AWLAKI REALLY SEEMS TO HAVE BEEN DRONE-KILLED EXCLUSIVELY ON PRESIDENTIAL AUTHORITY

Jason Leopold liberated another White Paper — this one dated May 25, 2011 — on drone killing.

Man. It's just like they kept throwing legal arguments against the wall in hopes that one saying "You can kill Americans with no due process" would stick. And since this one is not signed, we may never know what lawyer gets rewarded with a lifetime judicial sinecure!

I'll have a lot more to say on the logistics of all this in a later post.

But I want to comment briefly on a point that Kevin Jon Heller made in his post on the memo (remember, Heller's the guy who forced David Barron to write more than 7 pages to authorize killing Awlaki by raising a statute Barron hadn't considered).

Heller still sees absolutely no justification for CIA being granted public authority to kill Americans in this White Paper.

> Like the earlier memorandum, the White Paper is largely devoted to establishing that the public-authority justification applies to the foreign-murder statute and that members of the US military would be entitled to the justification. (Two conclusions I agree with.) It then simply says this (pp. 14-15):
>
> > Given the assessment that an analogous operation carried out pursuant to the AUMF would fall within the scope of the public-authority justification, there is no reason to reach a

> different conclusion for a CIA operation.

That's it. That's the sum total of the unredacted argument. But there *is* a reason to reach a different conclusion "for a CIA operation" – as pointed out above, *the AUMF does not apply to the CIA*. Which means that the source of the public-authority justification must lie elsewhere.

Now let me be clear: I am *not* saying the CIA cannot be entitled to the public-authority justification. I am simply pointing out that *the AUMF* does not provide the CIA with the necessary authority. Perhaps there is another source, such as **Title 50** of the US Code, as my co-blogger Deb Pearlstein**has suggested**. Indeed, the redaction on page 16 of the new White Paper may well refer to that other source of authority, given that five or six lines of redacted text follow this statement:

> Thus, just as Congress would not have intended section 1119 to bar a military attack on the sort of individual described above, neither would it have intended the provision to prohibit an attack on the same target, in the same authorized conflict and in similar compliance with the laws of war, carried out by the CIA in accord with _____.

I don't understand why the OLC would need to redact a reference to Title 50 (or to some other source of authority). The legal source of the CIA's authorization to kill Americans overseas – if one exists – hardly seems like a

> state secret. Until the government reveals that source, however, we remain entitled to conclude that the CIA drone-strike that killed Anwar al-Awlaki violated 18 USC 1119.

I don't think those redacted lines he points to are a reference directly to statute.

I think it's a reference to the September 17, 2001 Gloves Come Off Memorandum of Notification which we know authorized killing high value al Qaeda figures with drones.

After all, that's precisely where Stephen Preston — then CIA's General Counsel before he moved onto bigger and better General Counseling at DOD — said he'd look to for the authority for CIA to carry out certain operations (and when he gave this speech, it was regarded to be part of the set of drone killing speeches Obama's top officials gave in 2012, and he discusses assassination, which several of the drone authorizations also do, specifically).

> Authority to Act under U.S. Law.
>
> 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.

> 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.

Preston would look to a Finding, and we know there was (still is, as far as we know!) a Finding authorizing precisely the thing the government claimed to have done, kill a top al Qaeda figure.

Remember, too, David Kris — who left DOJ not long before this White Paper explicitly authorizing CIA's execution of the execution got written — issued this warning about the real secrets behind the National Security Act's language prohibiting CIA from violating US statute.

> For example, the covert action statute could be interpreted and applied in ways that may be extraordinarily important, but about which very, very few Members of Congress, let alone the American People, ever learn. The statute defines covert action to exclude "traditional" military and law-enforcement activities, provides that a covert action finding "may not authorize any action that would violate the Constitution or any statute of the United States," and specifically warns that "No covert action may be conducted which is intended to influence United States political processes, public opinion, policies, or media." Without making any comment, express or implied, on any actual or hypothetical covert action, or even acknowledging that any covert action of any kind has ever actually taken place, it is quite obvious that each of those elements of the statute could raise enormously difficult and complex interpretive questions, some of which might affect

> many Americans. Yet it might be impossible, in many cases, to explain those interpretations without revealing the most sensitive classified information. [60; footnotes removed]

In killing Awlaki, CIA was acting in both a law enforcement (that's where the Fourth Amendment argument derives from) and Traditional Military capacity (which is how these endless justifications apply the public authority to CIA, by claiming CIA officers are just like soldiers). Kris tells us the statute says CIA can't, but that the NSA "could be interpreted and applied in ways [that] very few Members of Congress, let alone the American People, ever learn."

It has to have in this case, because CIA acted as both law enforcement and military in violating a slew of statutes to carry out the drone killing of an American citizen as part of a covert op. Kris is basically saying that part of the NSA doesn't mean what it says. That it means something far more horrible.

Which means he's also saying — as was Preston — that the drone killing of Anwar al-Awlaki was done on Article II authority.

It is, admittedly, a guess. But I believe that behind that redaction, the White Paper makes it clear this killing was done on Presidential authorization.