge on the 2012 NDAA. So let's put away both the rhetoric and the fear that the U.S. military will be detaining U.S. citizens captured in the United States.

I can only take this irresponsible claim to mean that it is a core part of Obama's re-elect strategy to make sure a President who doesn't embrace indefinite military detention of American citizens—as Newt would likely do—gets re-elected.

Then there's the even bigger problem with Gude's argument.

Sure, Obama's not a fan of indefinite military detention. Sure, in key cases he chose to use the civilian legal system—and used it well.

But Obama **is** a fan of targeted killings.

And, as Charlie Savage has reported, the legal justification the Administration invented for killing an American citizen in a premeditated drone stike consists of largely the same legal justification at issue in the NDAA detainee provisions.

- The 2001 AUMF, which purportedly defined who our enemies are (though the NDAA more logically includes AQAP in its scope than the 2001 AUMF)

- Hamdi, which held the President could hold an American citizen in military detention under the 2001 AUMF
- Ex Parte Quirin, which held that an American citizen who had joined the enemy's forces could be tried in a military commission
- Scott v. Harris (and Tennesee v. Garner), which held that authorities could use deadly force in the course of attempting to detain American citizens if that person posed an imminent threat of injury or death to others

In other words, Obama relied on substantially the same legal argument supporters of the NDAA detainee provisions made to argue that indefinite detention of American citizens was legal, with the addition of Scott v. Harris to turn the use of deadly force into an unfortunate side-effect of attempted detention.

And, oh, if you're not an imminent threat but happen to be sitting next to the guy the government has determined is one? Duck.

The example of Anwar al-Awlaki—which Gude deftly chooses to ignore—not only shows that Obama fully endorses precisely the arguments made by the defenders of the indefinite detention provisions. But that he is willing to use the authority granted under the provisions to kill, rather than detain, American citizens.

Maybe using Obama's beliefs about his detention authority really aren't such a good election strategy after all.

SERIAL ABUSER OF EXECUTIVE BRANCH "FLEXIBILITY," JOHN BRENNAN, MAKING VETO CASE ON DETAINEE PROVISIONS

I have already said I think Obama needs to veto the Defense Authorization because of the detainee provisions. And I have argued that the Administration needs to lay the groundwork for doing so right now, preferably by fear-mongering about how much less safe presumptive military detention would make us.

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

But I'm dismayed the Administration has chosen John Brennan, of all people, to do so. (h/t Ben Wittes)

The Administration has chosen someone who served as a top CIA executive during the period it developed its torture program to go out and argue the Executive Branch needs "flexibility" in detention to collect intelligence.

> And so, what we've tried to do in this administration is to maintain as much flexibility as possible. And **anything that restricts our flexibility in terms of how we want to detain them**, question them, prosecute them is something that

> counterterrorism professionals and practitioners really are very concerned about.
>
> [snip]
>
> What we want to do is to extract the intelligence from them so that we can keep this country safe. We cannot hamper this effort. It's been successful to date and this legislation really puts that at risk. [my emphasis]

We let a President have that kind of unrestricted flexibility on how to detain suspected terrorists and he used it to order Brennan's agency to engage in torture.

But it's not just with torture that John Brennan has been party to the Executive Branch's abuse of this kind of unfettered "flexibility" in the past.

As I've pointed out, one of the problems (for the Administration) with the AUMF-affirming language in the Senate detainee provisions is that it may circumscribe the Administration's ability to claim that terrorists with no ties to al Qaeda are legitimate military targets. That broader interpretation, relying on the Iraq AUMF, was implemented in 2004 to authorize things that presumably were already being done with the illegal wiretap program. When that May 2004 opinion was written, John Brennan oversaw the targeting—relying on that expansive definition—for the illegal wiretap program.

And then there's the Administration's insistence that no court should be able to review their decisions about who is and is not an enemy under the AUMF and whether those enemies represent an imminent threat. They prevented such a review with Anwar al-Awlaki, in part, by invoking state secrets over the precise terms at issue in the detainee language. Yet after the Administration killed Awlaki, Administration officials spilled state secrets repeatedly, at times solely to boast about the kill. Brennan even provided

details covered under state secrets declarations on the record. The Administration's badly hypocritical approach to secrecy in the case of Awlaki, particularly its failure to prosecute John Brennan for leaking state secrets, makes it clear their state secrets invocation had nothing to do with national security, but instead had to do with remaining free from any oversight—with retaining the maximum "flexibility," if you will—over precisely the issues at the core of the detainee provisions. And as with torture and illegal wiretapping, John Brennan was at the center of that gross abuse of executive power as well.

There are some superb reasons to veto the Defense Authorization because of the detainee provisions: largely because DOJ has proven best able to interrogate and prosecute terrorists in the last decade. And there are some horrible reasons to do so: to allow the Executive Branch to continue to wield expanded powers with almost no oversight.

John Brennan is, in this Administration at least, the personification of all the horrible reasons.

