

SELECTIVE LEAK TO MICHAEL ISIKOFF PROVES THE UNDOING OF OTHERWISE SUCCESSFUL SELECTIVE LEAK CAMPAIGN ON DRONE KILLING

The 2nd Circuit has just ruled that the government must release a redacted version of the targeted killing memo to the NYT and ACLU, as well as Vaughn documents listing the documents pertaining to the Anwar al-Awlaki killing.

The central gist of the argument, written by Jon Newman, is that the White Paper first leaked selectively to Michael Isikoff and then released, under FOIA, to Jason Leopold (Leopold FOIAed after reading about it in this post I wrote), amounts to official disclosure of the information in the OLC memo which, in conjunction with all the other public statements, amounts to a waiver of the government's claim that the OLC memo amounted to pre-decisional deliberations.

This argument starts on page 23, in footnote 10, where the opinion notes that the White Paper leaked to Mike Isikoff was not marked draft, while the one officially released to Leopold was.

The document disclosed to [Leopold] is marked "draft"; the document leaked to Isikoff is not marked "draft" and is dated November 8, 2011. The texts of the two documents are identical, except that the document leaked to Isikoff is not dated and not marked "draft."

The opinion strongly suggests the government should have released the Mike Isikoff – that is, the one not pretending to be a draft – version to ACLU.

The Government offers no explanation as to why the identical text of the DOJ White Paper, not marked “draft,” obtained by Isikoff, was not disclosed to ACLU, nor explain the discrepancy between the description of document number 60 and the title of the DOJ White Paper.

Then, having established that the document leaked to Isikoff is the same as the document released to Leopold, which was officially released, the opinion describes the DOD opinion at issue, a 41 page classified document dated July 16, 2010 signed by David Barron.

An almost entirely redacted paragraph describes the content of the memo.

The OLC-DOD Memorandum has several parts. After two introductory paragraphs, Part I(A) reports [redacted]. Parts I(B) and I(C) describe [redacted]. Part II(A) considers [redacted]. Part II(B) explains [redacted]. Part III(A) explains [redacted], and Part III(B) explains [redacted]. Part IV explains [redacted]. Part V explains [redacted]. Part VI explains [redacted].

A subsequent passage explains that parts II through VI provide the legal reasoning.

FOIA provides that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552b. The Government’s waiver applies only to the portions of the OLC-DOD Memorandum that explain

legal reasoning. These are Parts II, III, IV, V, and VI of the document, and only these portions will be disclosed.

And a still later passage reveals that the remaining section – part I – discusses intelligence gathering activities, presumably as part of a discussion of the evidence against Anwar al-Awlaki.

Aware of that possibility, we have redacted, as explained above, the entire section of the OLC-DOD Memorandum that includes any mention of intelligence gathering activities.

So while the paragraph describing the content of the Memo is redacted, we know the first section lays out the evidence against Awlaki, followed by 5 sections of legal reasoning.

The redacted paragraph I included above, describing the content of the Memo, is followed immediately by a paragraph addressing the content of the White Paper.

The 16-page, single-spaced DOJ White Paper [redacted] in its analysis of the lawfulness of targeted killings.
[redacted]

The first redaction here probably states that the White Paper parallels the OLC memo. The second probably describes the key differences (besides length and the absence of the underlying evidence against Awlaki in the White Paper). And that second redaction is followed by a discussion describing the White Paper's extensive passage on 18 US 1119, and lack of any discussion of 18 USC 956, a law prohibiting conspiracies to kill, maim, or kidnap outside the US.

The DOJ White Paper explains why targeted killings do not violate

18 U.S.C. §§ 1119 or 2441, or the Fourth and Fifth Amendments to the Constitution, and includes an analysis of why section 1119 encompasses the public authority justification. Even though the DOJ White Paper does not discuss 18 U.S.C. § 956(a)[redacted].

In other words, the big difference in the legal reasoning is that the still-secret Memo argues that the US plot against Awlaki was not an illegal conspiracy to kill him, in addition to not being a murder of an American overseas.

Conspiracies to conduct extralegal killings of terrorists are not the same as conspiracies by terrorists to kill, apparently.

