

JACK GOLDSMITH, OPEN SOURCE OLC LAWYER, TO OBAMA: YOU'RE BREAKING THE LAW

Eleven days ago, Senate Intelligence Committee member Ron Wyden sent a publicly released letter to John Brennan making two things clear:

- The Administration has refused to tell grunt (that is, non-Gang of Four) members of the Senate Intelligence Committee whether its targeted killing program—extending even to the killing of US citizens—is authorized under Article II or AUMF power.
- The Administration has refused to tell grunt members of the Senate Intelligence Committee which countries it uses “lethal counterterrorism authorities” in.

Nine days later, Jack Goldsmith, a man best known for going to some length to force a President to have credible legal justifications for his counterterrorism programs, wrote this column, offering his advice about “What to do about growing extra-AUMF threats?”

Mind you, Goldsmith is addressing the legal problem presented by (and explaining his column by pointing to) our fight against AQIM in North Africa and al-Nusra in Syria. He is not pointing—at least not explicitly—to the troubling revelations of Wyden’s letter.

But Goldsmith's advice is directly relevant to the topics on which the Administration refuses to brief the grunt Senate Intelligence Committee members. Goldsmith warns that Article II power—on which it increasingly appears the Administration is relying—doesn't extend as far as AUMF authority would.

One possibility is to rely on the president's independent Article II power, which authorizes the president to use force, in the absence of congressional authorization, in defense of the nation. This approach faces at least three problems. First, it is a fraught basis for action because the president must act without the overt support of Congress, which can later snipe at his decisions, **or worse**. Relatedly, courts are more inclined to uphold presidential action supported by Congress. Second, the scope of **Article II targeting authorities is less certain than the scope of AUMF targeting authorities, and might be narrower**. [my emphasis]

And Goldsmith describes the importance of telling Congress—and he's talking about telling **all** of Congress, not just grunt Senate Intelligence Committee members—what groups are actually included among legal counterterrorism targets.

Congress could authorize the President to use force against specified terrorist groups in specified countries (or perhaps just against particular groups without specifying nations). The *Wall Street Journal* recently reported that some in the administration are considering asking Congress for just such a statute to address Islamist terrorist threats in some North African countries. This retail approach is in theory the best option because **Congress defines the enemy, and because Congress**

stays in the loop politically and legally and must debate and approve any expansions of the conflict. The problem with the retail approach is that it is unclear whether Congress can or will, on a continuing basis, authorize force quickly or robustly enough to meet the ever-morphing threat.

Third, Congress could set forth general statutory criteria for presidential uses of force against new terrorist threats but require the executive branch, through an administrative process, to identify particular groups that are targetable. One model here is the State Department's "Foreign Terrorist Organization" designation process. There are at least two problems with this approach. First, **it is unclear whether Congress may constitutionally delegate the war power in this fashion.** And second, it lessens congressional involvement and accountability as compared to the second approach. [my emphasis]

Now, let me be clear: Goldsmith never comes out and directly says that the Obama Administration is, currently, breaking the law (and he makes no comment on whether the Administration is violating National Security Act requirements on briefing Congress). And if he did, he'd probably couch it in language about needing the cover of Congressional sanction—more language about Congress "sniping, or worse." Nevertheless, the clear implication if you take Wyden's letter in conjunction with Goldsmith's Office of Legal Counsel-type advice is that the Obama Administration is conducting counterterrorism ops without legal sanction.

But consider what it means that this solidly conservative lawyer is telling the Obama Administration the same thing he had to tell George Bush when the latter relied on John Yoo's crappy legal advice.

This suggests that the administration will continue to rely as much as possible on an expansive interpretation of the AUMF and on Article II. We will see if these authorities suffice to meet the threat.

When Jim Comey, in response Goldsmith's advice, dramatically stood up to Andy Card and Alberto Gonzales' bullying in a DC Intensive Care Unit, he did so to convey to them that an "expansive interpretation" of Article II power was not good enough (though according to Tom Daschle's read of the AUMF discussions, Goldsmith replaced John Yoo's expansive interpretation of Article II authority with an expansive interpretation of the AUMF).

Goldsmith's advice, writing without the authority he once had as the confirmed OLC head, and lacking the leverage of an expiring wiretapping authorization or the imposing figure of a 6'8" Acting Attorney General to deliver his message, may not carry the weight it once did.

But he is offering fundamentally the same warning he did 9 years ago.

Update: This post has been updated for clarity.