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

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

> It's also clear that, whether for political reasons or due to some complex internal dynamics, the administration seems at this point willing to put up more of a public fight over detainee-related strictures than it has in the past. However, whether that will ultimately translate to a willingness to blow up the defense bill with a veto is unclear. At least some lawmakers seem to view the threats as bluster, in light of the president's track record.
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> As McCain said Thursday: "The administration ratcheted up the stakes…with a threat of a veto. I hope they are not serious about it. There is too much in this bill that is important to this Nation's defense."

The veto threat is probably tied to the new AUMF language

But I think Gerstein has the dynamic wrong—and his claim that this veto threat represents more public fight than he has shown in the past is flat out wrong. You see, Gerstein's making the claim based on the assertion that the fight is

over the Administration's authority to move and try detainees as it sees necessary.

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

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

> Despite my strong objection to these provisions, which my Administration has consistently opposed, I have signed this Act because of the importance of authorizing appropriations for, among other things, our military activities in 2011.
>
> Nevertheless, my Administration will work with the Congress to seek repeal of these restrictions, will seek to mitigate their effects, and will oppose any attempt to extend or expand them in the future.

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

But Obama **has** issued a veto threat on "detainee

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

And this language:

> Congress affirms that—
>
> (1) the United States is engaged in an armed conflict with al-Qaeda, the Taliban, and associated forces and that those entities continue to pose a threat to the United States and its citizens, both domestically and abroad;
>
> (2) the President has the authority to use all necessary and appropriate force during the current armed conflict with al-Qaeda, the Taliban, and associated forces pursuant to the Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 15 1541 note);
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> (3) the current armed conflict includes nations, organization, and persons who—
>
> (A) are part of, or are substantially supporting, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners; or
>
> (B) have engaged in hostilities or have directly supported hostilities in aid of a nation, organization, or person described in subparagraph (A); and
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> (4) the President's authority pursuant to the Authorization for Use of Military Force (Public Law 3 107–40; 50 U.S.C. 1541 note) includes the authority to detain belligerents, including persons described in paragraph (3), until the termination of hostilities.

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

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

> Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107-40) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war.
>
> COVERED PERSONS—A covered person under this section is any person as follows:
>
> (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
>
> (2) A person who was part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or who has supported such hostilities in aid of such enemy forces.
>
> [snip]
>
> (d) CONSTRUCTION.—. Nothing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force.

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

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

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

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

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

> Is the president really going to expose himself, in an election cycle, to the charge (fair or not) that he jeopardized the nation's defenses in order to vindicate the principle of presidential discretion to release terrorists from GTMO or to bring them to the United States to try them in civilian courts? It is the right principle, but it is a generally unpopular one that the president has not to date fought for.

But that's not really his baby like it is for his co-bloggers Robert Chesney and Benjamin Wittes. Or rather, just the presidential discretion part is. And Goldsmith, as much as anyone out there, knows well how that discretion has been built up over the years, in total secrecy, in OLC opinions that claim Presidential authorization for certain things—detention, certainly, but also wiretapping and assassination—based on the vaguely worded version of the AUMF passed in 2001. That's

because he authored a particularly seminal version of that argument when he shifted the justification for Bush's illegal wiretap program from raw Article II authority to authorization rooted in the AUMF.

> The [AUMF] functions as precisely such legislation [that overrides FISA]: it is emergency legislation passed to address a specific armed conflict and expressly designed to authorize **whatever military actions the Executive deems appropriate to safeguard the United States**. In it the Executive sought and received a blanket authorization from Congress **for all uses of the military against al Qaeda that might be necessary to prevent future terrorist attacks against the United States**. There mere fact that the Authorization does not expressly amend FISA is not material. By its plain terms it gives clear authorization for "all necessary and appropriate force" against al Qaeda that the President deems required "to protect United States citizens both at home and abroad from those (including al Qaeda) who "planned, authorized, committed, or aided" the September 11 attacks. [citation omitted] It is perfectly natural that Congress did not attempt to single out into subcategories every aspect of the use of the armed forces it was authorizing, for as the Supreme Court has recognized, even in normal times outside the context of a crisis "Congress cannot anticipate and legislate with regard to every posible action the President may find it necessary to take." [my emphasis]

After Hamdi, this assertion that the AUMF authorized fairly broad use of Presidential discretion became more closely tied to the President's detention authority, as that was the one example where SCOTUS had affirmed that broad "uses of the military" were included in the

AUMF. Here's how it got translated in the White Paper purportedly authorizing limited parts of Bush's illegal wiretapping program.

> The Supreme Court's interpretation of the AUMF in Hamdi v. Rumsfeld, 542 U.S. 507 (2004), confirms that Congress in the AUMF gave its express approval to the military conflict against al Qaeda and its allies and thereby to the President's use of all traditional and accepted incidents of force in this current military conflict—including warrantless electronic surveillance to intercept enemy communications both at home and abroad. This understanding of the AUMF demonstrates Congress's support for the President's authority to protect the Nation and, at the same time, adheres to Justice O'Connor's admonition that "a state of war is not a blank check for the President," Hamdi, 542 U.S. at 536 (plurality opinion), particularly in view of the narrow scope of the NSA activities.
> [snip]
>
> Although Congress's war powers under Article I, Section 8 of the Constitution empower Congress to legislate regarding the raising, regulation, and material support of the Armed Forces and related matters, rather than the prosecution of military campaigns, the AUMF indicates Congress's endorsement of the President's use of his constitutional war powers. This authorization transforms the struggle against al Qaeda and related terrorist organizations from what Justice Jackson called "a zone of twilight," in which the President and the Congress may have concurrent powers whose "distribution is uncertain," Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring), into a situation in which the President's authority is at is

> maximum because "it includes all that he possesses in his own right plus all that Congress can delegate," id. at 635. With regard to these fundamental tools of warfare—and, as demonstrated below, warrantless electronic surveillance against the declared enemy is one such tool—the AUMF places the President's authority at its zenith under Youngstown.

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

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

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

That's because the Executive has already exceeded the terms of the newly-defined AUMF (or at least claimed the authority to do so). Here's

how Goldsmith defined the application of the war on terror in 2004 (probably because he needed to apply it to the way Bush's illegal wiretap program had already been used).

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

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

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

Administration language opposes this limit on its claimed authority

And this focus—a concern that the explicit

restatement of AUMF actually limits the Executive Branch's authority—shows up in Administration objections to it. Here's what they said in May:

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

Here's what they said last week:

> Section 1031 attempts to expressly codify the detention authority that exists under the Authorization for Use of Military Force (Public Law 107-40) (the "AUMF"). The authorities granted by the AUMF, including the detention authority, are essential to our ability to protect the American people from the threat posed by al-Qa'ida and its associated forces, and have enabled us to confront the full range of threats this country faces from those organizations and individuals. Because the authorities codified in this section already exist, the Administration does not believe codification is necessary and poses some risk. After a decade of settled jurisprudence on detention authority, Congress must be careful not to open a whole new series of legal questions that will distract from our efforts to protect the country. While the current language minimizes many of those risks, future legislative action must ensure that the codification in statute of express military detention authority does not carry unintended consequences that could compromise our ability to protect the American people.

And the language of one of Gerstein's anonymous Administration officials can certainly be read

to include flexibility both on questions about where you hold detainees but also on whether they can assassinate a US citizen affiliated with a group that didn't exist on 9/11.

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

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

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