Having laid out that the non-draft Isikoff memo is the same as the officially-released Leopold memo, and the officially-released Leopold memo lays out the same legal reasoning as the OLC Memo, the opinion basically says the government's claims it hasn't already released the memo are implausible.

As the District of Columbia Circuit has noted, "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982)). But *Gardels* made it clear that the justification must be "logical" and "plausible" "in protecting our intelligence sources and methods from foreign discovery."

[snip]

With the redactions and public disclosures discussed above, it is no longer either "logical" or "plausible" to maintain that disclosure of the legal analysis in the OLC-DOD Memorandum risks disclosing any aspect of "military

plans, intelligence activities, sources and methods, and foreign relations.” The release of the DOJ White Paper, discussing why the targeted killing of al-Awlaki would not violate several statutes, makes this clear. [redacted] in the OLC-DOD Memorandum adds nothing to the risk. Whatever protection the legal analysis might once have had has been lost by virtue of public statements of public officials at the highest levels and official disclosure of the DOJ White Paper.

Clearly, throughout its treatment of the Awlaki killing, the Obama Administration has attempted to be able to justify its killing of an American citizen publicly without bearing the risk of defending that justification legally.

And they almost got away with it. Until they got a little too loosey goosey with the selective leaks when they (someone) leaked the White Paper to Isikoff.

Ultimately, though, their selective leaking was the undoing of their selective leaking plan.

JUDGE COLLYER’S FACTUALLY ERRONEOUS FREELANCE RUBBER STAMP FOR KILLING AMERICAN CITIZENS

As I noted on Friday, Judge Rosemary Collyer threw out the Bivens challenge to the drone killings of Anwar and Abdulrahman al-Awlaki and

Samir Khan.

The decision was really odd: in an effort to preserve some hope that US citizens might have redress against being executed with no due process, she rejects the government's claims that she has no authority to decide the propriety of the case. But then, by citing precedents rejecting Bivens suits, including one on torture in the DC Circuit and Padilla's challenge in the Fourth, she creates special factors specifically tied to the fact that Awlaki was a horrible person, rather than that national security writ large gives the Executive unfettered power to execute at will, and then uses these special factors she invents on her own to reject the possibility an American could obtain any redress for unconstitutional executions. (See Steve Vladeck for an assessment of this ruling in the context of prior Bivens precedent.)

The whole thing lies atop something else: the government's refusal to provide Collyer even as much information as they had provided John Bates in 2010 when Anwar al-Awlaki's father had tried to pre-emptively sue before his son was drone-killed.

On December 26, Collyer ordered the government to provide classified information on how it decides to kill American citizens.

MINUTE ORDER requiring the United States, an interested party 19 , to lodge no later than January 24, 2014, classified declaration(s) with court security officers, in camera and ex parte, in order to provide to the Court information implicated by the allegations in this case and why its disclosure reasonably could be expected to harm national security..., include[ing] information needed to address whether or not, or under what circumstances, the United States may target a particular foreign terrorist organization and its senior leadership, the specific threat

posed by... Anwar-al Aulaqi, and other matters that plaintiff[s have] put at issue, including any criteria governing the use of lethal force, updated to address the facts of this record.

Two weeks later, the government moved to reconsider, both on jurisdictional grounds and because, it said, Collyer didn't need the information to dismiss the case.

Beyond the jurisdictional issue, the Court should vacate its Order because Defendants' motion to dismiss, which raises the threshold defenses of the political question doctrine, special factors, and qualified immunity, remains pending. The information requested, besides being classified, is not germane to Defendants' pending motion, which accepts Plaintiffs' well-pled facts as true.

As part of their motion, however, the government admitted to supplementing the plaintiffs' facts.

Defendants' argument that decedents' constitutional rights were not violated assumed the truth of Plaintiffs' factual allegations, and supplemented those allegations only with judicially noticeable public information, the content of which Plaintiffs did not and do not dispute.

The plaintiffs even disputed that they didn't dispute these claims, pointing out that they had introduced claims about:

- AQAP's status vis a vis al Qaeda
- Whether the US is in an armed conflict with AQAP
- The basis for Awlaki's

listing as a Special Designated Global Terrorist

Ultimately, even Collyer scolds the government for misstating the claims alleged in the complaint.

