WE DIDN'T NEED LONE WOLF PROVISION TO CATCH LONE WOLF

A few weeks ago, I wondered whether Khalid Ali-M Aldawsari, a Saudi citizen arrested in Texas for purchasing the ingredients to build picric acid, would be our first Lone Wolf. Here was a non-US person, seemingly unconnected to any known terrorist organizations; the FBI obviously used his emails to indict him. So would he be the first ever use of the Lone Wolf provision?

Nope. Todd Hinnen, the Acting head of the National Security Division, reveals in his congressional testimony today we still haven't used the provision.

> The next expiring provision is the so-called "lone-wolf" definition, contained in section 1801(b)(1)(C) of Title 50. This definition allows us to conduct surveillance and physical search of non-U.S. persons engaged in international terrorism without demonstrating that they are affiliated with a particular international terrorist group.
>
> There are two key points to understand about this provision. First, it applies only to non-U.S. persons (not to American citizens or green-card holders), see 50 U.S.C. § 1801(b)(1)(C), and only when they engage or prepare to engage in "international terrorism." See 50 U.S.C. § 1801(c). In practice, the Government must know a great deal about the target, including the target's purpose and plans for terrorist activity (in order to satisfy the definition of "international terrorism"), but need not establish probable cause to believe the target is engaging in those activities for or on behalf of a foreign power..
>
> Second, although we have not used this

> authority to date, it is designed to fill an important gap in our collection capabilities by allowing us to collect on an individual foreign terrorist who is inspired by – but not a member of – a terrorist group. For example, it might allow surveillance when an individual acts based upon international terrorist recruitment and training on the internet without establishing a connection to any terrorist group. It might also be used when a member of an international terrorist group, perhaps dispatched to the United States to form an operational cell, breaks with the group but nonetheless continues to plot or prepare for acts of international terrorism. If such cases arise, which seems increasingly likely given the trend toward independent extremist actors who "self-radicalize," we might have difficulty obtaining FISA collection authority without the lone-wolf provision. [my emphasis]

Fine. Then we can give up the charade that we still need this provision? Obviously it had gotten easy enough to get electronic communications we don't need this on the books.

THE BUSINESS RECORDS AND CLASSIFIED (?) EMAILS OF JAMES RISEN

Jeffrey Sterling's lawyers are throwing a number of interesting theories against the wall. In a filing demanding a bill of particulars (and presumably ultimately supporting a greymail defense),they demand to know which "defense information" is tied to each count of leaking or

possessing such information, arguing that they need to know that to prevent double jeopardy. As part of that argument, though, they note that the 10 year statute of limitations on this crime exists only to make sure crafty Communists don't evade the law.

> In this case, the Government will surely claim that there is a ten year statute of limitations applicable to violations of 18 U.S.C. 793. See Internal Security Act, Ch. 1024, 64 Stat. 987, P.L. 831 (§19) (1950).
>
> As set forth in the statute, this law was passed, by its terms, because of the then existing threat of global communism.
>
> > There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose is by treachery, deceit…espionage, sabotage, terrorism, and any other means necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a worldwide Communist organization. Id. at § 2 (1)
>
> In this regard, the Court can see that when this law was passed in 1950, it appears that the Congress extended the statute of limitations applicable to 18 U.S.C. § 793 because the "agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form and manner successfully evasive of existing law." Id. at § 2 (11).
>
> As such, the defense reserves the right to challenge the application of this

> McCarthy era law to the charges in this case which challenge would result in the application of the general five year statute applied to felonies. 18 U.S.C. § 3282.

Sterling is alleged to have leaked to James Risen in 2003; if a 5 year SOL applied, then it would have expired after the time when the Bush DOJ declined to charge Sterling. Charging him at this late date, he seems to suggest, is just McCarthyite.

But the other interesting aspect of this filing is the one Josh Gerstein points out: the details Sterling's lawyers provide about what they've gotten in discovery.

> In this case, for example, the United States has provided in unclassified discovery various telephone records showing calls made by the author James Risen. It has provided three credit reports – Equifax, TransUnion and Experian – for Mr. Risen. It has produced Mr. Risen's credit card and bank records and certain records of his airline travel. The government has also provided a copy of the cover of the book State of War written by Mr. Risen and published in 2006. It has provided receipts and shipping records from Borders and Barnes and Noble indicating that State of War was sold in this District between November 1, 2005 and March 1, 2006.4 From this document production, it can be inferred that Mr. Risen is Author A and that the "national defense information" at issue can perhaps be found somewhere in State of War.
>
> But State of War is a long book containing many chapters. Just pointing the defense to the book, or even a particular chapter in the book, is not legally sufficient to provide notice.

