

HOW GOOD ARE DOJ'S REASONS FOR BURYING ITS CASE AGAINST ANWAR AL-AWLAKI?

Today's the day Eric Holder explains how his Department decided it was okay to kill a US citizen with no independent legal review, even while he says we should use civilian courts to, uh, give terrorists due process.

Now, at least as of late January, the Administration still planned not to include any real information about its case against Anwar al-Awlaki in Holder's speech.

As currently written, the speech makes no overt mention of the Awlaki operation, and reveals none of the intelligence the administration relied on in carrying out his killing.

Since much of the evidence that has been used to implicate Awlaki came from Umar Farouk Abdulmutallab, I'm going to return to a question I first raised several weeks ago, why DOJ sat on the information it got from Abdulmutallab implicating Awlaki so long.

In this post, I considered why DOJ published a narrative explicitly describing Anwar al-Awlaki's role in Umar Farouk Abdulmutallab's terror plot last month, rather than when it learned the information from Abdulmutallab sometime in 2010. The reason is likely evidentiary. It appears the government never persuaded Abdulmutallab to testify against Awlaki even while he was implicating Awlaki during "plea negotiations," meaning it's unclear Abdulmutallab would have repeated the information implicating Awlaki in court. Note, since that post, Abdulmutallab prosecutor Jonathan Tukul confirmed in court that the UndieBomber was offered—but did not accept—a

plea agreement.

In this post, I will consider other reasons why DOJ may have buried (and presumably will continue to bury) their case against Awlaki: a desire to hide its signals intelligence, its informants, as well as a desire to win legal cases.

Wiretaps on Awlaki had already been exposed

I've laid out a timeline of select events and disclosures below. But I want to start from this article, published the day after Abdulmutallab fired his public defenders in 2010, presumably putting an end to hopes to get him to testify against Awlaki publicly. It noted that charging Awlaki would require the US to rely on wiretaps and confidential informants.

Charging al-Awlaki with having direct involvement in terrorism could require the U.S. to reveal evidence gleaned from foreign wiretaps or confidential informants.

The issues with the terms of Abdulmutallab's "plea negotiations" aside, was that a credible reason to hide the intelligence on Awlaki?

With respect to the wiretaps, no.

Crazy Pete Hoekstra made it clear in November 2009—over a month before Awlaki was first targeted by a US drone—that NSA had been wiretapping him for at least a year. In reporting in the days after Abdulmutallab's attack, anonymous sources made it clear the NSA had (belatedly) discovered intercepts discussing the plot, too.

Other intelligence linking al-Awlaki to Abdulmutallab only became apparent after the attempted bombing, including communications intercepted by the National Security Agency that indicated that the cleric was meeting with "a Nigerian" in preparation for some kind of operation, according to a U.S.

intelligence official.

The intelligence revealed last month—detailing how Awlaki tested Abdulmutallab’s interest in jihad before they met—doesn’t seem to compromise NSA’s wiretaps any more than Hoekstra already did.

Defendant provided this individual with the number for his Yemeni cellular telephone. Thereafter, defendant received a text message from Awlaki telling defendant to call him, which defendant did. During their brief telephone conversation, it was agreed that defendant would send Awlaki a written message explaining why he wanted to become involved in jihad. Defendant took several days to write his message to Awlaki, telling him of his desire to become involved in jihad, and seeking Awlaki’s guidance. After receiving defendant’s message, Awlaki sent defendant a response, telling him that Awlaki would find a way for defendant to become involved in jihad.

It seems the government could have released this information months earlier, and certainly should never have been declared a state secret.

That said, the intercept information doesn’t make the case that Awlaki ordered Abdulmutallab to strike the US. So even if the government had released that information, it wouldn’t have justified targeting Awlaki with a drone.

The need to protect confidential informants

I’m much more sympathetic to DOJ’s concerns about revealing details obtained from confidential informants—because there is good reason to believe we had at least a few double agents working within AQAP, at least two of whom went through Saudi Arabia’s “deradicalization” program.

