ON PRESIDENTIAL POWERS TO DESTABILIZE ENTIRE REGIONS

In his latest installment on Trump and the powers of the American presidency, Ben Wittes manages to avoid calling his adversaries delusional while making delusional arguments himself, which makes for a much more intriguing post. In this one, he shifts his focus to the topics his adversaries had originally focused on, which Wittes calls "U.S. arms and war powers" but which for the moment I'll call "national security."

Wittes argues that the degree of authority granted the President in matters of war is scary, but less scary than not having such a powerful President.

> It was a few years ago, on a panel at American University's Washington College of Law, that I heard Brad Berenson—who served in the White House Counsel's office under President Bush—make an arresting statement about the American Presidency.
>
> The Presidency, Berenson argued, is an office of terrifying power. There is no legal question—at least as a matter of domestic constitutional law—that the president has the authority to order a preemptive nuclear strike on Tehran. Indeed, there is really only one thing, Berenson said, that is scarier than a president who has such power in his sole command: a president who does *not* have that power.
>
> [snip]
>
> "Energy in the Executive," wrote Hamilton, "is a leading character in the

> definition of good government. It is essential to the protection of the community against foreign attacks. . . .” The reason? “A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.” Translation: If you want government to *do* things, you have to have an executive capable of it.

Wittes admits that presidency doesn’t have to be this way — indeed, that Israel, which he describes as “another democratic country that has ongoing security issues and fights wars semi-regularly” doesn’t have it. Me, I’d call Israel a partially democratic country that faces far greater security issues, but which has nevertheless thrived for 70 years without it. Which is another way of saying, right in the middle of his post arguing for the necessity of a unitary presidency, Wittes provides a counterargument that suggests that, at least in some circumstances (Israel has had a lot of help, after all), it’s not actually necessary.

Nevertheless, Wittes likes what we’ve got because it gives us decisiveness and accountability.

> The American system has a lot to recommend it. It generates not merely decisiveness of action, but also political accountability for that action—what Hamilton called “a due dependence on the people” and “a due responsibility.” Divide up the executive authority and nobody really knows who gets credit for success and who gets blame for failure. Nobody is responsible for anything in Israel, for example. Give all the responsibility to one president, and that is not really a problem. Nobody doubts who is responsible for Obamacare, for example,

> or for the Iraq war.

It's definitely true we know who to hold responsible for Obamacare. *Getting into* the Iraq War, too — though there's far less certainty among the public about who is responsible for the failure to negotiate a SOFA, which led to the withdrawal timeline, and (arguably) to the resurgence of what would become ISIS. Both Obama and Bush get blamed.

But it's an interesting argument particularly in light of Wittes' prior dismissal of Conor Friedersdorf and Jennifer Granick's concerns about drones and surveillance, because on those issues and many more, the Executive is shielded from much political and all legal accountability. Presidents have authorized a vast range of covert action over the years that have led to a great deal of blowback that they by definition cannot be held accountable for. Hell, as recently as 2013, the Executive was stone-walling SSCI member Ron Wyden about what countries we were conducting lethal counterterrorism operations in, and it took years of requests, starting before the Anwar al-Awlaki killing and continuing for some time after it, before Wyden was permitted to see the authorization for that.

No one may doubt who is responsible for Obamacare, but even select oversight committees, and especially voters, simply don't know all the things they might want to hold a president accountable for.

And on the issues that (I think) Wittes would lump under "national security," such secrecy, such unilateral power, actually may lead to rash and often stupid decisions. Setting aside what you think about the need for the President to have authority to order preemptive nuclear strikes (the "Bomb Power" that Garry Wills argues created the necessity for such secrecy), with such authority also comes the ability to create significant harms to the US by a thousand cuts of stupid covert action. We helped to

create modern Sunni terrorism via such secret authority, after all.

Add in the fact that the Intelligence Community now claims cyberattacks are the biggest threat to the US. That's an area where there has been a distinct lack of accountability, even after catastrophic failures.

> But one thing never happens in either of those worlds: accountability.
>
> On the national security side, I have long noted that people like then Homeland Security Czar John Brennan or Director of National Security Keith Alexander never get held responsible when the US gets badly pawned. The Chinese were basically able to steal the better part of the F-35 program, yet we still don't demand good cyber practices from defense contractors or question the approach the NSA used on cyber defense. A few people lost their job because of the OPM hack, but not the people who have a larger mandate for counterintelligence or cybersecurity. Indeed, the National Security Council apparently considers cyber a third category, in addition to public safety and national security.
>
> As a result, whereas we assume (wrongly) that we should expect the NatSec establishment to prevent all terrorist attacks, no one thinks to hold our NatSec establishment responsible if China manages to steal databases of all our cleared personnel.

Finally, our supposedly nimble presidency has been distinctly unable to act decisively in two areas that have been a bigger threat to the US than Iran or terrorism of late: financial recklessness and crime, and climate change. The reasons for inaction are dramatically different (though both have a lot to do with the way big

money dominates our elections), but the effect is that the President has a lot of power to kill Americans in secret, but doesn't wield that same power to prevent systemic catastrophes of another sort.

Wittes ends his piece by blaming the electorate — a stance I'm not unsympathetic with.

> I want to suggest, in closing, that the problem here is not a structural flaw in the executive branch. That we are contemplating our fears of a Trump presidency reflects, rather, a flaw in the electorate that would contemplate his election and in the political leadership of one of our major political parties—leadership that prefers to back him than repudiate him. In a democracy, the people, generally speaking, get the president they ask for. And if the populace asks for an abusive, erratic, proudly ignorant figure of no coherent policy vision, it's going to get that.

But I'm far more struck by this passage, which seems a much better argument for reversing some of what even Wittes admits has been growing power of the presidency.

> [I]n the ordinary course of business, nobody gets to remove from the hands of the president the vast powers that he lawfully wields: the power to destabilize regions, launch military adventures, abrogate agreements, and destroy alliances. These powers are inherent features of powers of the presidency, and they are inherent powers that we actively need.

Wittes argues we can't impose any limits on the President (even ones that existed as recently as 15 years ago), because we need the ability to do stupid things with little oversight.

Given how damaging those powers have already

been, in the hands of purportedly sane Presidents, why do we think we want to keep it that way?

IMPERIALIST ROBERT KAGAN DISAVOWS THE BUREAUCRACY OF IMMENSE AMERICAN PRESIDENCY HE CHAMPIONED

The chattering class is in love with this Robert Kagan op-ed warning of Donald Trump bringing fascism,

> not with jackboots and salutes (although there have been salutes, and a whiff of violence) but with a television huckster, a phony billionaire, a textbook egomaniac "tapping into" popular resentments and insecurities, and with an entire national political party — out of ambition or blind party loyalty, or simply out of fear — falling into line behind him.