> 4 Count Eight is a mail fraud count under 18 U.S.C. §§1341 & 2, that seeks to hold Mr. Sterling criminally liable for the decision of Author A's publisher to sell in the Eastern District of Virginia a book allegedly containing "national defense information" obtained from Mr. Sterling. Author A and his publisher are not charged with any crime.

Now, obviously this passage does several things. It sets up a future argument—one that might be modeled on the AIPAC case—that if they're going to charge mail fraud they also need to charge Risen's publishers. Also, it exploits the fact that the government has sent an entire book full of highly classified disclosures—including details of the warrantless wiretap program—to introduce selective prosecution. Why is the government choosing to prosecute the alleged leaker of MERLIN information, but not the leakers of the illegal surveillance program?

But it seems Sterling's lawyers are just as interested in getting details about the government surveillance of Risen into the record.

Now, some of this is unsurprising. We knew the government had Risen's phone records, because the indictment cites at least 46 phone calls between Risen and Sterling. The indictment also mentions a trip Risen made (presumably to Vienna), so it's unsurprising they have his credit card and airline information.

But that leaves two other items.

The filing mentions Risen's three credit reports and bank records. The only possible application of this information in the indictment is the repeated distinction between Risen's office and his residence. Presumably the latter would show up on the credit report. But that information would also be available by public means (publicly available property records, for

example). So why collect Risen's credit reports and bank records?? Was the government trying to argue Risen was in some way induced to publish this?

Also, given that this would have qualified as a counterintelligence investigation, one wonders whether the government used the PATRIOT Act to collect these records.

More interesting, though, is what Sterling's lawyers don't mention in this passage: emails. We know they got emails, since they refer to at least 13 emails between Risen and Sterling (and point out that the emails went through a server conveniently located in the CIA's home district!). But for some reason, Sterling's lawyers don't mention having received the emails in what they specify is "unclassified discovery."

The probable explanation for that, of course, is that they have received those emails. It's possible they can't mention them, though, in an unclassified filing (one clearly targeted to the public), because they were turned over in classified discovery.

It's troubling that the government collected Risen's credit report and bank records to develop its case against Sterling. But the possibility that the government considers the email traffic between Risen and Sterling classified suggests some even more troubling possibilities.

FBI GETS ITS LONE WOLF, JUST IN TIME FOR PATRIOT DEBATE

This morning, the FBI arrested 20-year old Saudi citizen Khalid Ali-M Aldawsari on one charge of

attempted use of a weapon of mass destruction. According to the FBI, Aldawsari had allegedly purchased all the ingredients to make an IED using the explosive trinitrophenol, which also known as T.N.P., or picric acid. In addition, he had researched targets, including George W Bush's home in Dallas, not far from his own location in Lubbock, TX.

If the facts are as alleged, Aldawsari sounds like a potentially much more dangerous person than the number of aspirational terrorists the FBI has entrapped of late. So I am grateful that Con-Way freight officials alerted the Lubbock Police Department when Aldawsari attempted to have them receive his shipment of phenol, an ingredient in picric acid.

But I have two concerns. The first, as Robert Chesney lays out, this case seems to strain the meaning of "attempt" in the charge.

> This could be an important case from a legal perspective, in the sense that it may turn on the anticipatory scope of attempt liability – an issue that just doesn't matter when it is possible to charge conspiracy, but which becomes central in the case of a lone wolf.
>
> Absent a conspiracy, the prosecutors are instead relying on attempt as the inchoate charge (under 18 USC 2332a, the WMD statute; recall that "WMD" is defined very loosely to encompass more or less all bombs). The interesting question is whether the facts alleged below suffice to trigger "attempt" liability. It does not sound as if he had yet assembled a bomb, which would have made for a much easier case. On the other hand, the many substantial steps that he had actually taken, if one credits the allegations below, leave no room for doubt as to what was going on. In any event, we can expect some interesting and important debate about the anticipatory scope of the attempt

> concept. If this proves problematic, and if this turns out to be a truly solo operation, it will serve to highlight a critical point about inchoate criminal law: criminal liability attaches far earlier in the planning process for groups than for individuals.

