

MARK UDALL'S UNSATISFACTORY SOLUTION TO THE DETAINEE PROVISIONS

As I have repeatedly described, I have very mixed feelings about the debate over Detainee Provisions set to pass the Senate tonight or tomorrow. I view it as a fight between advocates of martial law and advocates of relatively unchecked Presidential power. And as I've pointed out, the SASC compromise language actually limits Presidential power as it has been interpreted in a series of secret OLC opinions.

Which is why I'm no happier with Mark Udall's amendment than I am with any of the other options here.

On its face, Udall's amendment looks like a reset: A request that the Executive Branch describe precisely how it sees the military should be used in detention.

SEC. 1031. REVIEW OF AUTHORITY OF THE ARMED FORCES OF THE UNITED STATES TO DETAIN COVERED PERSONS PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE.

(a) *In General.*—Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense shall, in consultation with appropriate officials in the Executive Office of the President, the Director of National Intelligence, the Secretary of State, the Secretary of Homeland Security, and the Attorney General, submit to the appropriate committees of Congress a report setting forth the following:

(1) A statement of the position of the Executive Branch on the appropriate role for the Armed Forces of the United

States in the detention and prosecution of covered persons (as defined in subsection (b)).

(2) A statement and assessment of the legal authority asserted by the Executive Branch for such detention and prosecution.

(3) A statement of any existing deficiencies or anticipated deficiencies in the legal authority for such detention and prosecution.

On one hand, this seems like a fair compromise. The Republicans want something in writing, Carl Levin claims SASC met just about every demand the Administration made in its attempt to codify the authority, but in response the President still issued a veto threat. So why not ask the President to provide language codifying the authority himself?

And after the President submits such language, then all three committees with equities on this issue—not just SASC, but also SJC and SSCI—can propose legislation to codify those authorities (note, Udall is a member of SASC and SSCI, but not SJC).

(c) *Congressional Action.*—Each of the appropriate committees of Congress may, not later than 45 days after receipt of the report required by subsection (a), hold a hearing on the report, and shall, within 45 days of such hearings, report to Congress legislation, if such committee determines legislation is appropriate and advisable, modifying or expanding the authority of the Executive Branch to carry out detention and prosecution of covered persons.

(d) *Appropriate Committees of Congress Defined.*—In this section, the term “appropriate committees of Congress” means—

(1) the Committee on Armed Services, the Committee on the Judiciary, and the Select Committee on Intelligence of the Senate; and

(2) the Committee on Armed Services, the Committee on the Judiciary, and the Permanent Select Committee on Intelligence of the House of Representatives.

So far so good—in the face of bad legislation, a legislative punt, one that requires the President to reveal to everyone how he uses and wants to use his Commander in Chief power.

My complaint with Udall's amendment, however, is that it—like the default of doing nothing—equates to an expansion on the way the 2001 AUMF is understood to be used (though it no doubt reflects the war powers the Executive currently claims to have). That's because Udall situates the definition of "covered persons"—those who can be detained, but also, because of the way OLC has built its opinions off of the AUMF and Hamdi, those who can be wiretapped or assassinated and probably a bunch of other things—not just in our war against al Qaeda (as the SASC language does), but also in the Iraq War and "Any other statutory or constitutional authority for use of military force."

(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.

Now, I assume the “other statutory authority” is meant to cover things like FISA Amendment Acts and the Military Commissions Acts—though I’d bet there are some breathtaking interpretations hiding behind that “constitutional authority” bit. Also keep in mind that statutory authority does things like authorize the use of drones on the border.

And as I showed earlier this year, Jack Goldsmith used the Iraq War authorization language to expand the definition of “terrorists” against whom the President could direct his Commander in Chief authorities beyond just those tied to 9/11.

I’ll have much more to say about this. But note that Goldsmith’s limit here [in his May 2004 OLC memo authorizing warrantless wiretapping] does not match the terms of the **Afghan AUMF**, which is limited to those who were directly tied to 9/11.

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines **planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001**, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. [my emphasis]

In other words, while the requirement that the program collect **content** only

from those with a tie to a terrorist may be a new limit imposed in 2004, it also seems to exceed the very AUMF that Goldsmith was newly relying upon to authorize the program.

Goldsmith does have one out for that problem. As he notes elsewhere, the Afghan AUMF language on terrorism is repeated (and actually expanded) in the Iraq AUMF.

Whereas Congress has taken steps to pursue vigorously the war on terrorism through the provision of authorities and funding requested by the President to take the necessary actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such persons or organizations;

Whereas the President and Congress are determined to continue to take all appropriate actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such persons or organizations;

Did you know that the Iraq AUMF mentions “terrorist” or “terrorism” two more times—19—than it mentions “weapon”—17?

In other words, we know OLC (and therefore, the President) has, over the years, used language **in the Iraq AUMF** to expand the target of the GWOT from just terrorists tied to 9/11 to terrorists more generally. And Udall's amendment would codify that move.

Besides, **why the fuck** are we adhering to language in the Iraq AUMF when that war ends next month?

And none of this, of course, prevents the use of this authority against American citizens.

So while Udall offers a way to reconsider a crappy bill, it does so on terms that start by expanding the scope of the AUMF language included in the SASC bill.

I seem to be one of the few people that cares about this. But the reason the Administration has issued a veto threat is not because it wants to close Gitmo. Rather, it is increasingly clear the Administration has threatened to veto any language that does not codify the fairly limitless claims the Executive Branch has, over the last decade (and especially since 2004) greatly expanded the application of the AUMF as a way to ignore laws on the books.

There is, IMO, just one real advantage to the Udall Amendment: it would remove this debate from the Defense Authorization, which prevents either side from fear-mongering to push through their favored solution. Aside from that, though, Democrats and the Administration sure do seem intent on a really vast codification of Commander in Chief power.