As the timeline below shows, before Abdulmutallab showed up in Yemen, former Gitmo detainee Mazin Salih Musaid al-Awfi, who had "rejoined" al Qaeda in Yemen, returned from Yemen to Saudi Arabia, a possible double agent. Then, at about the same time Abdulmutallab was headed to Yemen, AQAP bombmaker Ibrahim al-Asiri's brother, Abdullah, tried to assassinate then Saudi Interior Minister Mohammed bin Nayef. Asiri used Nayef's willingness to work with "repentant jihadis" to get close to him. As such, the plot may have been an attempt to retaliate against Nayef for his efforts at "deradicalization." Most famously, Jabir al-Fayfi, who worked with AQAP for two years, returned to Saudi Arabia in October 2010; Fayfi would have been with AQAP when Abdulmutallab was training with the group and would have been able to provide information on him—and Awlaki (I understand that Fayfi implicated others far more than he did Awlaki, though, so in a sense, that would have hurt DOJ's case against Awlaki).

The threat to suspected informants is real and ongoing; a few weeks ago, the rebranded AQAP group Ansar al-Sharia executed three men suspected of providing targeting intelligence to the US.

Note, though, intelligence on Abdulmutallab's training shouldn't have been that hard to collect. In his superb story on Yemen, Jeremy Scahill reported that a tribal leader he traveled with and discussed on the record had met the UndieBomber, as well as top AQAP leaders. One would hope that what Scahill can get in a several week trip, our intelligence operatives can learn in lengthier deployments.

It's not really clear whether and how much of what the government released last month came from alternative intelligence sources. My guess is that information on Abdulmutallab's training, such as the detail that he met Samir Khan and unnamed others, came from or at least was supplemented by others. And given that the government doesn't name the person who

introduced Abdulmutallab to Awlaki—the narrative explains, “defendant made contact with an individual who in turn made Awlaki aware of defendant’s desire to meet him”—I suspect they may have learned this detail from someone else.

That leaves the big question: was someone like Fayfi close enough to Awlaki in December 2009 to corroborate the key detail that Awlaki ordered Abdulmutallab?

If so, by that point Yemen had already made it clear that Fayfi was one source of the intelligence on the toner cartridge plot.

The example of Fayfi also reveals non-safety reasons why the government might not want to release the intelligence it has on Awlaki. First, Fayfi implicated others more than Awlaki, so his testimony might have exonerated Awlaki. In addition, tying intelligence about Awlaki directly to Fayfi would raise questions about whether we’ve used Gitmo to persuade people to spy for us—not to mention, the accuracy of such information, particularly since a number of detainees were known to fabricate information to please Gitmo handlers. By the time Fayfi returned to Saudi Arabia, OLC had already authorized the killing of Awlaki; what would we have done if Fayfi refuted the intelligence we used to target Awlaki?

So while a desire to hide informants is a more reasonable excuse for hiding the information on Awlaki than a desire to hide the wiretapping that Hoestra exposed in 2009, not all of the reasons the government would want to do so are laudable.

The government wouldn’t say because it didn’t want to lose a lawsuit

The other reason the government may have withheld information—which is utterly absurd but nevertheless a possible explanation—is that it didn’t want to lose any lawsuits over the information.

That, at least, was the reason Kathryn Ruemmler

opposed the speech Holder will give today last November.

Another senior official expressing caution about the plan was Kathryn Ruemmler, the White House counsel. She cautioned that the disclosures could weaken the government's stance in pending litigation. *The New York Times* has filed a lawsuit against the Obama administration under the Freedom of Information Act seeking the release of the Justice Department legal opinion in the Awlaki case.