I suppose I'm unsurprised that Beltway insiders are so gleeful that this Hillary-endorsing Neocon has turned on Republicans in such a fashion. Or, perhaps more importantly, that they're so thrilled someone with such a soapbox has written a warning of impending fascism that so neatly disavows any responsibility — for Kagan himself, and by association, for other insiders.

But there are a couple of real problems with Kagan's screed.

First, Kagan would like you to believe that Trump's success has nothing to do with policy or ideology or the Republican party except insofar as the party "incubated" Trump.

> But of course the entire Trump phenomenon has nothing to do with policy or ideology. It has nothing to do with the Republican Party, either, except in its historic role as incubator of this singular threat to our democracy. Trump has transcended the party that produced him.

Kagan gets Trump's relationship with the Republican party exactly reversed. The party did not in any way incubate Trump. 80's style greed and cable TV incubated Trump, if anything. What the Republican party has long incubated is racism. Trump just capitalized on that and pushed it just … a … bit … further than Republican dogwhistles traditionally go, in a year in which the GOP had lost a great deal of its credibility.

Which is why Kagan is also wrong in claiming that Trump isn't about policy or ideology. I admit that Trump has always shown great deal of ideological flexibility, both before and during this run. But he has been consistent on two points: that racism, but also protectionism. There are a lot of reasons those two ideological keystones have appealed this year, but one has to do with the failures of globalization and the related American hegemonic project it assumes. That's ideology and policy, both Trump's, but also DC's, including Kagan's.

Kagan goes on to deal with these two issues.

> We're supposed to believe that Trump's support stems from economic stagnation or dislocation. Maybe some of it does. But what Trump offers his followers are not economic remedies — his proposals change daily. What he offers is an attitude, an aura of crude strength and

> machismo, a boasting disrespect for the niceties of the democratic culture that he claims, and his followers believe, has produced national weakness and incompetence. His incoherent and contradictory utterances have one thing in common: They provoke and play on feelings of resentment and disdain, intermingled with bits of fear, hatred and anger. His public discourse consists of attacking or ridiculing a wide range of "others" — Muslims, Hispanics, women, Chinese, Mexicans, Europeans, Arabs, immigrants, refugees — whom he depicts either as threats or as objects of derision. His program, such as it is, consists chiefly of promises to get tough with foreigners and people of nonwhite complexion. He will deport them, bar them, get them to knuckle under, make them pay up or make them shut up.

Note the assumption that Trump's protectionism is not an economic remedy but some unstated alternative is? Note Kagan's treatment of racism, an ideology, as fear divorced from that ideology of white American exceptionalism?

Fear!! Kagan wants to boil Trump's popularity down to fear! A guy who has had a central role in ginning up serial American aggressive wars is offended that someone wields fear to achieve political power!!! And having done that, this warmonger says the ability to gin up fear is precisely what our Founders — the men who set up three competing branches of government, each jealously guarding its power — were concerned about.

Which brings me to the Kagan argument that most baffles me. After bewailing Republican politicians' refusal to stand up to Trump's demagoguery, Kagan then argues (though I'm not sure he even realizes he's making this argument) that Article I and Article III (the latter of which goes entirely unmentioned in this op-ed)

will be powerless to stop Trump and his "legions" once he becomes president.

> What these people do not or will not see is that, once in power, Trump will owe them and their party nothing. He will have ridden to power despite the party, catapulted into the White House by a mass following devoted only to him. By then that following will have grown dramatically. Today, less than 5 percent of eligible voters have voted for Trump. But if he wins the election, his legions will comprise a majority of the nation. Imagine the power he would wield then. In addition to all that comes from being the leader of a mass following, he would also have the immense powers of the American presidency at his command: the Justice Department, the FBI, the intelligence services, the military. Who would dare to oppose him then? Certainly not a Republican Party that laid down before him even when he was comparatively weak. And is a man like Trump, with infinitely greater power in his hands, likely to become more humble, more judicious, more generous, less vengeful than he is today, than he has been his whole life? Does vast power un-corrupt?

Never mind that Kagan describes general election numbers that simply don't exist in our democracy. What he's really complaining about is that a President — one he happens to distrust and dislike — would have "the immense powers of the American presidency at his command: the Justice Department, the FBI, the intelligence services, the military." Of course, Kagan focuses not on the government as a whole, but on the Deep State and the Justice Department that has increasingly become an integral part of it.

The guy who, *for years*, championed the unfettered exercise of the Deep State in the hands of people like Dick Cheney is now troubled

about what would happen if Donald Trump got the same powers Dick Cheney had. And for what it's worth, while I don't buy Michael Hayden's claim the CIA would resist a President Trump's order to torture (Hayden's successors at NSA and CIA will likely do just what Hayden himself did, capitulate to unconstitutional demands), I also know that neither Trump nor anyone in his immediate orbit has the kind of bureaucratic mastery of the Deep State that Dick Cheney had.

One more really important point: the Deep State — those tools Kagan is horrified Trump might soon wield — got so powerful, creating the danger that a demagogue like Trump might tap into them fully formed, largely in the service of an imperial project significantly sold by Robert Kagan. Kagan has claimed to be selling "Democracy™" around the world, but all along that project has rotted our own democracy here at home.

Kagan (and his fellow imperialists) did that. Not Trump. Trump would just take advantage of the bureaucratic tools Kagan's propaganda has served to justify.

I'm not denying Donald Trump is a huge threat to American democracy (though I happen to think Hillary's foreign policy will come with great risks and costs as well). I'm saying that Robert Kagan is not the one to make this argument — at least not without a whole lot of soul searching and commitment to change the underlying empowerment of "the immense powers of the American presidency."

But Kagan doesn't want that. Rather, he just wants to hand those powers, still unchecked, to Hillary Clinton.

MIRROR MIRROR AND HIS WALL

I think I'm going to have to write a daily piece on how frantic insiders trying to squelch the populism of this year's election (Trump, especially, but also Bernie) are, at the same time, revealing a delusional lack of self-awareness.

Today, for example, Mitt Romney will make a speech in which he will call Donald Trump phony.

And Wall Street will spend unlimited amounts of money to warn that Trump — as opposed to their own reckless practices and abuse of oligarchical position — will doom the economy.

