

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 a range of commentators](#) (e.g., [Bruce Ackerman](#), [Noah Feldman](#), [Jack Goldsmith](#), [Deborah Pearlstein](#), and [Jonathan Turley](#)), the administration [confided](#) to *theTimes* 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 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.