The United States argued that the factual information that the Court requested was not relevant to the Defendants' special factors argument because special factors precluded Plaintiffs' cause of action, given the context in which the claims, "as pled," arose—that is, "the alleged firing of missiles by military and intelligence officers at enemies in a foreign country in the course of an armed conflict." Mot. for Recons. & to Stay Order at ECF 10. The United States, however, mischaracterizes the Complaint. Nowhere does the Complaint allege that Anwar Al-Aulaqi was an "enemy" of the United States or that he was part of AQAP. The Complaint states only that "government officials told reporters that Al-Aulaqi had "cast his lot" with terrorist groups and encouraged others to engage in terrorist activity. Later, they claimed he had played "a key role in setting the strategic direction" for [AQAP]." Compl. ¶ 26. Further, far from alleging that Anwar Al-Aulaqi was killed "in the course of an armed conflict," the Complaint asserts that he was killed outside of armed conflict, in Yemen. See Compl. ¶ 4 ("At the time of the killing, the United States was not engaged in armed conflict with or within Yemen."). In fact, Plaintiffs allege that "at the time the strike was carried out, Anwar Al-Aulaqi was not engaged in activities that presented a concrete, specific, and imminent threat of death or serious physical injury."

All this, she complains, made it a lot harder to come up with the legally improper but judicially cowardly decision to throw out the case.

The United States' truculent opposition to the December 26, 2013 Minute Order made this case unnecessarily difficult. Were the Court not able to cobble together enough judicially-noticeable facts from various records, it would have denied the motion to dismiss for the sheer fact that the Defendants failed to support the assertion that Bivens special factors apply.

She doesn't let the government's "truculence" dissuade her, however. In spite of the fact that both sides say she needs no more details to decide the motion to dismiss, Collyer takes judicial notice of what she calls facts and uses them to decide the issue.

Because the Court may take judicial notice of facts contained in the public records of other proceedings, see *Covad*, 407 F.3d at 1222, the Court takes judicial notice of the facts regarding Anwar Al-Aulaqi's involvement in the Christmas Day attack. See Sentencing Mem. at 12-14; Tr. of Plea Hr'g (Oct. 12, 2011) at 26. The Court also takes judicial notice of the fact that in a May 2010 video interview, Anwar Al-Aulaqi called for "jihad against America" and declared that he would "never surrender." *Al-Aulaqi v. Obama*, 727 F. Supp. 2d at 10-11; Clapper Decl. ¶ 16. Judicial notice is taken, too, of the Treasury publication in the Federal Register, i.e., the designation of Anwar Al-Aulaqi as a Specially Designated Global Terrorist due to the fact that he was a key leader of AQAP. See 75 Fed. Reg. 43,233-01.

But she misstates some of the facts she takes

judicial notice of, most significantly in the way she misreads the evidence in the record on the UndieBomb attack.

When pleading guilty, Mr. Abdulmutallab stated that he conspired with Anwar Al-Aulaqi to carry an explosive device onto the aircraft, thereby attempting to kill those onboard and wreck the plane, as an act of jihad against the United States. Tr. of Plea Hr'g (Oct. 12, 2011) at 26. Mr. Abdulmutallab was debriefed by FBI agents at various times between January and April 2010; he specifically named Anwar Al-Aulaqi as the AQAP leader who approved the Christmas Day attack, and he described in detail the nature of Anwar Al-Aulaqi's participation in the attack. See *United States v. Abdulmutallab*, Crim. No. 10-CR-20005-1 (E.D. Mich.), Gov't Sentencing Mem., Supp. Factual Appx. (Sentencing Mem.) at 12-14.

Ultimately, Collyer points to the UndieBomb as "proof" of the "fact" that Awlaki was dangerous (and just as importantly, that he supported attacks rather than just propagandized for them).

The fact is that Anwar Al-Aulaqi was an active and exceedingly dangerous enemy of the United States, irrespective of his distance, location, and citizenship. As evidenced by his participation in the Christmas Day attack, Anwar Al-Aulaqi was able to persuade, direct, and wage war against the United States from his location in Yemen, i.e., without being present on an official battlefield or in a "hot" war zone. Defendants, top military and intelligence officials, acted against Anwar Al-Aulaqi, a notorious AQAP leader, as authorized by the AUMF.