> The pitch to Wall Street titans and other CEOs is that a President Trump would be disastrous for markets and the economy. Many economists say that if the U.S. were to deport 11 million undocumented immigrants in a single year, the immediate hit to gross domestic product would lead to a depression. And slapping massive tariffs on goods from Mexico and China could dramatically increase prices for U.S. consumers and create destabilizing trade wars. "The most important thing about Trump is, he is completely unpredictable and volatile, and the one thing business needs is predictability," [GOP strategist Katie] Packer said.

Perhaps most remarkable are the bunch of Neocons who signed a letter calling Trump dangerous. In it, some of the signers who have, in the past, argued for ticking time bomb use of coercive interrogation, here call the "expansive use of torture is inexcusable." The guy who oversaw our last effort to build a wall signed the letter complaining that asking Mexico to pay for one "inflames unhelpful passions." A slew of past servants to the Saudi family and other vicious

dictators complain about Trump's admiration for foreign dictators (in this case, the democratically elected thug Vladimir Putin). The author of the 16 words in Bush's 2003 State of the Union complains that Trump is "fundamentally dishonest." And a bunch of people who worked closely with Dick Cheney as he shredded the Constitution (and at least one of whom helped make legal arguments to do so) worry that Trump's "expansive view of how presidential power should be wielded against his detractors poses a distinct threat to civil liberty in the United States."

I mean, all this Sturm und Drang about Trump is nice, but maybe these folks should clean up their own act first?

OBAMA BYPASSED OLC ON BIN LADEN KILLING

There's a name missing from Charlie Savage's latest — a description of the legal analysis behind Osama bin Laden's killing: Caroline Krass, who served as Acting Head of DOJ's Office of Legal Counsel from January to September 2011. She's not mentioned, apparently, because she was not among the four lawyers who collaborated on five memos deeming the raid to be legal.

> Weeks before President Obama ordered the raid on Osama bin Laden's compound in May 2011, four administration lawyers

> hammered out rationales intended to overcome any legal obstacles — and made it all but inevitable that Navy SEALs would kill the fugitive Qaeda leader, not capture him.
>
> [snip]
>
> Just days before the raid, the lawyers drafted five secret memos so that if pressed later, they could prove they were not inventing after-the-fact reasons for having blessed it. “We should memorialize our rationales because we may be called upon to explain our legal conclusions, particularly if the operation goes terribly badly,” said Stephen W. Preston, the C.I.A.’s general counsel, according to officials familiar with the internal deliberations.
>
> [snip]
>
> This account of the role of the four lawyers — Mr. Preston; Mary B. DeRosa, the National Security Council’s legal adviser; Jeh C. Johnson, the Pentagon general counsel; and then-Rear Adm. James W. Crawford III, the Joint Chiefs of Staff legal adviser — is based on interviews with more than a half-dozen current and former administration officials who had direct knowledge of the planning for the raid.

The account makes it quite clear that Eric Holder was excluded from discussions.

> On April 28, 2011, a week before the raid, Michael E. Leiter, the director of the National Counterterrorism Center, proposed at least telling Mr. Holder. “I think the A.G. should be here, just to make sure,” Mr. Leiter told Ms. DeRosa.
>
> But Mr. Donilon decided that there was no need for the attorney general to know. Mr. Holder was briefed the day

> before the raid, long after the legal questions had been resolved.

This means that on the OBL raid, Donilon excluded the Attorney General in the same way Dick Cheney excluded John Ashcroft from key information about torture and wiretapping. I find that interesting enough, given hints that Holder raised concerns about the legal authority to kill Anwar al-Awlaki in the weeks after we missed him on December 24, 2009, which led to OLC writing two crappy memos authorizing *that* killing in ways that have never been all that convincing.

But Savage provides no explanation for why Krass was excluded, which is particularly interesting given that the month after OBL's killing, Savage revealed that President Obama had blown off Krass' advice on Libya (as I read it, the decision to blow off her advice would have happened after the OBL killing, though I am not certain on that point). The silence about Krass is also remarkable given that she was looped in on the initial Libya decision — and asked to write a really bizarre memo memorializing advice purportedly given after the fact.

On Libya, Krass was looped in on questions addressing precisely the same issues addressed in the OBL killing (indeed, we were assassinating Qaddafi's family members in Libya, which should have presented many of the same legal questions) both before and (as I understand it) after the OBL killing, but she was apparently not read in at all on the OBL killing itself.

There's one more reason I think the question of OBL's killing was more uncertain than laid out here. Savage reveals that even though lawyers had authorized not telling Congress about the raid, Leon Panetta did so on his own anyway.

> Mr. Preston wrote a memo addressing when the administration had to alert congressional leaders under a statute

> governing covert actions. Given the circumstances, the lawyers decided that the administration would be legally justified in delaying notification until after the raid. But then they learned that the C.I.A. director, Leon E. Panetta, had already briefed several top lawmakers about Abbottabad without White House permission.

This is the action of someone — rightly — covering his ass, doing what the law actually requires rather than what his lawyer says it permits.

By the way, any bets on whether SSCI got a copy of that Preston memo, stating that they didn't need to be informed on covert operations, contrary to the clear language of the National Security Act, before they approved his promotion from CIA General Counsel to DOD General Counsel (where he remains)? I bet no.

Ultimately, Savage depicts an Administration going *even further* than Cheney had on inventing legal authorizations for secret actions. Obama (and Donilon) will never catch heat for it like Cheney did, because everyone likes dancing on OBL's watery grave. But make no mistake, this exhibits some of the same behaviors as we criticize Cheney for.

Update: I find this, from Savage's June 2011 story on Krass, of particular interest given Savage's description of the decision process on OBL.

> The administration followed an unusual process in developing its position. Traditionally, the Office of Legal Counsel solicits views from different agencies and then decides what the best interpretation of the law is. The attorney general or the president can overrule its views, but rarely do.
>
> In this case, however, Ms. Krass was asked to submit the Office of Legal

> Counsel's thoughts in a less formal way to the White House, along with the views of lawyers at other agencies. After several meetings and phone calls, the rival legal analyses were submitted to Mr. Obama, who is a constitutional lawyer, and he made the decision.
>
> A senior administration official, who spoke on the condition of anonymity to talk about the internal deliberations, said the process was "legitimate" because "everyone knew at the end of the day this was a decision the president had to make" and the competing views were given a full airing before Mr. Obama.

JOHN YOO'S ASSISTANCE IN STARTING IRAQ WAR MIGHT HELP OBAMA AVOID AN IRAN WAR

Last week, Steven Aftergood released a January 27, 2003 OLC memo, signed by John Yoo, ruling that the Executive Branch could withhold WMD information from Congress even though 22 USC § 3282 requires the Executive to brief the Foreign Relations committees on such information. I had first noted the existence of the memo in this post (though I guessed wrong as to when it was written).