Unlike the case of Mohamed Osman Mohamud, the FBI doesn't have evidence of the suspect literally trying to trigger a bomb. Unlike Najibullah Zazi, they FBI doesn't have evidence of him trying to make the explosive he intended to use. They have, according to the affidavit, just evidence that he had purchased all the things he'd need to make an IED, and evidence that he had researched potential targets. Is that going to be enough to constitute an attempt?

But what I find more interesting is a point Chesney also alludes to.

> Note too that this was not a "sting" case that might raise objections on entrapment grounds, at least according to these allegations. It is very much the real deal lone wolf scenario, or so it seems, and we were deeply fortunate that it was discovered in advance.

Unlike Zazi and Mohamud, who had contacts with people abroad, Aldawsari is portrayed to be someone who plotted this completely on his own using research available on the Internet. Also unlike Zazi and Mohamud, Aldawsari is not a US person; he's an F-1 student visa holder, meaning he qualifies for the Lone Wolf provision in the PATRIOT Act. And it appears likely that the government used the Lone Wolf provision to collect evidence in this case.

It appears Aldawsari first came to the government's attention when Con-Way Freight contacted the Lubbock Police sometime on January 30 or February 1, 2011 to report

Aldawsari's attempt to get them to receive the phenol he had ordered. It appears that the FBI in Greensboro, NC (either in response to the Con-Way alert or independently, the affidavit doesn't make clear) learned that the company from which Aldawsari ordered the phenol had had a suspicious attempted purchase of phenol. From there, the FBI agent in this case, Michael Orndoff, first had the chemical supply company call (on February 3) and then posed as an employee of that company to call (February 8) Aldawsari to find out more about why he intended to buy the phenol. The FBI conducted physical searches of Aldawsari's apartment on February 14 and February 17.

But the rest of the evidence against Aldawsari appears to come from what the affidavit repeatedly describes as "legally authorized electronic surveillance." The affidavit describes emails on three different accounts going back to October 2010 (though I assume these would have been accessible in archived storage).

Now, we don't know that the FBI used the Lone Wolf provision to get those emails. But DOJ has a habit of using expiring provisions just in time to demand their reauthorization. I suppose we'll learn whether they did when the debate over the PATRIOT Act heats up again in the coming weeks.

If Aldawsari is as he is alleged, the detective work here was responsive and thorough; it may have prevented a real attack. But I can't help but wonder whether the FBI triggered this "attempted use of a WMD" early so as to have its Lone Wolf in time for Congressional debates.

POLITICAL GIVING AND WILLINGNESS TO CAVE TO LAW ENFORCEMENT

When Jason Leopold linked to a WSJ report titled, “Obama breaks bread with Silicon Valley execs,” I quipped, “otherwise known as, Obama breaks bread w/our partners in domestic surveillance.” After all, some of the companies represented—Google, Facebook, Yahoo—are among those that have been willingly sharing customer data with federal law enforcement officials.

Which is why I found this Sunlight report listing lobbying and political donations of the companies so interesting.

	Lobbying (2010)	Contributions to Obama (2008)
Apple	$1,610,000.00	$92,141.00
Google	$5,160,000.00	$803,436.00
Facebook	$351,390.00	$34,850.00
Yahoo	$2,230,000.00	$164,051.00
Cisco Systems	$2,010,000.00	$187,472.00
Twitter	$0.00	$750.00
Oracle	$4,850,000.00	$243,194.00
NetFlix	$130,000.00	$19,485.00
Stanford University	$370,000.00	$448,720.00
Genentech	$4,922,368.00	$97,761.00
Westly Group	$0.00	$0.00

Just one of the companies represented at the meeting, after all, has recently challenged the government’s order in its pursuit of WikiLeaks to turn over years of data on its users: Twitter. And the difference between Twitter’s giving and the others’ is stark.

Does Twitter have the independence to challenge the government WikiLeaks order because it hasn’t

asked or owed anyone anything, politically?

Mind you, there's probably an interim relationship in play here, as well. Those companies that invest a lot in politics also have issues—often regulatory, but sometimes even their own legal exposure—that they believe warrant big political investments. Which in turn gives the government some issue with which to bargain on.

Maybe this is all a coinkydink. And maybe having broken bread with Obama, Twitter will cave on further government orders.

But I do wonder whether there's a correlation between those telecommunication companies that try to buy political favors and those that offer federal law enforcement favors in return.