[snip]

Anwar Al-Aulaqi was an AQAP leader who levied war against his birth country, as unambiguously revealed by his role in the Christmas Day bombing, as well as his video and writings.

But Collyer completely misquotes the evidence from Abdulmutallab's guilty plea, in which he said Awlaki's tapes – which he watched long before he arrived in Yemen – **inspired** his attempted attack, but pointedly does not name his co-conspirators and definitely did not name Awlaki as such. And the claim that any of the rest of the evidence is "unambiguous" is equally false. Significantly, Collyer doesn't mention Abdulmutallab's initial confession – details of which appear in the sentencing memo she does cite and which were used for the opening of the trial – which attributes the actions blamed on Awlaki on someone made up, a probable synthesis of multiple people, including Fahd al-Quso (whom the government doesn't name in the sentencing memo) named Abu Tarak.

Collyer similarly ignores evidence in the White Paper showing that the government considered Awlaki to be outside the battlefield – a point the plaintiffs called attention to prior to her ruling.

Even her claim that this was authorized by the AUMF is, at least, unproven. Not even Ron Wyden, who by law should have been but was probably not a participant in what she "prior approval" of the killing (only the Gang of Four gave prior approval, but even there, they had inadequate information), did not know for over a year after Awlaki's killing whether he was killed under the AUMF or not, and the White Paper she invokes leaves that studiously unclear as well.

And while her freelance research isn't as egregious in the case of Abdulrahman al-Awlaki (mostly because there's almost no hard evidence one way or another), she doesn't take notice of the report that the government deliberately killed the younger Awlaki. Given that John

Brennan reportedly ordered a report into the killing to find out who had killed him deliberately, that claim is something that rightly should be assessed in discovery, not ignored so as to make dismissing the case more palatable.

In their comments on the decision, both Center for Constitutional Rights and ACLU talk about Collyer accepting the government's allegations as proof so she could rubber stamp the killing.

Said Center for Constitutional Rights Senior Attorney Maria LaHood, "Judge Collyer effectively convicted Anwar Al-Aulaqi posthumously **based on the government's own say-so**, and found that the constitutional rights of 16-year-old Abdulrahman Al-Aulaqi and Samir Khan weren't violated because the government didn't target them. It seems there's no remedy if the government intended to kill you, and no remedy if it didn't. This decision is a true travesty of justice for our constitutional democracy, and for all victims of the U.S. government's unlawful killings."

Said ACLU National Security Project Director Hina Shamsi, one of the attorneys who argued the case, "This is a deeply troubling decision that **treats the government's allegations as proof** while refusing to allow those allegations to be tested in court. The court's view that it cannot provide a remedy for extrajudicial killings when the government claims to be at war, even far from any battlefield, is profoundly at odds with the Constitution. It is precisely when individual liberties are under such grave threat that we need the courts to act to defend them. In holding that violations of U.S. citizens' right to life cannot be heard in a federal courtroom, the court abdicated its constitutional role."

But it's worse than that. Having been refused details by the government of those allegations, Collyer went out looking for "proof" of the allegations on her own. What the evidence she consulted shows is that the public proof, at least, is actually contradictory. So she ignored that and just rubber stamped away.

THE NEVERENDING CIA DRONE STORY ACTUALLY ABOUT OUTSOURCED INTELLIGENCE

On March 20, 2013, I wrote one of several stories calling bullshit on reports that CIA would get out of the drone business. Not only did John Brennan's actions up to that point (as opposed to what had been leaked to journalists anonymously) make it clear he intended for CIA to keep that portfolio. But his confirmation testimony made it clear he intended to retain and use CIA's paramilitary – as distinct from traditional military – capabilities (and no, I'm not sure where the line between the two lies).

Today, the NYT has another of those stories reporting that – shock!! – I was right after all. It has a new twist though. It selectively quotes from Brennan's confirmation materials to suggest he testified he would get CIA out of paramilitary operations.