The memo is, even by Yoo's standards, inadequate and poorly argued. As Aftergood notes,
Yoo relies on a Bill Clinton signing statement that doesn't say what he says it says. And he treats briefing Congress as equivalent to public

disclosure.

Critically, a key part of the Yoo's argument relies on an OLC memo the Reagan Administration used to excuse its failure to tell Congress that it was selling arms to Iran.

> Fourth, despite Congress's extensive powers under the Constitution, Its authorities to legislative and appropriate cannot constitutionally be exercised in a manner that would usurp the President's authority over foreign affairs and national security. In our 1986 opinion, we reasoned that this principle had three important corollaries: a) Congress cannot directly review the President's foreign policy decisions; b) Congress cannot condition an appropriation to require the President to relinquish his discretion in foreign affairs; and c) any statute that touches on the President's foreign affairs power must be interpreted, so as to avoid constitutional questions, to leave the President as much discretion as possible. 10 Op. O.L.C. at 169-70.

That's one of the things — a pretty central thing — Yoo relies on to say that, in spite of whatever law Congress passes, the Executive still doesn't have to share matters relating to WMD proliferation if it doesn't want to.

Thus far, I don't think anyone has understood the delicious (if inexcusable) irony of the memo — or the likely reasons why the Obama Administration has deviated from its normal secrecy in releasing the memo now.

This memo authorized the Executive to withhold WMD information in Bush's 2003 State of the Union address

First, consider the timing. I noted above I was

wrong about the timing — I speculated the memo would have been written as part of the Bush Administration's tweaks of Executive Orders governing classification updated in March 2003.

Boy how wrong was I. Boy how inadequately cynical was I.

Nope. The memo — 7 shoddily written pages — was dated January 27, 2003.The day the White House sent a review copy of the State of the Union to CIA, which somehow didn't get closely vetted. The day before Bush would go before Congress and deliver his constitutionally mandated State of the Union message. The day before Bush would lay out the case for the Iraq War to Congress — relying on certain claims about WMD — including 16 famous words that turned out to be a lie.

> The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa.

This memo was written during the drafting of the 2003 State of the Union to pre-approve not sharing WMD information known by the Executive Branch with Congress even in spite of laws requiring the Executive share that information.

Now, we don't know — because Alberto Gonzales apparently didn't tell Yoo — what thing he was getting pre-authorization not to tell Congress about. Here's what the memo says:

> It has been obtained through sensitive intelligence sources and methods and concerns proliferation activities that, depending upon information not yet available, may be attributable to one or more foreign nations. Due to your judgment of the extreme sensitivity of the information and the means by which it was obtained, you have not informed us about the nature of the information, what nation is involved, or what activities are implicated. We understand, however, that the

> information is of the utmost sensitivity and that it directly affects the national security and foreign policy interests of the United States. You have also told us that the unauthorized disclosure of the information could directly injure the national security, compromise intelligence sources and methods, and potentially frustrate sensitive U.S. diplomatic, military, and intelligence activities.

Something about WMD that another nation told us that is too sensitive to share with Congress — like maybe the Brits didn't buy the Niger forgery documents anymore?

In any case, we do know from the SSCI Report on Iraq Intelligence that an INR analyst had already determined the Niger document was a forgery.

> On January 13, 2003, the INR Iraq nuclear analyst sent an e-mail to several IC analysts outlining his reasoning why, "the uranium purchase agreement probably is a hoax." He indicated that one of the documents that purported to be an agreement for a joint military campaign, including both Iraq and Iran, was so ridiculous that it was "clearly a forgery." Because this document had the same alleged stamps for the Nigerien Embassy in Rome as the uranium documents, the analyst concluded "that the uranium purchase agreement probably is a forgery." When the CIA analyst received the e-mail, he realized that WINP AC did not have copies of the documents and requested copies from INR. CIA received copies of the foreign language documents on January 16, 2003.

Who knows? Maybe the thing Bush wanted to hide from Congress, the day before his discredited 2003 State of the Union, didn't even have to do

with Iraq. But we know there has been good reason to question whether Bush's aides deliberately misinformed Congress in that address, and now we know John Yoo pre-approved doing so.

This memo means Obama doesn't have to share anything about the Iran deal it doesn't want to

Here's the ironic part — and one I only approve of for the irony involved, not for the underlying expansive interpretation of Executive authority.

By releasing this memo just a week before the Iran deal debate heats up, the Obama Administration has given public (and Congressional, to the extent they're paying attention) notice that it doesn't believe it has to inform Congress of anything having to do with WMD it deems too sensitive. John Yoo says so. Reagan's OLC said so, in large part to ensure that no one would go to prison for disobeying Congressional notice requirements pertaining to Iran-Contra.

If you think that's wrong, you have to argue the Bush Administration improperly politicized intelligence behind the Iraq War. You have to agree that the heroes of Iran-Contra — people like John Poindexter, who signed onto a letter opposing the Iran deal — should be rotting in prison. That is, the opponents of the Iran deal — most of whom supported both the Iraq War and Iran-Contra — have to argue Republican Presidents acted illegally in those past actions.

Me? I do argue Bush improperly withheld information from Congress leading up to the Iraq War. I agree that Poindexter and others should have gone to prison in Iran-Contra.

I also agree that Obama should be forthcoming about whatever his Administration knows about

the terms of the Iran deal, even while I believe the deal will prevent war (and not passing the deal will basically irretrievably fuck the US with the international community).

A key thing that will be debated extensively in coming days — largely because the AP, relying on an echo chamber of sources that has proven wrong in the past, published an underreported article on it — is whether the inspection of Parchin is adequate. Maybe that echo chamber is correct, and the inspection is inadequate. More importantly, maybe it is the case that people within the Administration — in spite of IAEA claims that it has treated that deal with the same confidentiality it gives to other inspection protocols made with inspected nations — know the content of the Parchin side agreement. Maybe the Administration knows about it, and believes it to be perfectly adequate, because it was spying on the IAEA, like it long has, but doesn't want the fact that it was spying on IAEA to leak out. Maybe the Administration knows about the Parchin deal but has other reasons not to worry about what Iran was allegedly (largely alleged by AP's sources on this current story) doing at Parchin.

The point is, whether you're pro-Iran deal or anti-Iran deal, whether you're worried about the Parchin side agreement or not, John Yoo gave Barack Obama permission to withhold it from Congress, in part because Reagan's OLC head gave him permission to withhold Iran-Contra details from Congress.

I believe this document Yoo wrote to help Bush get us into the Iraq War may help Obama stay out of an Iran war.