Update: The AP reports the Administration is conducting a "full court press" to get changes to the bill. But look at what they point to to justify their "flexibility:"

> The administration insists that the military, law enforcement and intelligence agents need flexibility in prosecuting the war on terror. Obama points to his administration's **successes in eliminating** Osama bin Laden and **al-Qaida figure Anwar al-Awlaki**. Republicans counter that their efforts are necessary to respond to an evolving, post-Sept. 11 threat, and that Obama has failed to produce a consistent policy on handling terror suspects. [my emphasis]

Frankly, they'd probably be able to assassinate

Awlaki under the new bill. But it's telling they point to it—based as it is on their ability to interpret the AUMF in secrecy and with no oversight—as their justification for "flexibility."

JON KYL JUSTIFIES MILITARY DETENTION BY CLAIMING CIA-MILITARY CREDIT FOR FBI INTERROGATIONS

In the entire two week debate over the detainee provisions of the Defense Authorization, the champions of military detention offered almost no rationale for it (a pity, then, that the opponents barely explained why it's such a bad idea), aside from Lindsey Graham repeating endlessly that detainees shouldn't get lawyers (he never explained how this claim jived with his promise that every detainee would have access to habeas corpus).

One exception is a statement that Jon Kyl submitted to the record but did not read (the statement starts on PDF 5). After reasserting the legality of the detainee provisions under Hamdi, Kyl's (**was** it Kyl's?) statement offered an "explanation" for military detention; I've reproduced that part of the statement in full below the line.

Now, the statement doesn't make any sense. It invokes what it claims were CIA interrogations and treats them as military interrogation; though in fact a number of the interrogations the statement invokes were FBI interrogations.

The statement claims detainees wouldn't have a lawyer, though the architects of the bill have

made it clear (as has SCOTUS) detainees would have access to habeas corpus and therefore (presumably) lawyers.

Perhaps not surprising, the statement also invokes two discredited pieces of propaganda: Vice Admiral Lowell Jacoby's January 9, 2003 Declaration in opposition to granting Jose Padilla habeas corpus and George Bush's September 6, 2006 speech announcing he was moving 14 high value detainees to Gitmo.

It relies on Jacoby's statement to argue for the value of a "relationship of dependency," which seems to no more than a rebranding of Bruce Jessen's "learned helplessness." And note, Jacoby's statement, written six months after DOD took custody of Padilla, spoke of intelligence he might offer prospectively; it doesn't claim to have gotten any intelligence using this "relationship of dependency."

And it relies on Bush's statement to claim that military or CIA interrogations exposed that KSM was Mukhtar and Jose Padilla's plans, both of which came from Ali Soufan's FBI interrogation of Zubaydah. It also claims the CIA interrogations yielded Ramzi bin al-Shibh's location, whereas Soufan, at least, claims that came from an FBI interrogation in Bagram. And it claims CIA's interrogation of KSM revealed the Liberty Towers plot that had been broken up a year earlier. In other words, Kyl's argument for why we need military detention consists of repeating discredited propaganda claiming CIA credit for interrogations largely conducted by the FBI. The same FBI officers who will lose their ability to interrogate detainees if and when this bill goes into place.

In short, one of the most comprehensive arguments for why we need military detention instead makes the case for retaining FBI primacy. At the same time, it appears to endorse the "learned helplessness" that ended up making delaying any value to KSM and other detainee interrogations.

Even the champions of military detention offer proof that we're safer with civilian detention.

What follows is the statement Kyl submitted to the record.

Wahy Military Detention Is Necessary: To Allow Intelligence Gathering That Will Prevent Future Terrorist Attacks Against the American People

Some may ask, why does it matter whether a person who has joined Al Qaeda is held in military custody or is placed in the civilian court system? One critical reason is intelligence gathering. A terrorist operative held in military custody can be effectively interrogated. In the civilian system, however, that same terrorist would be given a lawyer, and the first thing that lawyer will tell his client is, "don't say anything. We can fight this."

In military custody, by contrast, not only are there no lawyers for terrorists. The indefinite nature of the detention—it can last as long as the war continues—itself creates conditions that allow effective interrogation. **It creates the relationship of dependency and trust that experienced interrogators have made clear is critical to persuading terrorist detainees to talk**.

Navy Vice-Admiral Lowell Jacoby, who at the time was the Director of the Defense Intelligence Agency, explained how military custody is critical to effective interrogation in a declaration that he submitted in the Padilla litigation. He emphasized that successful noncoercive interrogation takes time—and it requires keeping the detainee away from lawyers.

Vice-Admiral Jacoby stated:

> **DIA's approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and the interrogator**. Developing the kind of

> relationship of trust and dependency necessary for effective interrogations is a process that can take a significant amount of time. There are numerous examples of situations where interrogators have been unable to obtain valuable intelligence from a subject until months, or, even years, after the interrogation process began.
>
> **Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence gathering tool**. Even seemingly minor interruptions can have profound psychological impacts on the delicate subject/interrogator relationship. Any insertion of counsel into the subject-interrogator relationship, for example—even if only for a limited duration or for a specific purpose—can undo months of work and may permanently shut down the interrogation process.