CONFIRMED: OUR GOVERNMENT HAS CRIMINALIZED BEAUTY PRODUCTS

A year and a half ago, I warned that if you bought certain beauty supplies—hydrogen peroxide and acetone—you might be a terrorism suspect.

> I'm going to make a wildarsed guess and suggest that the Federal Government is doing a nationwide search to find out everyone who is buying large amounts of certain kinds of beauty products. And those people are likely now under investigation as potential terrorism suspects.

Shortly thereafter, John Kyl basically confirmed that the government had been tracking certain people buying hydrogen peroxide.

Yesterday, FBI Director Robert Mueller did so in even more explicit terms.

> Federal Bureau of Investigation Director Robert Mueller appeared to indicate for the first time Wednesday that his agency uses a provision of the PATRIOT Act to obtain information about purchases of hydrogren peroxide—a common household chemical hair bleach and antiseptic that can also be turned into an explosive.
>
> The comment in passing by Mueller during a Senate Intelligence Committee hearing was noteworthy because critics have suggested that the FBI is using a provision in the PATRIOT Act to conduct broad surveillance of sales of lawful products such as hydrogen peroxide and acetone.
>
> "It's been used over 380 times since 2001," Mueller said of the so-called business records provision, also known as Section 215. "It provides us the ability to get records other than telephone toll records, which we can get through another provision of the statutes. It allows us to get records such as Fedex or UPS records….or records relating to the purchase of hydrogen peroxide, or license records—records that we would get automatically with a grand jury subpoena on the criminal side, the [Section] 215 process allows us to get on the national security side." (Emphasis original)

Emptywheel: where you read today about the civil liberties infringements your government will confirm years from now.

What Mueller didn't confirm, but what we can pretty much conclude at this point, is that they've used the 215 provision to investigate as terrorists perfectly innocent (and possibly Muslim) purchasers of beauty supplies.

Recall how I first figured out the government was using Section 215 to track beauty supplies. After DiFi blabbed that they had used Section 215 in the Najibullah Zazi case, I examined the detention motion on Zazi to see what kind of evidence they used to justify refusing him bail. It included this:

> Evidence that "individuals associated with Zazi purchased unusual quantities of hydrogen and acetone products in July, August, and September 2009 from three different beauty supply stores in and around Aurora;" these purchases include:
>
> - *Person one: a one-gallon container of a product containing 20% hydrogen peroxide and an 8-oz bottle of acetone*
> - *Person two: an acetone product*
> - *Person three: 32-oz bottles of Ion Sensitive Scalp Developer three different times*

The federal government argued, in part, that Zazi had to be denied bail because three people "associated with him" bought beauty supplies "in and around Aurora."

Last February, Zazi accepted a plea agreement and has been cooperating with investigators; the government has twice delayed his sentencing, suggesting he's still fully cooperating. Since that time, the only people arrested for participating in the actual plot—as opposed to obstructing justice by trying to hide the evidence of Zazi's bomb-making, with which both

Zazi's father and uncle were charged—are in NY or Pakistan.

That is, it appears that Zazi had no accomplices "in and around Aurora."

That's particularly interesting given that Zazi is reported to have had few close ties in the Denver area. He only moved there in January 2009, 8 months before his arrest. And both his employer and the other worshipers at his mosque describe him as keeping to himself.

> Unlike most drivers at ABC, who drove eight- or nine-hour shifts, Zazi routinely worked 16-to-18-hour days, often putting in as many as 80 hours a week ferrying passengers to and from DIA. "He was a regular kind of guy, but he worked hard and he wanted money," says Hicham Semmaml, a Moroccan-born ABC driver. "I would have never suspected any of this."
>
> [snip]
>
> "He kept to himself pretty much, and he never gave any outward signs of being connected with anybody," Gross said.
>
> [snip]
>
> Zazi would turn up for afternoon prayers each Friday — Islam's holy day — parking the ABC van in the parking lot outside the sprawling brick complex with its black dome and narrow minaret. Other regular worshippers agreed that he never spoke to anyone and usually rushed off immediately once the service ended.

All the currently available evidence suggests that these three Zazi "associates" buying beauty supplies turned out to be completely innocent. That would mean that one of the reasons the government said Zazi should be held without bail (there were plenty of others) basically amounts to innocent people with some attenuated tie to Zazi buying beauty supplies.

But consider what their beauty supply purchase has exposed them to—particularly if the association involved amounts to membership in the same mosque as him. Their purchase of beauty supplies undoubtedly made them a target for further investigation, presumably FBI agents asking questions of their neighbors and employers, probably the use of other PATRIOT provisions to track their calls and emails, and possibly even a wiretap.