But if that's what motivates Obama's lawyer, then it has been an issue throughout the time the Administration has refused to release its case against Awlaki. For example, Scott Shane must have FOIAed for the OLC memo on Awlaki's killing within days of its completion (we don't know what date in June 2010 OLC finalized the memo, but Shane FOIAed the memo on June 11, 2010). The next month, Awlaki's father retained ACLU and Center for Constitutional Rights to sue to prevent the son's killing except if he were an imminent threat. That suit was submitted on August 30, 2010, and not dismissed until December 7 of that year. And in the immediate aftermath of the Awlaki killing on September 30 of last year, Charlie Savage submitted a new FOIA for the memo, and Public Record Media and the ACLU followed suit later the same year. At least the NYT and ACLU are suing to force disclosure of the memo.

In other words, since just two months after the last interrogations of Abdulmutallab provided to Dr. Simon Perry—but several months before he fired his lawyers, presumably ending any hope that a plea deal would lead to Abdulmutallab's testimony against Awlaki—the government has been in at least one legal proceeding regarding the legal justification for killing Awlaki. It still is. And the White House Counsel thinks that's a good reason to prevent any more from coming out.

All of these reasons provide yet another reason to institute some kind of due process. Using CIPA, the government could submit much of this intelligence in a means that can be made public.

But instead, we're left with one court filing—the Abdulmutallab one—summarizing things Abdulmutallab refused to say in a trial and ... still more rumors.

Timeline

February 18, 2009: Possible double agent Mazin Salih Musaid al-Awfi leaves AQAP

August 2009: Abdulmutallab travels to Yemen to seek Awlaki

August 2009: Abdullah al-Asiri attempts to assassinate Mohammed bin Nayef by posing as repentant jihadi

November 9, 2009: Pete Hoekstra reveals government has been intercepting Awlaki's communications going back at least a year

December 25, 2009: Abdulmutallab confesses that an Abu Tarak ordered him to strike the US

December 26, 2009 to January 28, 2010: Abdulmutallab refuses to talk

January 19, 2010: US designates AQAP terrorist group

January 29, 2010 to February 23, 2010: The main period of Abdulmutallab's interrogations

By April 6, 2010: Awlaki placed on CIA's kill list

April 8, 16, 30, 2010: Abdulmutallab interrogated 3 more times and asked about Awlaki's death

June 2010: OLC authorizes Awlaki's killing

June 11, 2010: Scott Shane FOIA's OLC memo on Awlaki killing

July 2010: Nasser al-Awlaki retains ACLU/CCR to sue for due process

July 16, 2010: US declares Awlaki a designated terrorist

August 30, 2010: ACLU, CCR sue to limit killing of Awlaki to imminent threat

September 8-9, 2010: Jabir al-Fayfi rounded up by Yemen.

September 13, 2010: Abdulmutallab fires his lawyers, citing a conflict of interest

September 14, 2010: DOJ considers charges against Awlaki but worries about relying on information from wiretaps or confidential informants

September 25, 2010: Government opposes ACLU/CCR suit to force government to show due process, in part by invoking state secrets

October 29, 2010: Toner cartridge plot exposed by presumed double agent Jabir al-Fayfi

December 7, 2010: Judge John Bates dismisses ACLU/CCR Awlaki suit

August 28, 2011: Government commits not to use Abdulmutallab's confessions implicating Awlaki directly at trial

September 23, 2011: Government requests protective order for item apparently pertaining to Awlaki and Abdulmutallab

September 30, 2011: Anwar al-Awlaki killed in drone strike

October 7, 2011: Charlie Savage FOIAs OLC memo

October 11, 2011: Opening arguments in Abdulmutallab trial

October 12, 2011: Abdulmutallab pleads guilty

October 19, 2011: ACLU FOIAs Anwar al-Awlaki OLC memo, underlying evidence supporting it, and information relating to Samir Khan and Abdullah al-Awalaki

November 2011: Administration decides to partially release information pertaining to

Awlaki's death

February 10, 2012: Government releases narrative implicating Awlaki