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 definined 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.