LORETTTA LYNCH IS A DUBIOUS NOMINEE FOR ATTORNEY GENERAL

Loretta Lynch is an excellent nominee for Attorney General, and her prior actions in whitewashing the blatant and rampant criminality of HSBC should not be held against her, because she didn't know that at the time she last whitewashed that criminal enterprise, right?

No. Nothing could be further from the truth.

This is a cop out by Lynch's advocates. Lynch either knew, or damn well should have known. She signed off on the HSBC Deferred Prosecution Agreement (DPA), if she was less than fully informed, that is on her. That is what signing legal documents stands for….responsibility. Banks like HSBC, Credit Suisse, ING etc were, and still are, a cesspool of criminal activity and avoidance schemes. Willful blindness to the same old bankster crimes by Lynch doesn't cut it (great piece by David Dayen by the way).

But, all the above ignores the Swiss Alps sized mountains of evidence that we know Lynch was aware of and blithely swept under the rug by her HSBC DPA. So, we are basically left to decide whether Lynch is a bankster loving toady that is her own woman and cravenly whitewashed this all on her own, or whether she is a clueless stooge taking orders to whitewash it by DOJ Main. Both views are terminally unattractive and emblematic of the oblivious, turn the other cheek to protect the monied class, rot that infects the

Department of Justice on the crimes of the century to date.

And that is only scratching the real surface of my objections to Lynch. There are many other areas where Lynch has proven herself to be a dedicated, dyed in the wool "law and order adherent" and, as Marcy Wheeler artfully coined, "executive maximalist". Lynch's ridiculous contortion, and expansion, of extraterritorial jurisdiction to suit the convenient whims of the Obama Administration's unparalleled assault on the Rule of Law in the war on terror is incredibly troubling. Though, to be fair, EDNY is the landing point of JFK International and a frequent jurisdiction by designation. Some of these same questions could have been asked of Preet Bharara (*see, e.g. U.S. v. Warsame*) Loretta Lynch has every bit the same, if not indeed more, skin in the game as Bharara, whether by choice or chance.

Lynch has never uttered a word in dissent from this ridiculous expansion of extraterritorial jurisdiction. Lynch's record in this regard is crystal clear from cases like *US v. Ahmed, Yousef, et. al.* where even Lynch and her office acknowledged that their targets could not have "posed a specific threat to the United States" much less have committed specific acts against the US.

This unconscionable expansion is clearly all good by Lynch, and the ends justify the means because there might be "scary terrists" out there. That is just dandy by American "executive maximalists", but it is toxic to the Rule of Law, both domestically and internationally (See, supra). If the US, and its putative Attorney General, are to set precedents in jurisdictional reach on common alleged terroristic support, then they ought live by them on seminal concerns like torture and war crimes under international legal norms. Loretta Lynch has demonstrated a proclivity for the convenience of the former and a toady like disdain for the latter.

And the same willingness to go along to get

along with contortion of the Rule of Law in that regard seems beyond certain to extend to her treatment of surveillance issues and warrant applications, state secrets, over-classification, attack on the press and, critically, separation of powers issues. Those types of concerns, along with how the Civil Rights Division is utilized to rein in out of control militarized cops and voting rights issues, how the OLC stands up to Executive overreach, whether OPR is allowed to continue to shield disgraceful and unethical AUSAs, and whether she has the balls to stand up to the infamously insulated inner Obama circle in the White House. Do you really think Loretta Lynch would have backed up Carolyn Krass and OLC in telling Obama no on the Libyan War Powers Resolution issue?

For my part, I don't think there is a chance in hell Lynch would have stood up to Obama on a war powers, nor any other critical issue, and that is a huge problem. Krass and Holder may have lost the Libyan WPR battle, but at least they had the guts to stand up and say no, and leave a record of the same for posterity.

That is what really counts, not the tripe being discussed in the press, and the typically preening clown show "hearing" in front of SJC. That is where the rubber meets the road for an AG nominee, not that she simply put away some mobsters and did not disgrace herself – well, beyond the above, anyway (which she absolutely did) – during her time as US Attorney in EDNY. If you are a participant in, or interested observer of, the criminal justice system as I am, we should aspire to something better than Eric Holder. Holder may not have been everything hoped for from an Obama AG when the Administration took office in January of 2009, but he was a breath of fresh air coming off the AG line of the Bush/Cheney regime. Loretta Lynch is not better, and is not forward progress from Holder, indeed she is several steps down in the wrong direction. That is not the way to go.

The fact that Loretta Lynch is celebrated as a great nominee by not just Democrats in general, but the so called progressives in specific, is embarrassing. She is absolutely horrible. If Bush had put her up for nomination, people of the progressive ilk, far and wide, would be screaming bloody murder. Well, she is the same person, and she is a terrible nominee. And that does not bode well for the Rule of Law over the remainder of the Obama Administration.

And this post has not even touched on more mundane, day to day, criminal law and procedure issues on which Lynch is terrible. And horrible regression from Eric Holder. Say for instance pot. Decriminalization, indeed legalization, of marijuana is one of the backbone elements of reducing both the jail and prison incarceration rate, especially in relation to minorities. Loretta Lynch is unconscionably against that (See, e.g., p. 49 (of pdf) et. seq.). Lynch appears no more enlightened on other sentencing and prison reform, indeed, she seems to be of a standard hard core prosecutorial wind up law and order lock em up mentality. Lynch's positions on relentless Brady violations by the DOJ were equally milquetoast, if not pathetic (See, e.g. p. 203 (of pdf) et. seq.). This discussion could go on and on, but Loretta Lynch will never come out to be a better nominee for Attorney General.

Observers ought stop and think about the legal quality, or lack thereof, of the nominee they are blindly endorsing. If you want more enlightened criminal justice policy, to really combat the prison state and war on drugs, and to rein in the out of control security state and war on terror apparatus, Loretta Lynch is a patently terrible choice; we can, and should, do better.

TORTURE? OBVIOUSLY, BUT WHAT ABOUT LITANY OF OTHER CRIMES?

So, just a quick thought here, and with a little prompting by Jon Turley, obviously there is torture, and outright homicide thereon, spelled out and specified by the SSCI Torture Report. As I have said on Twitter, there are many things covered in the SSCI Torture Report and, yet, many things left out.

There are too many instances in the SSCI Torture Report to catalogue individually, but let's be perfectly clear, the failure to prosecute the guilty in this cock up is NOT restricted to what is still far too euphemistically referred to as "torture".

No, the criminality of US Government officials goes far beyond that. And, no, it is NOT "partisan" to point out that the underlying facts occurred under the Cheney/Bush regime (so stated in their relative order of power and significance on this particular issue).