So these three people, because they worshiped at the same mosque as Zazi or drove an airport van but presumably in the absence of any evidence of actual friendship with him had their lives unpacked by our government because they bought a couple bottles of beauty supplies.

A DAY AFTER READING CONSTITUTION, REPUBLICANS ABOLISH CIVIL LIBERTIES, CIVIL LIBERTIES BITS OF IT

I sort of expected the Republicans to abolish labor—or at least its named inclusion among the business of Congressional committees. After all, the GOP really doesn't like tough things like physical work or the people who do it.

But it wasn't so long ago that the Republican Party—not to mention its newest activist branch, the Tea Party—claimed to give a damn about civil liberties. Hell, Louie Gohmert, who reassured me yesterday the Fourth Amendment is still on the books, is even a member of the Judiciary Committee.

But like labor, the Republicans have also apparently done away with civil liberties and

civil rights.

From a Jerry Nadler press release:

> Today, Congressman Jerrold Nadler (D-NY), who has served as the Chairman of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties since 2007, responded to news that the Republican-led Judiciary Committee will change the name of the Subcommittee to the "Constitution Subcommittee." He issued the following statement:
>
> > Once again, the new Republican majority has shown that it isn't quite as committed to the Constitution as its recent lofty rhetoric would indicate. Today, it has yet again shown its contempt for key portions of the document – the areas of civil rights and civil liberties – by banishing those words from the title of the Constitution Subcommittee. In 1995, when Newt Gingrich became Speaker, one of the Republicans' first acts was to change the name of that Subcommittee. For anyone who thought the change was merely for rhetorical purposes, our experience over 12 years of Republican rule showed just how hostile they are to individual rights and liberties. With this move, we can only assume that they are intent on more of the same. It is going to be a long and difficult struggle to protect these cherished rights and liberties from assaults by the Republican majority.
> >
> > Republicans have made a great deal of noise in recent days about standing up for the Constitution. But, in less than

> 48 hours, they have already revealed their true intentions. In addition to reading selectively from the Constitution on the House floor in a much-exalted ceremony on Thursday, Republicans also blatantly violated the Constitution by allowing two of their Members to vote without having been sworn-in, and introduced unconstitutional legislation aimed at bypassing the 14th Amendment's citizenship clause. And, with the Subcommittee name change, they are again telling Americans that only some parts of the Constitution matter. Fundamental rights and liberties appear to have been dropped from the Constitution by far-right ideologues.

STATE SECRETS SANTA AND SCOTUS

2011 is going to be a busy and critical year for state secrets litigation in the Supreme Court, and the Obama Administration will be arguing for an expansion of the doctrine in the Supreme Court when it returns to business in January.

VAUGHN WALKER ISSUES FINAL AL-HARAMAIN OPINION ON DAMAGES AND ATTORNEY FEES

Judge Vaugn Walker has issued an extremely significant decision in the illegal wiretapping case of al-Haramain v. Bush/Obama. He has awarded damages and attorney fees to the plaintiffs on their claims of illegal and unconstitutional surveillance by the US government.

THROWING OUR PATRIOT AT ASSANGE

Last week, U.S. Attorney General Eric Holder admitted what bmaz laid out yesterday – the problems with prosecuting WikiLeaks' Julian Assange under the Espionage Act. But at the same time, he said, the Espionage Act may play a role in a possible Assange indictment.

> "I don't want to get into specifics here, but people would have a misimpression if the only statute you think that we are looking at is the Espionage Act," Mr. Holder said Monday at a news conference. "That is certainly something that might play a role, but there are other statutes, other tools that we have at our disposal."

So even with all the problems in applying the Espionage Act to Assange, Holder is still invoking the provision in his discussion of the

“tools that we have at our disposal” to combat Assange.

Legally, the stance could have import beyond the question of whether or not they can indict him.

Consider, for example, this language on the National Security Letter provision of the PATRIOT Act, which allows the FBI, with no court oversight, to require financial service and telecommunications providers to turn over data pertaining to any investigation the Department of Justice asserts is an espionage investigation:

> A wire or electronic communication service provider shall comply with a request for subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession made by the Director of the Federal Bureau of Investigation under subsection (b) of this section.
>
> The Director of the Federal Bureau of Investigation, or his designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, may—
>
> request the name, address, length of service, and local and long distance toll billing records of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the name, address, length of service, and toll billing records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the

> basis of activities protected by the first amendment to the Constitution of the United States; [my emphasis]

Or this language from Section 215 of the PATRIOT Act, which allows the FBI, with FISA Court approval, to require private businesses to secretly turn over a broad range of business records or tangible items pertaining to any investigation DOJ asserts is an espionage investigation.

