THE CIA GLOMARED THEIR OWN PUBLIC SPEECH

I've been reading the Colleen McMahon ruling on the ACLU Awlaki FOIA again in light of the release of the white paper. And I realized that the CIA must be treating the public targeted killing speech of CIA General Counsel Stephen Preston with a "No Number, No List" declaration — a modified Glomar invocation that admits the CIA has documents responsive to FOIA, but refuses to say how many or what they entail. That's interesting, because it demonstrates that the CIA is refusing to admit that the analysis Preston laid out pertaining to lethal covert operations has a tie to Anwar al-Awlaki's death.

Admittedly, this all should have been clear to me when I first went looking for mentions of Preston's speech last June. After all, when CIA Clandestine Services Director John Bennett explained why CIA was shifting from a Glomar (not admitting they had any documents) to a No Number No List (admitting they had some, but refusing to list them) declaration last June, he specifically admitted the CIA had Eric Holder and John Brennan's targeted killing speeches in their files, but did not admit they had the one made by CIA's own General Counsel.

> Several developments have occurred subsequent to the issuance of Plaintiffs' FOIA requests and the filing of these lawsuits that have caused the CIA to reconsider its response, as described further below. Those events include **several speeches by senior U.S. officials** that address significant legal and policy issues pertaining to U.S. counterterrorism operations and the potential use of lethal force by the U.S. government against senior operational leaders of al-Qa'ida or associated forces who have U.S.

> citizenship. In light of these recent speeches and the official disclosures contained therein, the CIA decided to conduct a reasonable search for records responsive to the ACLU's request. Based on that search, it has determined that it can now publicly acknowledge that **it possesses records responsive to the ACLU's FOIA request**. As described below, however, the CIA cannot provide the number, nature, or a categorization of these responsive records without disclosing information that continues to be protected from disclosure by FOIA exemptions (b) (1) and (b) (3).
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> [snip]
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> These records include, for example, **the speech that the Attorney General gave at Northwestern University Law School on 5 March 2012** in which he discussed a wide variety of issues pertaining to U.S. counterterrorism operations, including legal issues pertaining to the potential use of lethal force against senior operational leaders of al-Qa'ida or associated forces who have U.S. citizenship. The Attorney General explained that under certain circumstances, the use of lethal force against such persons in a foreign country would be lawful when, among other things, "the U.S. government . . determined, after a thorough and careful review, that the individual pose[d] an imminent threat of violent attack against the United States." **These records also include the speech that the Assistant to the President for Homeland Security and Counterterrorism gave on 30 April 2012,** in which he addressed similar legal and policy issues related to the U.S. Government's counterterrorism operations. Because the CIA is a critical component of the national security apparatus of the

> United States and because these speeches covered a wide variety of issues relating to U.S. counterterrorism efforts, it does not harm national security to reveal that copies of the speeches exist in the CIA's files. And because these speeches refer to both the "legal basis" for the potential use of lethal force against U.S. citizens and a review "process" related thereto, the speeches are responsive to these two categories. [my emphasis]

By comparison, DOD (which also invoked No Number No List) did admit that Jeh Johnson's speech was responsive to ACLU's FOIA in their declaration.

Now, of all the reasons Bennett lists why CIA must use a No Number No List invocation —whether CIA was involved in Awlaki's death and whether they can use drones — only one really seems to describe why could not acknowledge that Preston's speech is responsive to ACLU's FOIA. CIA doesn't want you to know that CIA can kill US citizens.

> Although it has been acknowledged in the Attorney General's speech and elsewhere that, as a legal matter, a terrorist's status as a citizen does not make him or her immune from being targeted by the U.S. military, there has been no acknowledgement with respect to whether or not the CIA (with its unique and distinct roles, capabilities, and authorities as compared to the U.S. military) has been granted similar authority to be directly involved in or carry out such operations.
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> [snip]
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> In this case, if it were revealed that responsive OLC opinions pertaining to CIA operations existed, it would tend to reveal that the CIA had the authority to directly participate in targeted lethal

> operations against terrorists generally, and that this authority may extend more specifically to terrorists who are U.S. citizens.

But I think it's more than that. After all, Preston used a hypothetical that definitely admitted the possibility CIA would be asked to kill on covert operations, if not Americans specifically.

> Suppose that the CIA is directed to engage in activities to influence conditions abroad, in which the hand of the U.S. Government is to remain hidden, – in other words covert action – and suppose that those activities may include the use of force, including lethal force.

I keep coming back to what makes Preston's speech different from all the others given at the time (which were invoked in FOIA responses, even while they also didn't mention Awlaki by name).

Preston makes it clear that this lethal authority can come exclusively from Article II power.

> Let's start with the first box: Authority to Act under U.S. Law.
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> 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.
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> A specific congressional authorization might also provide an independent basis for the use of force under U.S. law.
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> 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.

Sure, he mentions that a congressional authorization — like the AUMF — might also provide such authority. But it's just gravy on top of a steaming pile of biscuits, a little extra flavor, but not the main course.

Preston also doesn't mention a key part of the National Security Act — the purported prohibition on covert ops violating US law. On the contrary, Preston's "box" suggests the only analysis needed to decide whether a lethal covert mission is legal under US law is that Presidential order.

So it's not just that CIA doesn't want Americans to know the CIA can kill you. It also doesn't want to know that CIA believes it can kill you solely on the say-so of the President.