

WAR, INTELLIGENCE, LAW AND FOREVER

There are a number of oddly coinciding legal issues that I wanted to pull together into one post.

The Administration Fudges the War Powers Act

First and most obviously, today is the day the 60-day grace period for Libya under the War Powers Act expires. Obama should, by law, have to go to Congress to get sanction for our third war against a Muslim country.

Mind you, Congress isn't going to make the President do that.

But just to be safe, the Administration is going to conduct some kind of legal hocus pocus to make sure it can claim it isn't violating the WPA.

A variety of Pentagon and military officials said the issue was in the hands of lawyers, not commanders. Several officials described a few of the ideas under consideration.

One concept being discussed is for the United States to halt the use of its Predator drones in attacking targets in Libya, and restrict them solely to a role gathering surveillance over targets.

Over recent weeks, the Predators have been the only American weapon actually firing on ground targets, although many aircraft are assisting in refueling, intelligence gathering and electronic jamming.

By ending all strike missions for American forces, the argument then could be made that the United States was no longer directly engaged in hostilities in Libya, but only providing support to

NATO allies.

Another idea is for the United States to order a complete – but temporary – halt to all of its efforts in the Libya mission. Some lawyers make the case that, after a complete pause, the United States could rejoin the mission with a new 60-day clock.

My money, given the way that the OLC wrote a memo retroactively justifying the first several weeks of the war that culminated with us ceding control to NATO (and for other reasons), is that we'll choose option A; we'll pretend that we're just conducting a very expensive unfunded intelligence operation in support of our NATO allies and call that good.

Congress Tries to Force Obama to Fight the Forever Whereever War

Then there's the Republicans efforts to rewrite the AUMF in the spending bill, which would make it a lot easier to pass without a lot of debate and certainly without concerted attention to it. Ben Wittes has been orchestrating a debate on this topic over at Lawfare ([here](#), [here](#), [here](#), [here](#), [here](#), [here](#), and [here](#)).

There are a couple of elements to this. First, the belief by both the right and left that the Administration has already exceeded the terms of the Afghan AUMF by striking at groups that either didn't exist in 2001 or didn't support the 9/11 attacks. If we're right, it would mean such things as drone strikes in Yemen are legally questionable. And for those who believe we must use drones in Yemen and Somalia, it seems clear we must rewrite or expand the AUMF to incorporate these new targets.

In addition, there's the question of detention. I believe that we are close to sufficiently achieving the objectives in the 2001 AUMF that it might require Obama to base the detention of Gitmo detainees on something more permanent. McKeon would like to institutionalize Obama's

preferred indefinite detention, but by endorsing detention going forward, might invite further indefinite detention.

There are probably some other things our government is doing under the guise of war that we don't know about (but that McKeon presumably does and endorses).

But for the moment, let's assume that the forever wherever war authorizes the President to continue to make up the rules of this war as he goes forward, with no defined end point.

And, as Adam Serwer implies, McKeon is doing this not via free-standing statute (which is what he first tried), but on the spending bill, making it much harder to oppose.

But the country never made that decision—the country made the decision to go to war against the perpetrators of the 9/11 attacks. That's why I think that this new AUMF shouldn't be something that gets tucked into a spending bill—it's the kind of thing that the American people need to consider carefully. I suspect public opinion is probably on McKeon's side here, but at the very least, a separate vote on a new AUMF would have the advantage of sanctioning this larger conflict in a more public and accountable manner. More importantly, we could be having a conversation of what the end of the "war on terror" is supposed to look like.

This is, in other words, the head of the House Armed Services Committee acting where he has greatest powers, in mapping out how DOD can spend money, to institutionalize the authority of the President to evolve the terms of the war against terrorists as he goes on.

PATRIOT without Sunset

At the same time as one corner of Congress is

acting at the area of its strength, another corner of Congress is acting with typical cowardice. John Boehner, Mitch McConnell, and Harry Reid are pushing a vote on Monday to extend the PATRIOT Act another 4 years, until June 1, 2015.

Mind you, it might not be just their idea. This is the kind of thing Obama might encourage (though the Administration reportedly backed some, but not all, reforms on the table). This is a way for everyone involved—except for the liberals and handful of TeaParty candidates who will oppose the bill—to just endorse the status quo rather than acknowledge that PATRIOT has some real problems as well as some unnecessary authorities.

