

THE AUMF FALLACY

There's a whole strand of commentary on the targeted killing that lets the Obama Administration off easy for what it maintained in the white paper on the targeted killing of Americans.

There's the argument made by David Cole and Jane Mayer that Obama's targeted killing isn't as bad as Bush's torture because torture is always illegal, whereas killing is legal during war. This is Cole:

Thus, where Bush sought to rationalize a universally proscribed war crime, Obama is seeking to chart an appropriate legal course in a new setting of a well-established and generally lawful military tactic: killing the enemy.

There's Armando Llorens' argument that because the AUMF didn't expressly authorize the military to operate in the US, the President therefore couldn't target Americans in the US.

Serwer writes:

The question is whether the Authorization for Use of Military Force, which Congress passed in the aftermath of the 9/11 attacks, counts as "express authorization" to carry out a targeted killing on US soil.

Well, let's read the empowering provisions:

Section 2 – Authorization For Use of United States Armed Forces(a) IN GENERAL- 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.

The argument that Serwer appears to adopt is that this empower the president to “use all necessary and appropriate force against those [...] organizations or persons he 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” including such persons and organizations located in the United States.

The problem is the 2001 AUMF does not include the language “in the United States.” To wit, the Posse Comitatus Act’s requirement of “express authorization” is not met. There is no express authorization for military targetting in the United States.

And there’s Garrett Epps’ in some ways strong argument that a Drone and/or Targeted Killing Court wouldn’t work that nevertheless problematically includes the claim that Obama has claimed no inherent authority in his use of drone strikes.

The present administration does *not* claim that the president has “inherent authority” to attack anyone anywhere. Instead, from the documents and speeches we’ve seen, the administration **says it can order drone attacks only as provided by** the Authorization for the Use of

Military Force passed by Congress after the September 11 attacks—that is, 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.”

Unlike the fictional President Bennett in Tom Clancy’s *Clear and Present Danger*, then, President Obama can’t suddenly send the drone fleet down to take out, say, Colombian drug lords or the Lord’s Resistance Army in Uganda.
[my emphasis]

All of them claim the Administration is operating exclusively within the AUMF, and based on that assumption conclude certain things about what the Administration has done.

There is abundant evidence to refute that. After all, the Administration invokes self-defense about as many times as it does AUMF in the white paper. The white paper actually situates the authority to kill an American in “constitutional responsibility to protect the country” – that is, Article II authority – and inherent right to self-defense even **before** it lists the AUMF.

The President has authority to respond to the imminent threat posed by al-Qa’ida and its associated forces, arising from his constitutional responsibility to protect the country, the inherent right of the United States to national self defense under international law, Congress’s authorization of the use of all necessary and appropriate military force against this enemy, and the existence of an armed conflict with al-Qa’ida under international law.

(Interestingly, the Holder speech reverses that order, listing AUMF, law of war, Article II, and then self-defense under international law.)

One of the Senators who has actually been briefed on Anwar al-Awlaki's killing kept asking, for an entire year, "is the President's authority to kill Americans based on authorization from Congress or his own authority as Commander-in-Chief?" While Wyden didn't repeat that question in open session at Brennan's hearing (so it may have been answered in the OLC memos he got the morning of the hearing), if he didn't know, then how can all these people who haven't been briefed claim to know?

Similarly, Colleen McMahon – who has been briefed at least on why CIA needed to invoke No Number No List over their own public speech – emphasized the unilateral nature of the decision to kill Awlaki.

And ultimately, we should look to what Stephen Preston – the General Counsel of the agency that actually carried out the Awlaki killing – has to say about where the CIA gets its authorization to engage in lethal covert operations.

Let's start with the first box:
Authority to Act under U.S. Law.

First, we would confirm that the contemplated activity is authorized by the President in the exercise of his powers under Article II of the U.S. Constitution, for example, the President's responsibility as Chief Executive and Commander-in-Chief to protect the country from an imminent threat of violent attack. This would not be just a one-time check for legal authority at the outset. Our hypothetical program would be engineered so as to ensure that, through careful review and senior-level decision-making, each individual action is linked to the imminent threat justification.

A specific congressional authorization might also provide an independent basis for the use of force under U.S. law.

In addition, we would make sure that the contemplated activity is authorized by the President in accordance with the covert action procedures of the National Security Act of 1947, such that Congress is properly notified by means of a Presidential Finding. [my emphasis]

The CIA, the agency that killed Awlaki, looks to Article II authority before it engages in targeted killing. Congressional authorization might also provide authority, Preston says. But Preston makes it clear that all the CIA needs to conduct lethal covert operations (though he does not specify that this holds with an American citizen) is the President's Article II say-so.

At best, this record shows that Obama has operated under Article II and AUMF yoked together. There is no conceivable way (except by deliberate misreading) to argue that he is operating **exclusively** under the AUMF, because these public statements point to both the AUMF and Article II. And the Preston language at least envisions conducting such operations solely under Article II.

Finally, this notion that the President doesn't think he could shoot drones against the Colombian druglords or the LRA? It would be a lot more defensible statement if the Administration would share with even the Intelligence Committees – which it has thus far refused to do – the list of all the countries it has operated with lethal force. Add in those 7 OLC memos authorizing targeting killing (though not of Americans) that the Administration also has thus far refused to share, and there's good reason to believe the Administration is conducting targeted killings – whether by drones or other means – in ways that must stretch the AUMF, because they won't share that information with the Congress that purportedly authorized

it.

These arguments that Obama ordering the death of an American (purportedly under exclusively AUMF authority) isn't that bad are all very nice. But insofar as they ignore the public record, which shows that Obama is at least partially situating his authority to kill in his Article II authority, the arguments are simply spin on what Obama really did.