As you read through the report, if you have any mood and mind for actual criminal law at all, please consider the following offenses:

18 U.S.C. §1001 False Statements

18 U.S.C. §1621 Perjury

18 U.S.C. §1505 Obstruction of Justice

These are but a few of the, normally, favorite things the DOJ leverages and kills defendants with in any remotely normal situation. I know my clients would love to have the self serving, toxically ignorant and duplicitous, work of John Yoo and Jay Bybee behind them. But, then, even if it were so, no judge, court, nor sentient human, would ever buy off on that bullshit.

So, here we are. As you read through the SSCI Torture Report, keep in mind that it is NOT just about “torture” and “homicide”. No, there is oh so much more there in the way of normally prosecuted, and leveraged, federal crimes. Recognize it and report it.

JACK GOLDSMITH DECLARES VICTORY … FOR OSAMA BIN LADEN

Yesterday, Jack Goldsmith misread a crabby Harold Koh defense of Obama’s ISIL escalation justification as the end to the end to the Forever War.

> Harold’s Koh’s grudging defense of the domestic legal basis for President’s Obama’s use of force against the Islamic State in Iraq and Syria is important. It adds little new to other defenses of the President’s position – a legal position, I have argued in past posts, is politically stupid and constitutionally imprudent but nonetheless legally defensible under Article II and the 2002 AUMF (but not the 2001 AUMF). Koh’s defense is nonetheless important because it definitively reveals the death of the Obama administration’s ambition to end what Koh has described as “the Forever War.”

As I said, I think this is a misreading of Koh. Koh still clings to the notion that a Congress ducking legislative action for many reasons – almost none of which have to do with electoral pressure in the short term, and many of which have to do with the fact the President

has given them the luxury of dodging responsibility for what will almost certainly be an unpopular and probably unsuccessful escalation – will provide the President a more appropriate authorization for his escalation later this year.

> Achieving a better outcome is not politically impossible. Representative Adam Schiff's proposed AUMF, for example, would accomplish in one bill three of the four steps described above. It would (1) authorize "all necessary and appropriate force against ISIL" for eighteen months, limited geographically to Iraq and Syria and operationally to no US ground forces; (2) repeal the 2002 Iraq AUMF now and (3) repeal the 2001 al-Qaeda AUMF in eighteen months. If the President openly backed such legislation, it would place his war with ISIL on a much firmer legal ground, while advancing his longer-term objective—announced in 2013 at the National Defense University –of taking us off a permanent war footing.
>
> This President came to office to end war. But he just declared a new one, sparing Congress of its constitutional responsibility to back him. Instead of breaking the vicious cycle, and asking Congress to live up to its constitutional duties to confront the Islamic State, the President prolonged a dysfunctional historical pattern that is inconsistent with the design of our National Security Constitution. As the conflict with ISIL stretches on, pressure will build to send advisers and other boots on the ground to further the goal of destroying ISIL. Americans and the world will grow weary and forget the exigencies that led this President to take this course.

> There is still time to avoid this vicious cycle. When Congress returns, some will be lame ducks, and for all, the next election will be at least two years off. If members of Congress seriously care about their prerogatives, they will have no excuse for again ducking their constitutional responsibility. And this President will have those same years to consider what his constitutional legacy will be. History will treat this President far better if he leaves office not just having fought the Islamic State, but having lived up to his promise to put us on the path toward ending the Forever War.

That is, Koh still clings to the fantasy that the President will agree to limit his own authority when Congress won't force him to do so.

Goldsmith, on the other hand, presents Koh's painful somersaults as endorsement of the notion that Islamic extremism will remain a threat for the foreseeable future, and therefore Congress may finally replace the 2001 AUMF with something that better authorizes Forever War for the long haul.

> I always thought the debates about what to do with the 2001 AUMF – repeal it, let the President interpret it flexibly, or replace it with a more rigorous updated authorization – turned on intuitions about the persistence and danger posed by Islamist terrorists. It is now clear that the Islamist terrorist threat is not dissipating anytime soon. It is also clear that the President's interpretation of the 2001 AUMF to fight this threat, whether lawful or not, is certainly a stretch, even on Koh's account. It is also pretty clear, finally, that Congress will not easily authorize wars on a threat-by-threat

> basis. So perhaps now we can start talking about realistic statutory replacements for the 2001 AUMF.

For Koh, this is a choice between a legally defensible (in the short term) justification, and more legally justifiable way to bring the Forever War to a close. For Goldsmith, however, the choice is between a legally suspect justification for the Forever War, and a more defensible justification for the Forever War.

Forever War or Forever War.

Whichever you choose, the President will retain the authority to override limits on domestic spying (written by … Jack Goldsmith!), to override due process to drone-kill American citizens, to indefinitely detain men who were sold for a bounty, and to train and arm men we've given cause to loathe us. From time to time, Congress will be called on to stir itself from suckling, Matrix-like, on its Defense Contractor cash to approve funds and expand immunities. The fight Osama bin Laden started will continue to rot our government and Constitution. "They hate us for our freedoms," they used to say, and now our experts embrace indefinitely signing away those freedoms in increasing bits, via legally suspect means or legally defensible.

All the while, this Forever War will suck up money that should be spent funding things like education and infrastructure, things that used to sustain America's vitality. And the constant threat inflation needed to justify this Forever War will distract from far more pressing threats, like climate change and Ebola and reckless banksters.

Perhaps the only thing that hasn't worked as OBL wanted is that America's refusal to deal with climate change will kill devout Muslims in far greater numbers, at first, than it will Americans.

Institutionalizing the Forever War might as well

be declaring victory for OBL.

The most telling part of this exchange, though, is how Koh, after having referred to a bunch of fellow law professor critics as "commentators," then called law professor Mary Ellen O'Connell, writing for a publication with greater reach and news credibility than the legal blog Just Security that Koh was writing in, "the blogosphere."

> Despite ISIL's well-publicized rift with al-Qaeda, the administration's one-paragraph legal justification claimed not that ISIL is a co-belligerent of al-Qaeda, but that it is effectively a "successor" to Osama bin Laden's al-Qaeda. When this claim was derided by arange of commentators (e.g., Bruce Ackerman, Noah Feldman, Jack Goldsmith, Deborah Pearlstein, and Jonathan Turley), the administration confided to the*Times* that a different statute—the 2002 Iraq AUMF—also provided statutory authority for military action.
>
> [snip]
>
> Thus, as of Sept. 23, when the administration notified Congress of significant strikes inside Syria against ISIL and the Khorasan Group under the War Powers Resolution, it had become conventional wisdom in some parts of the blogosphere that the conflict with ISIL is illegal.
>
> [snip]
>
> Yet even as the blogosphere churned, both the House and the Senate gave limited "buy-in" to the President by passing statutory provisions to fund training and equipping of moderate Syrian rebels before adjourning to campaign for re-election.

