ASSUME OBAMA DRONE RULES DEAD

There's been a series of moves and trial balloons among Obama's national security lawyers that lead me to assume that any effort to apply some regularity and the patina of legality to the drone program is dead.

First, after some reporting that he might replace Eric Holder as Attorney General, DOD General Counsel Jeh Johnson instead announced his resignation, effective the moment the New Year's ball drops.

> Mr. Johnson, who was general counsel to the Air Force during the Clinton administration, was a key legal adviser and fund-raiser for then-Senator Obama during his run for the presidency in the 2008 campaign. On Thursday, he sent Mr. Obama a letter saying that he would resign effective midnight on Dec. 31.
>
> "Thank you for the opportunity to be part of your campaign, your transition, and your Administration," Mr. Johnson wrote. "Thank you also for the best clients I will ever have: Robert Gates, Leon Panetta, and the men and women of the U.S. military."
>
> Mr. Johnson, a former prosecutor, has been mentioned as a potential attorney general should Eric H. Holder Jr. step down in Mr. Obama's second term. That speculation has been centered more among his colleagues in the Pentagon rather than among civilian law enforcement officials, however.
>
> In his current job, Mr. Johnson worked closely on internal debates about the scope and limits of the government's power to hold terrorism suspects in indefinite detention and to target them with drone strikes in places like Yemen

> and Somalia. In those debates he generally sought broader latitude for the government than some others, notably State Department officials.
>
> But Mr. Johnson took a more restrained position than some colleagues during the NATO-led air war in Libya. As American participation in the effort neared an apparent 60-day limit imposed by the War Powers Resolution for hostilities that had not been authorized by Congress, he urged pulling back on direct combat activities – like missile strikes – but was overruled by the White House.

Now, as Charlie Savage notes, the reports that Johnson might be named Attorney General seemed to come from Johnson's backers, not the White House. And as Savage reports, Johnson's role has been mixed. While he pushed for more flexibility—particularly with drones themselves—he did try to hew to rule of law in other areas. And he recently suggested that the AUMF the government has operated under will one day (I would argue, already has) effectively been vacated because core al Qaeda has been disrupted so thoroughly.

> I do believe that on the present course, there will come a tipping point – a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed.
>
> At that point, we must be able to say to ourselves that our efforts should no longer be considered an "armed conflict" against al Qaeda and its associated forces; rather, a counterterrorism

> effort against *individuals* who are the scattered remnants of al Qaeda, or are parts of groups unaffiliated with al Qaeda, for which the law enforcement and intelligence resources of our government are principally responsible, in cooperation with the international community — with our military assets available in reserve to address continuing and imminent terrorist threats.

Once core al Qaeda has been decimated (which they have been), Johnson said, the military must become solely a reserve force, with intelligence and law enforcement leading the fight.

In many ways, the speech reads, in hindsight, like a valedictory, listing Johnson's personal accomplishments at DOD (notably, the repeal of Don't Ask Don't Tell). But it also calls for conventional legal limits to the war on terror.

And then, days after delivering that speech, Johnson was not only not named to replace Holder, but was himself on the way out the door.

Then the day after Johnson's departure announcement, came State Department Counselor Harold Koh's.

That one I find more troubling. While it might just be tied to Yale's desire to have Koh do his job again (though those transitions usually happen in August, not December), and while Hillary's departure may explain Koh's departure (though Hillary isn't leaving for some time yet), Koh's departure comes just weeks after Scott Shane's report that the attempt to put order to the drone program—which had first been reported before the election—had stalled after the election. I suggested then that the Shane report might be an effort from those trying to put more legal regularity to the drone program—an effort undoubtedly led by Koh—to force John Brennan to carry through on his earlier plans. Matthew Aid confirmed that the

drone rules, at least, if not the leak to Shane, came from those in State (again, this must be Koh) and DOJ who recognized the drone program didn't really fly under international law.

> A State Department official who recently left his post for a better paying job in the private sector admitted that there is deep concern at State and Justice that sooner or later, a court in the U.S. or in The Hague will issue a ruling on the question of the legality of these missions, which many in Washington fear will go against the U.S. government position that these strikes are legal.

So whether Koh left because he lost this fight with Brennan or because of academic schedules and Hillary's upcoming departure, in his absence, the drone rules Koh pushed for are far less likely to happen.

Then there's the news—this one, unlike reports of Johnson as Attorney General, sourced to the Administration itself—that Stephen Preston, currently CIA's General Counsel, may replace Johnson at DOD.

Along with Johnson and John Brennan and Eric Holder and Harold Koh, Preston also gave a speech on drone killing, though unlike the others, the Administration appears to pretend that Preston's speech is not public. Also unlike the others, Preston gave different emphasis on the legal basis for drone strikes. Preston situates the authority for drone assassination in Article II and Presidential Findings, with the AUMF all the others used as legal justification serving only as legal gravy on top of a pile of hard legal biscuits.

> Curiously, Preston checks off the first box—authorization under US law before the op—by looking to Article II, not the AUMF Congress passed.
>
> > 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. [my emphasis]

That's interesting for several reasons. First, it situates the authority to use lethal force not in the stated basis OLC is using—the one SCOTUS has affirmed (sort of), but in Article II. Just where John Yoo would look to situate it.

This also means that CIA maintains it has this authority—presuming a Presidential Finding—outside the context of a declared war.

Finally, note Preston's emphasis on imminent threat. I've already noted that Holder's own speech was weakest precisely when suggesting Awlaki was an imminent threat because he was a top leader of AQAP.

In checking off compliance with the National Security Act, Preston emphasizes the Presidential Finding.

> 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.

To be fair, Preston was representing just how the CIA engaged in assassinations (a label he of course decries), not the Administration generally. And it is true that CIA operates under Findings, not AUMFs (though on a number of assassinations and signature strikes, the Administration has seemingly opted to have CIA play the legal lead role—even where using DOD resources—precisely for the more flexible legal cover offered by the Gloves Come Off Memorandum of Notification).

So perhaps if Preston did move to DOD he'd resort to authorizing killing under the AUMF—the AUMF that Johnson suggested may be getting close to expiring.

Except that such a move would take place—as the FP piece that announced Preston's potential move notes—against the background of the Administration's efforts to blur all these lines. It comes against the background of the CIA becoming DOD and DOD becoming CIA, complete with thoroughly unconvincing assurances that DOD's spooks won't—as CIA does—engage in both spying and killing.

All of this is Kremlinology, mind you: I don't know for certain that Preston's potential move heralds a further blurring of the legal authorities that govern CIA and DOD generally, nor can I be sure that it means the drone program will continue to operate on the ad hoc basis it has been.

One thing we can be sure of though: with the

start of the new year, the guy trying to put some legal structure to the drone program will be gone, along with a guy who recently floated an end to the AUMF

And given the way things work without institutional champions. I suspect that means Obama’s so-called drone rules are dead.