During his confirmation hearings, Mr. Brennan obliquely criticized the performance of American spy agencies in providing intelligence and analysis of the Arab revolutions that began in 2009, and said the C.I.A. needed to cede some

of its paramilitary role to the Pentagon.

"The C.I.A. should not be doing traditional military activities and operations," he said.

This is what the quote actually looked like in context.

MIKULSKI: So, let me get to my questions. I have been concerned for some time that there is a changing nature of the CIA, and that instead of it being America's top spy agency, top human spy agency to make sure that we have no strategic surprises, that it has become more and more executing paramilitary operations.

And I discussed this with you in our conversation. How do you see this? I see this as mission-creep. I see this as overriding the original mission of the CIA, for which you're so well versed, and more a function of the Special Operations Command. Could you share with me how you see the CIA and what you think about this militarization of the CIA that's going on?

BRENNAN: Senator, the principal mission of the agency is to collect intelligence, uncover those secrets, as you say, to prevent those strategic surprises and to be the best analytic component within the U.S. government, to do the allsource analysis that CIA has done so well for many, many years. At times, the president asks and directs the CIA to do covert action. **That covert action can take any number of forms, to include paramilitary.**

[snip]

And the **CIA should not be doing traditional military activities** and

operations. [my emphasis]

That is, Brennan was not suggesting CIA should get out of paramilitary ops. On the contrary, he said CIA should retain that ability but not do traditional military activities.

His responses to questions for the record were even more clear.

What role do you see for the CIA in paramilitary-style intelligence activities or covert action?

The CIA, a successor to the Office of Strategic Services, has a long history of carrying out paramilitary-style intelligence activities and must continue to be able to provide the President with this option should he want to employ it to accomplish critical national security objectives.

How do you distinguish between the appropriate roles of the CIA and elements of the Department of Defense in paramilitary-style covert action?

As stated in my response to Question 6 above, the CIA and DOD must be ready to carry out missions at the direction of the President. The President must be able to select which element is best suited. Factors that should be considered include the capabilities sought, the experience and skills needed, the material required, and whether the activity must be conducted covertly.

The NYT quotes one more Brennan claim with much more fidelity, however, and in a way that is far more illuminating to the story it tells.

“Despite rampant rumors that the C.I.A. is getting out of the counterterrorism business, nothing could be further from the truth,” the C.I.A. director said

during a speech last month at the Council on Foreign Relations.

The agency's covert action authorities and relationships with foreign spy services, Mr. Brennan said, "will keep the C.I.A. on the front lines of our counterterrorism efforts for many years to come."

Those lines come from this speech, which was most closely watched as Brennan's rebuttal to Dianne Feinstein on the torture report, but which in fact declared the war on terror would continue along the same lines as it had since 9/11.

And despite rampant rumors that the CIA is getting out of the counterterrorism business, nothing could be further from the truth. CIA's global mission, our intelligence collection, analysis, and covert action authorities and capabilities, as well as our extensive liaison relationships with intelligence and security services worldwide, will keep CIA on the frontlines of our counterterrorism efforts for many years to come.

Which is interesting, because the items reported in NYT's story all say more about the US remaining hostage to the way we outsourced certain intelligence activities after 9/11 than anything else.

As a reminder, the Gloves Come Off Memorandum crafted by Cofer Black and signed on September 17, 2001 included a number of different activities. In addition to capturing and detaining top al Qaeda leaders (which became the torture program) and killing top al Qaeda figures using Predator drones (which remains in CIA hands), it authorized heavily subsidizing ("buying" was the word Bob Woodward used) Arab liaison services, originally including Jordan

and Egypt but presumably adding Saudi Arabia once we got over the fact that the Saudis had ties to the attack. In a 2006 interview, John Brennan echoed and endorsed Cofer Black's plan when discussing the war on terror.