8 years after Time made bloggers Person of the Year, such digs are usually deployed to dismiss arguments for which you have no response. And the main thrust of O'Connell's piece (aside from that Obama's justification is "highly questionable," which accords with the conclusions of a number of other lawyers) is that this war is not not working and that's partly because violent force wielded in legally suspect ways is not the solution for terrorism.

> The United States has used unlawful force persistently since 9/11. Rather than stem terrorism, it exacerbates it. In February, U.S. Sen. James Inhofe (R-Okla.) asked the Director of National Intelligence James Clapper, "Is al Qaeda on the run and on the path to defeat?" The answer: "No, it is morphing and — and franchising itself and not only here but other areas of the world."
>
> [snip]
>
> The crisis in Iraq today is the tragic aftermath of the unlawful 2003 invasion. U.S. and British forces remained for eight years; trillions were spent. The predictions for the aftermath of years fighting in Afghanistan's civil war and untold sums spent are much the same. Social science research shows that violent outside intervention is unlikely to result in stability. International law principles track the social science: Emergency aid to civilians is always lawful; the use of military force hardly ever is. And yet, here is this president, prepared to make the same mistake as his predecessor.
>
> Perhaps the greatest failure of America's decades of unlawful force: We think there are no other options.

We have been playing whack-a-mole with overpriced hammers for 13 years, and all we've

achieved is destabilizing most of the Middle East. (I'd add that this is due, in part, to covert operations with untrustworthy partners like the Saudis and Qataris, who have been feeding Sunni extremism even as they get us to hunt down rivals to their regional hegemony, which is a separate but related problem.)

This debate about the questionable legality of Obama's ISIL escalation has been nice. But it largely distracts from the discussion of how unsuccessful 13 years of war has been at combatting Islamic terrorism, not to mention how it has corrupted American governance and sapped our strength.

We're getting deeper and deeper in a pit opened for us by Osama bin Laden, and rather than stop digging, we're fighting over the most legally sound way to accelerate the digging.

It's time to reassess — both what best serves America's "security," writ large, and how best to respond to terrorism.

THE COVERT OPERATION UNDERMINING US CREDIBILITY AGAINST ISIS

Over the weekend, the NYT had a story reporting the "conspiracy theory" popular among Iraqis that the US is behind ISIS.

> The United States has conducted an escalating campaign of deadly airstrikes against the extremists of the Islamic State for more than a month. But that appears to have done little to tamp down the conspiracy theories still circulating from the streets of Baghdad

> to the highest levels of Iraqi government that the C.I.A. is secretly behind the same extremists that it is now attacking.
>
> "We know about who made Daesh," said Bahaa al-Araji, a deputy prime minister, using an Arabic shorthand for the Islamic State on Saturday at a demonstration called by the Shiite cleric Moktada al-Sadr to warn against the possible deployment of American ground troops. Mr. Sadr publicly blamed the C.I.A. for creating the Islamic State in a speech last week, and interviews suggested that most of the few thousand people at the demonstration, including dozens of members of Parliament, subscribed to the same theory.
>
> [snip]
>
> The prevalence of the theory in the streets underscored the deep suspicions of the American military's return to Iraq more than a decade after its invasion, in 2003. The casual endorsement by a senior official, though, was also a pointed reminder that the new Iraqi government may be an awkward partner for the American-led campaign to drive out the extremists.

It suggests the theory arises from lingering suspicions tied to our occupation of Iraq.

But, given the publicly available facts, is the theory so crazy?

Let me clear: I am not saying the US currently backs ISIS, as the NYT's headline but not story suggests is the conspiracy theory. Nor am I saying the US willingly built a terrorist state that would go on to found a caliphate in Iraq.

But it is a fact that the US has had a covert op since at least June 2013 funding Syrian

opposition groups, many of them foreign fighters, in an effort to overthrow Bashar al-Assad. Chuck Hagel confirmed as much in Senate testimony on September 3, 2013 (the NYT subsequently reported that President Obama signed the finding authorizing the op in April 2013, but did not implement it right away). We relied on our Saudi and Qatari partners as go-betweens in that op and therefore relied on them to vet the recipient groups.

At least as Steve Clemons tells it, in addition to the more "moderate" liver-eaters in the Free Syrian Army, the Qataris were (are?) funding Jabhat al-Nusra, whereas Saudi prince Bandar bin Sultan gets credit for empowering ISIS — which is one of the reasons King Abdullah took the Syria portfolio away from him.

> McCain was praising Prince Bandar bin Sultan, then the head of Saudi Arabia's intelligence services and a former ambassador to the United States, for supporting forces fighting Bashar al-Assad's regime in Syria. McCain and Senator Lindsey Graham had previously met with Bandar to encourage the Saudis to arm Syrian rebel forces.
>
> But shortly after McCain's Munich comments, Saudi Arabia's King Abdullah relieved Bandar of his Syrian covert-action portfolio, which was then transferred to Saudi Interior Minister Prince Mohammed bin Nayef. By mid-April, just two weeks after President Obama met with King Abdullah on March 28, Bandar had also been removed from his position as head of Saudi intelligence—according to official government statements, at "his own request." Sources close to the royal court told me that, in fact, the king fired Bandar over his handling of the kingdom's Syria policy and other simmering tensions, after initially refusing to accept Bandar's offers to

> resign.
>
> [snip]
>
> ISIS, in fact, may have been a major part of Bandar's covert-ops strategy in Syria. The Saudi government, for its part, has denied allegations, including claims made by Iraqi Prime Minister Nouri al-Maliki, that it has directly supported ISIS. But there are also signs that the kingdom recently shifted its assistance—whether direct or indirect—away from extremist factions in Syria and toward more moderate opposition groups.
>
> [snip]
>
> The worry at the time, punctuated by a February meeting between U.S. National Security Adviser Susan Rice and the intelligence chiefs of Turkey, Qatar, Jordan, and others in the region, was that ISIS and al-Qaeda-affiliated Jabhat al-Nusra had emerged as the preeminent rebel forces in Syria. The governments who took part reportedly committed to cut off ISIS and Jabhat al-Nusra, and support the FSA instead. But while official support from Qatar and Saudi Arabia appears to have dried up, non-governmental military and financial support may still be flowing from these countries to Islamist groups.