Specifically with regard to Jose Padilla, Vice Admiral Jacoby also noted in his Declaration that: "Providing [Padilla] access to counsel now would create expectations by Padilla that his ultimate release may be obtained through an adversarial civil litigation process. This would break—probably irreparably—the sense of dependency and trust that the interrogators are attempting to create."

In other words, military custody is critical to successful interrogation. Once a terrorist detainee is transferred to the civilian court system, the conditions for successful interrogation are destroyed.

Preventing the detention of U.S. citizens who collaborate with Al Qaeda would be a historic abandonment of the law of war. And, by preventing effective interrogation of these collaborators, it would likely have severe

consequences for our ability to prevent future terrorist attacks against the American people.

We know from cold, hard experience that successful interrogation is critical to uncovering information that will prevent future attacks against civilians.

On September 6 of 2006, when President Bush announced the transfer of 14 high-value terrorism detainees to Guantanamo, he also described information that the United States had obtained by interrogating these detainees. Abu Zubaydah was captured by U.S. forces several months after the September 11 attacks. **Under interrogation, he revealed that Khalid Sheikh Mohammed was the principal organizer of the September 11 attacks**. This is information that the United States did not already know—and that we only obtained through the **successful military interrogation** of Zubaydah.

Zubaydah also described a terrorist attack that Al Qaida operatives were planning to launch inside this country—an attack of which the United States had no previous knowledge. Zubaydah described the operatives involved in this attack and where they were located. This information allowed the United States to capture these operatives—one while he was traveling to the United States.

Again, just imagine what might have happened if the Feinstein amendment had already been law, and if the Congress had stripped away the executive branch's ability to hold Al Qaeda collaborators in military custody and interrogate them. We simply would not learn what that detainee knows—including any knowledge that he may have of planned future terrorist attacks.

Under military interrogation, **Abu Zubaydah also revealed the identity of another September 11 plotter, Ramzi bin al Shibh**, and provided information that led to his capture. U.S. forces then interrogated bin al Shibh. Information that both he and Zubaydah provided helped lead to the capture of Khalid Sheikh Mohammed.

Under interrogation, **Khalid Sheikh Mohammed provided information that helped stop another planned terrorist attack on the United States**. K.S.M. also provided information that led to the capture of a terrorist named Zubair. And K.S.M.'s interrogation also led to the identification and capture of an entire 17-member Jemaah Islamiya terrorist cell in Southeast Asia.

Information obtained from interrogation of terrorists detained by the United States also helped to stop a planned truck-bomb attack on U.S. troops in Djibouti. Interrogation helped stop a planned car-bomb attack on the U.S. embassy in Pakistan. And it helped stop a plot to hijack passengers planes and crash them into Heathrow airport in London.

As President Bush stated in his September 6, 2006 remarks, "[i]nformation from terrorists in CIA custody has played a role in the capture or questioning of nearly every senior al Qaida member or associate detained by the U.S. and its allies." The President concluded by noting that Al Qaida members subjected to interrogation by U.S. forces: "have painted a picture of al Qaeda's structure and financing, and communications and logistics. They identified al Qaeda's travel routes and safe havens, and explained how al Qaeda's senior leadership communicates with its operatives in places like Iraq. They provided information that ….. has allowed us to make sense of documents and computer records that we have seized in terrorist raids. They've identified voices in recordings of intercepted calls, and helped us understand the meaning of potentially critical terrorist communications.

[Were it not for information obtained through interrogation], our intelligence community believes that al Qaeda and its allies would have succeeded in launching another attack against the American homeland. By giving us information about terrorist plans we could not get anywhere else, this [interrogation] program has saved

innocent lives."

If the Feinstein amendment were adopted, this is all information that we would be unable to obtain if the Al Qaeda collaborator that our forces had captured was a U.S. citizen. **It would simply be impossible to effectively interrogate that Al Qaeda collaborator—the relationship of trust and dependency that military custody creates would be broken, and the detainee would instead have a lawyer telling him to be quiet**. And we know that information obtained by interrogating Al Qaeda detainees has been by far the most valuable source of information for preventing future terrorist attacks.

Again, in every past war, our forces have had the ability to capture, detain, and interrogate U.S. citizens who collaborate with the enemy or join forces with the enemy. I would submit that in this war, intelligence gathering is more critical than ever. Al Qaeda doesn't hold territory that we can capture. It operates completely outside the rules of war, and directly targets innocent civilians. Our only effective weapon against Al Qaeda is intelligence gathering. And the Feinstein amendment threatens to take away that weapon—to take away our best defense for preventing future terrorist attacks against the American people. [my emphasis]

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.

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.