OBAMA (ALMOST) CAPITULATES TO ACLU ON DRONE KILLING STANDARDS

Actually, that headline overstates things. Obama will never capitulate to ACLU, the organization. As I've shown, his Administration has gone to absurd lengths to defeat ACLU in Court, even holding up legitimate congressional oversight to do so.

But Eric Holder's letter to Congress yesterday suggested that the government's new drone rulebook will almost adhere to the standard the ACLU tried to hold the President to almost 3 years ago. Holder claims,

> This week the President approved and relevant congressional committees will be notified and briefed on a document that institutionalizes the Administration's exacting standards and processes for reviewing and approving operations to capture or use lethal force against terrorist targets outside the United States and areas of active hostilities; these standards are either already in place or are to be transitioned into place.
>
> [snip]
>
> When capture is not feasible, the [new drone] policy provides that lethal force may be used only when a terrorist target poses a continuing, imminent threat to Americans, and when certain other preconditions, including a requirement that no other reasonable alternatives exist to effectively address the threat are satisfied.

That's very close to the standard Nasser al-

Awlaki, the ACLU, and Center for Constitutional Rights sought in August 2010 when they sued to prevent the government from killing Anwar al-Awlaki unless he was such an imminent threat.

> Plaintiffs seek a declaration from this Court that the Constitution and international law prohibit the government from conducting targeted killing outside of armed conflict except as a last resort to protect against concrete, specific, and imminent threats of death or serious physical injury; and an injunction prohibiting the targeted killing of U.S. citizen Anwar al-Aulaqi outside this narrow context.

When I noted the Administration was now embracing the standard it had refused in 2010, ACLU's Jameel Jaffer responded on Twitter,

> Is it? What's the function of the word "continuing"?

He's got a point. That word, "continuing," likely serves to permit the same kind of sophistry with the word imminent as the drone killing white paper engaged in when it asserted,

> First, the condition that an operational leader present an "imminent" threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.

Indeed, the word "continuing" served in the white paper to explode the concept of imminence with Awlaki such that it would still apply 20 months after the government got its evidence of such imminent threat.

> With this understanding, a high-level official could conclude, for example, that an individual poses an "imminent

> threat" of violent attack against the United States where he is an operational leader of al-Qa'ida or an associated force and is personally and continually involved in planning terrorist attacks against the United States. Moreover, where the al-Qa'ida member in question has recently been involved in activities posing an imminent threat of violent attack against the United States, and there is no evidence suggesting that he has renounced or abandoned such activities, that member's involvement in al-Qa'ida's continuing terrorist campaign against the United States would support the conclusion that the members is an imminent threat.

So the drone rulebook's retention of the word "continuing" from the white paper seems to suggest that word "imminent" doesn't actually mean what most legal observers think it does.

Then there's the other issue. Back when ACLU et al tried to use courts to hold the Executive Branch to (almost) the same standard it claims to be adopting now, the Administration predicted dire consequences would result. Not only did it suggest the standard it is now (almost) adopting didn't bind the President's Article II authorities, it insisted no one could review its work.

> For example, even assuming for the sake of argument that plaintiff has appropriately described the legal contours of the President's authority to use force in a context of the sort described in the Complaint, the questions he would have the court evaluate—such as whether a threat to life or physical safety may be "concrete," "imminent," or "specific," or whether there are "reasonable alternatives" to force—can only be assessed based upon military and foreign policy considerations, intelligence and

> other sources of sensitive information, and real-time judgments that the Judiciary is not well-suited to evaluate. Application of these and other considerations in this setting requires complex and predictive judgments that are the proper purview of the President and Executive branch officials who not only have access to the sensitive intelligence information on which such judgments are necessarily based, but also are best placed to make such judgments. Enforcing an injunction requiring military and intelligence judgments to conform to such general criteria, as plaintiff would have this court command, would necessarily limit and inhibit the President and his advisors from acting to protect the American people in a manner consistent with the Constitution and all other relevant laws, including the laws of war. Such judicial interference in fact-intensive decisions concerning how to protect national security could have unforeseen and potentially catastrophic consequences. [my emphasis]

In other words, when the ACLU tried to get a court to hold the Administration to (almost) the same standard it claims it is now in the process of adopting, the Administration refused to be bound by any outside review of its interpretations of these terms.

I guess that's why these "exacting standards and processes" are what Holder describes only as a "policy" that will be delivered and briefed to Congress, not a law that would do real work to limit the Executive's actions.