> The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution. [my emphasis]

Between these two provisions, the government can collect a wide range of information on US persons — things like donations via credit card and server data — simply by claiming the investigation involves spying. They don't have to even claim there's a connection between those US persons making those donations or accessing the particular server and the alleged spy. They don't have to prove that the case involves spying or that they have the ability to indict under the Espionage Act. They only have to claim they are pursuing an authorized — ultimately, the AG does the authorizing — investigation to protect against spying.

Which is what the Attorney General is suggesting here, that they are investigating Assange and

the Espionage Act might play a role.

Mind you, they'd also have to claim (to themselves, in the case of the NSL, to FISC in the case of Section 215) that they were collecting data on a US person for reasons above and beyond that person's First Amendment right to read stuff on the InterToobz or donate to people the government is loosely alleging may be sort of like a spy. Mind you, if the government did collect — say — the names of Americans donating to WikiLeaks via MasterCard or Visa or Paypal, or the names of Americans accessing the WikiLeaks site for the day Amazon hosted it, those people might have a great lawsuit claiming they had been targeted for First Amendment protected activities.

If they ever found out they were targeted.

But of course, we don't have any way of knowing whether the government decided to use the PATRIOT Act provisions allowing them to collect data on Americans so long as they assert a connection to an Espionage investigation. Because that all remains secret.

Now, I have no idea whether the government is doing this (though I could imagine that if financial service providers like MasterCard and Visa got a really onerous request from DOJ, they might choose to end their relationship with Assange rather than provide ongoing compliance with the DOJ request).

But it seems these PATRIOT provisions are just the tip of the iceberg of potential investigative techniques they could have access to (FISA wiretaps are another) based on the stance that DOJ is investigating Assange for spying, whether or not they ever intend to charge him with spying.

WE WILL ALWAYS BE AT WAR AGAINST EVERYONE

As Spencer reported yesterday, the incoming Chair of the House Armed Services Committee Buck McKeon wants to revisit and expand the 2001 AUMF authorizing our war against al Qaeda.

> The objective wouldn't the "drop a new Authorization to Use Military Force, but to reaffirm and strengthen the existing one," says an aide to McKeon who requested anonymity, "recognizing that the enemy has changed geographically and evolved since 2001."

I'm thoroughly unsurprised by this. As I pointed out the other day, if we're going to hold Khalid Sheikh Mohammed solely using the justification of the AUMF, then we're going to want to make sure that AUMF is designed to last forever; otherwise, KSM would be entitled to get out when—for example—we withdraw from Afghanistan. Frankly, I expect the Administration will be happy to be forced to accept another AUMF, because it'll get them out of some really terrible arguments they've been making as they try to apply the AUMF to detention situations it clearly doesn't apply to.

But there are two other aspects to a "reaffirmed and strengthened" AUMF. As McKeon's aide notes, the enemy has changed geographically, moving to Yemen and Somalia. A new AUMF will make it easier to build the new bases in Yemen they're planning.

> The U.S. is preparing for an expanded campaign against al Qaeda in Yemen, mobilizing military and intelligence resources to enable Yemeni and American strikes and drawing up a longer-term proposal to establish Yemeni bases in remote areas where militants operate.

And I would bet that the AUMF is drafted broadly enough to allow drone strikes anywhere the government decides it sees a terrorist.

Which brings us to the most insidious part of a call for a new AUMF: the "homeland." The AUMF serves or has served as the basis for the government's expanded powers in the US, to do things like wiretap Americans. Now that the Republicans know all the powers the government might want to use against US persons domestically, do you really think they will resist the opportunity to write those powers into an AUMF (whether through vagueness or specificity), so as to avoid the quadrennial review and debate over the PATRIOT Act (not to mention the oversight currently exercised by DOJ's Inspector General)? The only matter of suspense, for me, is what role they specify for drones operating domestically…

Remember, John Yoo once wrote an OLC memo claiming that because of the nature of this war the military could operate in the US with no limitations by the Fourth Amendment. That memo remained in effect for seven years. We know where they want to go with this permanent war against terror.