

ZOE LOFGREN DIDN'T VOTE TO LET PRESIDENTS WAGE UNLIMITED WAR, BUT JOHN YOO DID

As a series of Presidents continue to claim the September 18, 2001 Authorization to Use Military Force authorizes fairly unlimited power on an unlimited battlefield, I keep coming back to this Tom Daschle op-ed, in which he described how Congress refused to extend the AUMF to US soil.

Just before the Senate acted on this compromise resolution, the White House sought one last change. Literally minutes before the Senate cast its vote, the administration sought to add the words “in the United States and” after “appropriate force” in the agreed-upon text. This last-minute change would have given the president broad authority to exercise expansive powers not just overseas – where we all understood he wanted authority to act – but right here in the United States, potentially against American citizens. I could see no justification for Congress to accede to this extraordinary request for additional authority. I refused.

The op-ed is, as far as I know, the only public statement describing how Congress narrowed a breathtakingly broad claim for military force.

Until Wednesday’s drone hearing, that is.

In response to a comment from John Bellinger that it was appropriate for the Executive Branch to refuse to share its OLC memos with Congress, Zoe Lofgren suggested (1:36 and following) the President was exceeding the terms of the AUMF

(she comes very close to saying the President broke the law, but stops herself). She refers to – as Daschle did – negotiations leading up to the AUMF that actually did get passed.

Lofgren: If you take a look at the Authorization to Use Military Force, which all of us voted for – those of us who were here (there was only one no vote in the House) – it says “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.” Now, are we to believe that everyone on this list was responsible for the 9/11 attack? I mean, is that the rationale?

Bellinger: No, your exactly right. All four of us agree with you that the 2001 AUMF, which was only about 60 words long – I was involved in drafting it literally almost on the back of an envelope while the World Trade Center was still smoldering – now is very long in the tooth. The good government solution, while extremely difficult and controversial, would be for Congress to work together with the Executive Branch to revise that AUMF. It’s completely unclear about what it covers, who it covers, where it covers.

Lofgren: If I may, I think it’s not as unclear as you suggest. There are – this was a limitation, and there were big arguments about it as you’re, I’m sure, aware, there was a prior draft that was much more expansive. There was a prior draft that was much more expansive and it was narrowed so we could get bipartisan consensus and it was narrowed for an important reason. And I guess I – yes, the Executive has the ability to keep his legal advice confidential,

that's a long-standing principle, but since it looks like – at least, questions are raised – as to whether the executive is complying with the law, then if he feels he is, then I feel it would be a very positive thing for the Administration to share that legal advice with this committee and with the American people. [my transcript]

While I have not yet checked with Lofgren's office, this – also from Daschle's op-ed – seems to describe the more expansive AUMF the Bush Administration, advised in part by then Legal Advisor to the National Security Advisor John Bellinger, tried to get passed.

On the evening of Sept. 12, 2001, the White House proposed that Congress authorize the use of military force to “deter and pre-empt any future acts of terrorism or aggression against the United States.” Believing the scope of this language was too broad and ill defined, Congress chose instead, on Sept. 14, to authorize “all necessary and appropriate force against those nations, organizations or persons [the president] determines planned, authorized, committed or aided” the attacks of Sept. 11. With this language, Congress denied the president the more expansive authority he sought and insisted that his authority be used specifically against Osama bin Laden and al Qaeda.

That is, it seems (though I need to check with the Congresswoman's office) that she's reminding Bellinger that Congress refused to pass his napkin-back AUMF authorizing the use of military force to “deter and pre-empt any future acts of terrorism or aggression against the United States.” And she also seems to be suggesting that's precisely the kind of broad claim reflected in the white paper.

Now, I think I've made it clear that I support Lofgren's case that the Administration should have to turn over its memos authorizing targeted killing.

But I also think she hasn't looked at the publicly available still active OLC memos that are out there. As I was reminded by Amnesty International's Zeke Johnson, among the fairly broad OLC memos written "while the World Trade Center was still smoldering" to authorize broad counterterrorism authority is this October 25, 2001 memo which has not been withdrawn.

It states, right from the beginning,

The President may deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11.

Eleven days after Congress refused to authorize military force against just any terrorist threat, John Yoo reasserted the authority to do so. And no one – not Jack Goldsmith, not Steven Bradbury, not any of Obama's OLC lawyers – has officially backed off that claim.

Along the way, Yoo invokes inherent authority, cites a bunch of Attorneys General, a Poppy Bush signing statement, and ends here:

In both the War Powers Resolution and the Joint Resolution [the AUMF], Congress has recognized the President's authority to use force in circumstances such as those created by the September 11 incidents. Neither statute, however, can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make.

So Lofgren doesn't even have to get that memo authorizing the killing of an American citizen based on the word of an "informed, high-level officer" (though by all means, she should). Because this memo, readily available on DOJ's website, asserts that the limitation she and Daschle believed they voted for on September 14, 2001 doesn't limit the Executive Branch in the least.

"These decisions, under our Constitution," John Yoo says, "are for the President alone to make."

That AUMF, the one everyone keeps pointing to as imposing limitations on the President's authority to (among other things) kill Americans in America? The Executive Branch, for over 11 years, has maintained that it cannot place any limits on the President's determinations about the scope or method of fighting terrorists, broadly defined.