Thus, to the extent that we worked with Bandar on a covert op to create an opposition force to overthrow Assad, we may well have had an indirect hand in its creation. That doesn't mean we wanted to create ISIS. It means we are led by the nose by the Saudis generally and were by Bandar specifically, in part because we are so reliant on them for our HUMINT in such matters. Particularly given Saudi support for Sunnis during our Iraq occupation, can you fault Iraqis for finding our tendency to get snookered by the

Saudis suspect?

Moreover, our ongoing actions feed such suspicions. Consider the way the Administration is asking for Congressional sanction (at least in the form of funding) for an escalated engagement in the region, without first briefing Congress on the stupid things it has been doing covertly for the last 18 months?

That's one of the most striking details from last Wednesday's Senate Foreign Relations Committee hearing on the Mideast escalation. As I noted in my Salon piece last week, former Associate Counsel to the White House Andy Wright noted, and today Jack Goldsmith and Marty Lederman note, Tom Udall suggested before Congress funds overt training of Syrian opposition groups, maybe they should learn details about how the covert funding of Syrian opposition groups worked out.

> Everybody's well aware there's been a covert operation, operating in the region to train forces, moderate forces, to go into Syria and to be out there, that we've been doing this the last two years. And probably the most true measure of the effectiveness of moderate forces would be, what has been the effectiveness over that last two years of this covert operation, of training 2,000 to 3,000 of these moderates? Are they a growing force? Have they gained ground? How effective are they? What can you tell us about this effort that's gone on, and has it been a part of the success that you see that you're presenting this new plan on?

Kerry, who had been sitting right next to Hagel when the Defense Secretary confirmed this covert op a year ago, said he couldn't provide any details.

> I know it's been written about, in the public domain that there is, quote, a

> covert operation. But I can't confirm, deny, whatever.

(At the end of the hearing he suggested he has been pushing to share more information, and that he might be able to arrange for the Chair and Ranking Member to be briefed.)

Shortly thereafter, SFRC Bob Menendez confirmed that his committee was being asked to legislate about a war with no details about the covert op that had laid the groundwork for — and created the urgency behind — that war.

> To the core question that you raise, this is a problem that both the Administration, as well as the Senate leadership must be willing to deal with. Because when it comes to questions of being briefed on covert operations this committee does not have access to that information. Yet it is charged with a responsibility of determining whether or not the people of the United States should — through their Representatives — support an Authorization for the Use of Military Force. It is unfathomable to me to understand how this committee is going to get to those conclusions without understanding all of the elements of military engagement both overtly and covertly. … I'll call it, for lack of a better term, a procedural hurdle we're going to have to overcome if we want the information to make an informed judgment and get members on board.

How are we supposed to reassure Iraqis we're not still indirectly in bed with ISIS if the Administration won't even brief Congress about what's going on — and, more importantly, what did go on? As Tom Udall says, "everybody's well aware" we were working with Bandar for months to strengthen the opposition to Assad, but not even Congress is permitted to learn the details of

it.

In their piece, Goldsmith and Lederman profess not to know why our previous training cannot now be acknowledged (and their larger piece explains there's no legal reason preventing it).

> It's hard to imagine why U.S. involvement in the training of Syrian rebels must remain officially unacknowledged even now, in light of Secretary Hagel's public acknowledgment, and in light of the very public debate and congressional vote that just occurred on this very subject: After all, going forward there won't be any secret that the U.S. is training the rebels; so why must the current operation remain unacknowledged?

But there probably is a very good reason why the Administration won't acknowledge the operation: in part, because we still want to use at least some of the terrorist groups our allies funded to combat Assad. And in even larger part, because acknowledging the actions implemented by Bandar might lead to exposure of our complicity in some pretty appalling things.

So the Obama Administration may once again — as it did with the Awlaki drone killing — be using the fiction of covert status to avoid having to fully reveal all the sordid details of an indefensible operation.

But in this case, our refusal to come clean — and, frankly, to right our dysfunctional relationship with the Saudis — will continue to undermine our efforts to combat ISIS. It may be easy for NYT to mock Moqtada al-Sadr's "conspiracy theories." But dismissing them in the NYT is going to do nothing for the very justifiable belief among many in the Middle East that our secret past actions directly conflict with our stated words.

PRESIDENT OBAMA'S EPISTOLARY WAR

Jack Goldsmith observes that President Obama seems to be skirting War Power Resolution rules by sending Congress notice of incremental battles against ISIS.

> Yesterday President Obama sent a War Powers Resolution (WPR) letter to Congress concerning U.S. airstrikes "in support of an operation to deliver humanitarian assistance to civilians in the town of Amirli, Iraq." This is the third Iraq WPR letter to Congress in a month, and the sixth this summer. In June the President sent three WPR letters – the first (June 16) on the initial deployment of 275 soldiers to protect the embassy; then another (June 26) on further troops to protect the embassy and increased intelligence-gathering against the Islamic State; and a third (June 30) for ore troops to protect the embassy. Six weeks later, on August 8, the President sent a WPR letter concerning the use of force in Iraq to stop the "current advance on Erbil by the terrorist group Islamic State of Iraq and the Levant and to help forces in Iraq as they fight to break the siege of Mount Sinjar and protect the civilians trapped there." On August 17, he sent a letter concerning the use of force in Iraq "to support operations by Iraqi forces to recapture the Mosul Dam." And then yesterday's letter on Amirli. (John recently summarized how these WPR letters are typically generated.)
>
> Such frequent letters to Congress about discrete missions within a single

> country are not typical. Typically the President sends one WPR letter to cover the use of force within a country, and then updates that use of force as part of a biannual consolidated report.
>
> [snip]
>
> Why, then, has the President sent Congress six narrowly tailored WPR letters related to Iraq since mid-June? I can think of two possible explanations.
>
> First, the President wants to keep Congress super-informed about what he is doing in Iraq. I doubt this is the reason, or at least the main reason, since the information in the letters was publicly known (or about to be). Relatedly, the administration might want to emphasize to Congress that each use of force is limited in scope and time, though in the aggregate such discrete reporting might have the opposite effect.
>
> Second, the administration is trying to circumvent WPR time limits on it deployment of troops and uses of force in Iraq. (NSC spokeswoman Caitlin Hayden recently dodged whether the WPR applied to the recent air strikes and related actions in Iraq.)

Definitely click through to see the addendum Goldsmith put together, showing Obama's accelerating rate of WPR note-sending.

Not only does he seem to be dodging the intent of WPR (in more legalistic, though no less obstinate fashion than Obama did with Libya). But by attaching letters to each mountain or dam we have to defend on humanitarian grounds, you pretty much ensure a piecemeal approach.

That may still be better than declaring war against ISIS, with the inevitable mission creep

that would bring. But I’m not sure that war by epistolary novel is any less likely to result in mission creep.