

CIA GENERAL COUNSEL: IF THE PRESIDENT AUTHORIZES IT, IT'S LEGAL

I do hope the Harvard students who listened to this speech from CIA General Counsel Stephen Preston—in which he purported to explain what a law-abiding agency the CIA is and which appears to be the CIA's effort to prove that the Anwar al-Awlaki killing was legal—are sophisticated enough to realize he, like all spooks, was peddling deceit. I'll get to those details below.

But first I want to focus on how he bookends his claim that CIA's "activities are subject to strict internal and external scrutiny."

He starts by admitting that courts and citizens are not part of this "external scrutiny."

It is true that a lot of what the CIA does is shielded from public view, and for good reason: much of what the CIA does is a secret! Secrecy is absolutely essential to a functioning intelligence service, and a functioning intelligence service is absolutely essential to national security, today no less than in the past. This is not lost on the federal judiciary. The courts have long recognized the state secrets privilege and have consistently upheld its proper invocation to protect intelligence sources and methods from disclosure. Moreover, federal judges have dismissed cases on justiciability or political question grounds, acknowledging that the courts are, at times, institutionally ill-equipped and constitutionally incapable of reviewing national security decisions committed to the President and the political branches.

Let's unpack the logic of this: first, CIA operations are subject to strict "external scrutiny." But because—"national security"—such external scrutiny is not possible.

Next, Preston claims that the courts have been in the business of consistently upholding the "proper invocation" of state secrets "to protect intelligence sources and methods." Of course, just about every invocation of state secrets has been subsequently or contemporaneously shown to be an effort to protect—at best—misconduct and, in most cases, illegal activities: things like kidnapping, illegal wiretapping, and torture. So when he describes this "proper invocation" of state secrets, he is effectively saying that when lawsuits threatened to expose CIA's law-breaking, courts have willingly dismissed those cases in the name of sources and methods.

And even before it gets to that stage, courts will bow to the Executive Branch's claim that only Congress and the Executive can decide what forms of law-breaking by the CIA will be tolerated; courts are "ill-equipped" to judge the legality of illegal actions if those illegal actions are committed by the CIA.

So to prove that CIA's ops are subject to "external scrutiny," Preston starts by admitting that two of the most important agents of external scrutiny—citizens and courts—don't actually exercise any scrutiny, particularly in cases where the government is willing to invoke state secrets to shield illegal activities.

Preston then lists a whole bunch of agents exercising "internal and external scrutiny." He lists the Intelligence Committees—which in the case of the unspoken subject of this speech, Awlaki's killing, did not receive key details of the op; in addition, under Bush, CIA lied to these committees about at least five ops. He mentions the FISA Court, which not only rubber stamps most things (and also got lied to under Bush), but doesn't have any oversight over the unspoken subject of this speech, Awlaki's killing. Preston mentions the Intelligence

Advisory Board and Intelligence Oversight Board, committees which the President appoints (in Obama's case, after two years of delay) with no oversight, whose members are apparently so secret the Director of National Intelligence doesn't know to invite them to his holiday party. And he mentions the DNI and CIA Inspectors General, the latter of which had been a key oversight player in the past until John Helgeson got hounded out for ... exercising oversight.

Which brings us to the second bookend of Preston's list of the not-so-impressive entities exercising scrutiny over the legality of CIA's operations.

Last, but by no means least, there is the U.S. Department of Justice, to which the CIA is required to report all possible violations of federal criminal laws by employees, agents, liaison, or anyone else.

Even ignoring past practice with torture of DOJ allowing the CIA—not FBI—to investigate potential legal violations, remember how Preston began this section: by admitting that when cases do go to any court besides FISA, the Executive Branch can and does invoke state secrets or political question grounds to make sure courts don't review these actions.

"Last but not least," Preston is arguing, DOJ gets to learn about potential criminal violations, which is absolutely meaningless once courts have been rendered incapable of actually reviewing those criminal violations (even assuming DOJ chose to pursue them).

So where does that leave Preston's claim, then, that the "the rule of law is integral to Agency operations"? With a list of Executive Branch entities—some of them not always functioning—exercising "scrutiny," with the Intelligence Committees as the sole external entity on the use of force this speech

implicitly discusses, and aside from the mention of FISA that doesn't apply to his example ... no courts.

So with no courts to determine whether the CIA actually is abiding by the rule of law Preston claims is integral to its operations, then who decides?

The President.

First, there is direct supervision by the National Security Council and the President, who, after all, not only is constitutionally responsible for keeping the American people safe, but also, quote, "shall take Care that the Laws be faithfully executed."

[snip]

I don't mean to suggest that these judgments are confined to the Agency. To the contrary, as the authority for covert action is ultimately the President's, and covert action programs are carried out by the Director and the Agency at and subject to the President's direction, Agency counsel share their responsibilities with respect to any covert action with their counterparts at the National Security Council.

[snip]

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.

Sure, Preston mentions a few other things—Congressional notice, the Constitution and some laws that don't pertain to targeted killings, and international law (I'll return to some of these in a later post). But ultimately, once Preston admits that courts won't ever review these activities—that they're shielded by the President's habit of declaring illegal activities a state secret—then you're really left with one thing.

If the President has authorized a covert action then, from the CIA's standpoint, it's legal.