And so, with each new extension of a PATRIOT sunset, the myth that it actually will ever sunset gets weaker and weaker.

I'm interested in this development, though, for several reasons. Aside from detention and any secret stuff McKeon knows about and the Afghan-turning-into-Pakistan war, many of the key measures we use to fight terrorism are surveillance related. So at one level, with the never-sunsetting PATRIOT Act, we're seeing the creeping permanence of the war on terror from an intelligence perspective, too, though by Congressional cowardice rather than Congressional strength.

The Osama bin Laden Strike

All of this is taking place against the background of Osama bin Laden's death which, in a more noble era, would have steeled our elected representatives to reassess our war against terrorists.

The OBL death is interesting from this front for two other reasons, though.

First, the means. Rather than kill OBL with a drone strike, which (as Robert Chesney observes) the Administration seems to be tying to a war power, we took him out with JSOC operating under

the auspices of CIA. We feel free to use JSOC in a variety of locales that are no declared wars. But doing it under Leon Panetta's direction maintained the legal fiction that DOD operates exclusively in Afghanistan while CIA manages everything in Pakistan.

But it appears that fiction largely serves Pakistan's benefit. In defending the legality of OBL's killing (something I don't contest), Harold Koh emphasizes the AUMF and not—as he might have—the September 17, 2001 Finding that authorizes CIA to capture and detain (and kill, if it came to that) top al Qaeda leaders.

By enacting the AUMF, Congress expressly authorized the President to use military force “against ... *persons* [such as bin Laden, whom the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 ...in order to prevent any future acts of international terrorism against the United States by such ... persons” (emphasis added). Moreover, the manner in which the U.S. operation was conducted—taking great pains both to distinguish between legitimate military objectives and civilians and to avoid excessive incidental injury to the latter—followed the principles of distinction and proportionality described above, and was designed specifically to preserve those principles, even if it meant putting U.S. forces in harm's way. Finally, consistent with the laws of armed conflict and U.S. military doctrine, the U.S. forces were prepared to capture bin Laden if he had surrendered in a way that they could safely accept. The laws of armed conflict require acceptance of a genuine offer of surrender that is clearly communicated by the surrendering party and received by the opposing force, under circumstances where it is feasible for the opposing force to

accept that offer of surrender. But where that is not the case, those laws authorize use of lethal force against an enemy belligerent, under the circumstances presented here.

In other words, Koh could have made either an intelligence or a war justification for the killing (both of which, IMO, would have been legally more sound than the hocus pocus they're pulling in Libya). He chose to go the AUMF route. That's not surprising (we're not supposed to talk about that 2001 Finding, you know). But I find it worth noting.

I'm most interested in that approach because one route we could have gone, after OBL's death, was to commit to use JSOC raids rather than drones (which we have a history of doing without AUMF), as well as surveillance that works. We could have done most of what we're doing—save the drones and the forever detention—without an AUMF. (That's not saying I endorse using JSOC w/o a declared war, but it's what we do.) The way we think of OBL's death obviously doesn't institutionalize that choice, but it does prevent us from using this moment to rethink our approach to terrorism

Altering the Nature of our Nation by Refusing to Think

All of which, IMO, makes this a pretty remarkable moment. In several ways, we're about to endorse (either by apathy or aggressive choice) making our forever war permanent, not to mention the President's ability to just bomb wherever his OLC can invent a retroactive excuse for. Sure, we've been headed in this direction for a while. But at a moment we might have made another choice, we're doubling down.

Of course, it's not going to end up being a forever war.

The way we approach terrorism, generally, will in the medium term bump up against the reality that domestic right wing terrorists now may be

more dangerous than Islamic terrorists, particularly the informant-induced "homegrown" terrorist we seem to be focusing on (plus, the warlovers want to make drug cartels terrorists as well). Eventually, everyone will become a terrorist, at which point Americans might finally get tired of sacrificing their liberty and privacy for a myth that some terrorists are worse than other organized criminals.

More importantly, we're going to go broke. Maybe not before Republicans strip our entire safety net to pay for the forever wars we'll be fighting. If that happens, we'll lose the forever wars because no one will be educated enough to fight the forever wars, to make and operate our fancy war toys. But ultimately we can't continue to add multi-billion dollar wars with no discussion, because we simply can't afford it.

In the meantime, though, our utterly failed political system is just going to creep further and further away from our constitutional roots and towards a vastly different national security state.