HOW DAVID BARRON PLAYED JUDGE AND JURY FOR ANWAR AL-AWLAKI

Rand Paul has gone and united drone apologists and opponents with an op-ed explaining his opposition to David Barron's confirmation without full transparency on the drone memos Barron wrote. It's a good op-ed, though the only new addition from what he has said before is that any other drone memos Barron has written ought to be on the table as well.

It's Ben Wittes' and David Cole's responses that I'm reluctantly interested in.

In addition to a lot of "trust me I know the man" defenses from Cole that I find utterly inappropriate for a lifetime appointment, both Cole and Wittes argue we've already seen the "Administration's" logic on drone killing, so we have no need to see the memo itself. Cole cautiously doesn't characterize what that standard is in his defense.

> Second, the administration has in fact made available to *all Senators* any and all memos Barron wrote concerning the targeting of al-Awlaki — the core of the issue Sen. Paul is concerned about. So if Sen. Paul and any other Senator want to review Barron's reasoning in full, they are free to do so. Moreover, the administration also made available to the Senate, and ultimately to the public, a "White Paper" said to be drawn from the Barron memo (though written long after he left office). Thus, no Senator need be in the dark about the Administration's reasoning, and the public also has a pretty good idea as well.

Wittes, less wisely, does.

> This idea of a trial in absentia followed by drone strike as a means of effectuating a death sentence is novel—and very eccentric. Paul never seeks to explain why wartime authorities are inappropriate for dealing with a senior operational leader of an enemy force who is actively plotting attacks on the United States.
>
> [snip]
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> The legal standard for targeting a U.S. citizen the administration has embraced is limited to U.S. citizens (1) who are operational leaders of AUMF-covered groups, (2) who pose an imminent threat, (3) whose capture is not feasible, and (4) whose targeting is consistent with the law of armed conflict. Suspects in Germany or Canada or any other governed space would almost surely be feasible to capture and if not, because in a hostage-like situation, would be dealt with by law enforcement, including using law enforcement's powers at times to use lethal force. The definition of the group of citizens covered is so narrow, in reality, that it has so far described a universe of exactly one person—Al Awlaki—whom the administration has claimed the authority to target.

Wittes, you see, is certain that not only did the Administration have evidence Anwar al-Awlaki was a "senior operational leader" of AQAP by the time they executed him, but they had that evidence by July 2010 when Barron signed a memo saying that the specific circumstances at hand justified killing Awlaki. But even if he's seen it via some magic leak, the public has not.

As I've noted repeatedly — and as Lawfare has been sloppy about in the past — at the time Barron signed off on Awlaki's execution, one of the chief pieces of evidence against Awlaki — a confession Umar Farouk Abdulmutallab had given

as a proffer in a plea deal that never got consummated — was undermined by Abdulmutallab's previous confession and other evidence (and would be undermined further, just days after Awlaki's execution, when Abdulmutallab pled guilty without endorsing the claims about Awlaki included in that confession).

Now, I suspect the government didn't present that nuance to Barron when he wrote his memo (just as the government lied to John Yoo and a series of other OLC lawyers as they wrote torture memos). I imagine the memo starts with a caveat that says, "Assuming the facts are as you present them and no other facts exist," absolving Barron in case the government presented only partial evidence or worse, as it appears to often do in the case of OLC memos.

But it is possible that the government gave Barron really nuanced information, and he nevertheless rubber stamped this execution, in spite of the possibility that the case Awlaki was a senior operational official of AQAP by that point was overstated. It's possible too that there's a great deal of evidence to counterweigh the very contradictory information on the chief claim in the public record and absent any contrary evidence Barron thought it was a conservative legal decision.

One way or another, Barron participated in a tautological exercise in which the government presented unchallenged evidence showing that Awlaki was a senior operational leader that then served as justification for setting aside due process and instead having OLC — Barron — weigh whether or not Awlaki was a senior operational leader who could be executed with no due process.

This is why (egads) Paul is right and Wittes is wrong. Because the idea of a trial before you execute an American citizen is in fact the rule, and the idea of having an OLC lawyer judge all this in secret is in fact the novelty. It doesn't matter whether the case laid out against Awlaki applies to him and him alone (though I

doubt it does; I doubt it applies as well as supporters say, and complaints about the lack of specificity of it makes it clear it could too easily be applied for others).

But the big underlying point — and the reason why Cole and Wittes' claim that Barron can't be held to account here, only the Administration whose policy he reviewed can be, is wrong — is that tautology. What the memo shows and the white paper does not is that Barron was provided evidence against Awlaki and he willingly played the role of both saying that the underlying legal logic (what we see in the white paper) was sound but that the evidence in this case (what we haven't seen in the memo) made this departure from due process sound. Barron signed off on both the logic and the evidence justifying that logic itself.

And for me, that's enough. That's enough to disqualify him — no matter how liberal or brilliant he is, both qualities I'd like to see on a bench — as a judge.

That's enough for me. But those who want to push Barron through anyway ought to consider what they would need to show to prove that Barron's decision was reasonable: the evidence Barron saw that he believed sufficient (and unquestionable, given the absence of rebuttal) to authorize a due-process free execution. It's unlikely we'll ever get that evidence, because the government won't declassify it.

That's the problem with this nomination, one way or another. No matter how sound the underlying logic, Barron played another role in Awlaki's execution, certifying that the evidence merited getting to the underlying logic of denying a US citizen due process. Barron both approved an entirely parallel system to replace due process, and played the judge in that system.

Update: Katherine Hawkins reminds me that when David Cole wrote about the white paper shortly after it got released, he had trouble with precisely the thing he has no trouble now.

> The white paper addresses the legality of killing a US citizen "who is a senior operational leader of al-Qaeda or an associated force." Such a person may be killed, the document concludes, if an "informed, high-level official" finds (1) that he poses "an imminent threat of violent attack against the United States;" (2) that his capture is not feasible; and (3) the operation is conducted consistent with law-of-war principles, such as the need to minimize collateral damage. However, the paper offers no guidance as to what level of proof is necessary: does the official have to be satisfied beyond a reasonable doubt, by a preponderance of the evidence, or is reasonable suspicion sufficient? We are not told.
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> Nor does the paper describe what procedural safeguards are to be employed. It only tells us what is *not* required: having a court determine whether the criteria are in fact met.

What determines whether that standard has been met is the same OLC lawyer who determined that such a standard would be appropriate.