With that in mind, consider the real scope of the details described in the NYT story:

- After another catastrophically badly targeted strike – this time on a wedding – Yemen has banned JSOC's drones but continues to permit CIA to fly them; CIA's flights operate out of Saudi territory, presumably with significant Saudi involvement
- Pakistan continues to permit only drone strikes run by CIA
- Jordan required that CIA be in charge of training Syrian rebels and other fighters there
- CIA missed the Arab Spring because it relied so heavily on Egypt's Omar Suleiman, to whom we had outsourced our earliest torture

That is, the NYT is really reporting that, in spite of nominal efforts to change things, we remain captive to those relationships with liaison services, almost 13 years after 9/11. And that happens to also translate into operating drone strikes in such a way that two countries which were implicated in the 9/11 attacks – Pakistan and especially Saudi Arabia –

have managed to stay relevant and above criticism by sustaining (perhaps artificially) our dependence on them.

And, almost certainly, the President's implicit role in all these actions gives the CIA the institutional clout to make sure it retains whatever parts of this portfolio it cares to.

This, at least, should be the story.

In all of these countries, it's not clear whether our reliance on these long-term partners helps or exacerbates the war on terror. But no one should maintain any illusions that it will change.

JOHN BRENNAN TROLLS EMPTYWHEEL EVEN BEFORE HE PREVARICATES IN RESPONSE TO DIANNE FEINSTEIN

There's a lot to be said about John Brennan's appearance



ance at the Council on Foreign Relations today (video here). I'm actually most interested in Brennan's refusal, twice, to answer questions about whether the NSA needs to engage in bulk collection.

QUESTION: Good morning. Tom Risen with U.S. News and World Report. I'd like to follow up on some – talk about the intelligence gaps. Edward Snowden, yesterday, said that he's accused the **NSA's mass surveillance of distracting from pinpointed, credible threats. Do you think from where you sit that there's been any intelligence gaps in the NSA or the CIA on how they could conduct monitoring or spying better?**

BRENNAN: Well, you know, **anybody who violates their oath in terms of protecting sensitive classified information really has done a great disservice not just to the country, but also has put the American people at harm.** NSA, CIA, and others now are looking at what it is that we need to do to mitigate whatever types of – of gaps that we might now face as a result of – of disclosures, publicly.

So we are trying to stay ahead of the challenge, do what we can, both in the HUMINT and SIGINT, as well as other fronts, working very closely with our intelligence partners. But, you know, distractions, you know, do take away from our focus on the – the substantive functional issues that really deserve our full attention.

[snip]

MITCHELL: And can you [keep our country safe] without the mass collection of metadata?

BRENNAN: You know, there – there are a lot of challenges as that digital domain has changed. You know, you ask five people what metadata means, you know, they'll have probably five different explanations. Probably three or four of them are going to be totally off the mark. **Metadata itself is changing. You**

know, content, bulk data collection, these are things that, you know, really, you know, challenge the mind as far as, how are you going to ensure that if there is a terrorist in this country and he's determined to do harm with, you know, a conventional explosive or a, you know, biological or chemical weapon, how are you going to be able to operate at the speed of light so that if you get intelligence you find out where that person is? You know, as I said, memories of 9/11, I think, recede in the smoldering ashes on the Manhattan landscape. [my emphasis]

Brennan first responds to Snowden's claim by attacking his person, without addressing his claim. He then babbles about the challenge of thinking of bulk data. "Content, bulk data collection, these are things that, you know, really, you know, challenge the mind." Which is a not very graceful way to dodge the question. But he doesn't answer the question either time.

Most reporters, however, are focusing on Brennan's prevarications in response to Dianne Feinstein's statement today.

Well, first of all, we are not in any way, shape or form trying to thwart this report's progression, release. As I said in my remarks, we want this behind us. We know that the committee has invested a lot of time, money and effort into this report, and I know that they're determined to put it forward.

We have engaged with them extensively over the last year. We have had officers sit down with them and go over their report and point out where we believe there are factual errors or errors in judgment or assessments. So we are not trying at all to prevent its release.

As far as the allegations of, you know,

CIA hacking into, you know, Senate computers, nothing could be further from the truth. I mean, we wouldn't do that. I mean, that's – that's just beyond the – you know, the scope of reason in terms of what we would do.

[snip]

This review that was done by the committee was done at a facility where CIA had a responsibility to make sure that they had the computer wherewithal in order to carry out their responsibilities, and so if there was any inappropriate actions that were taken related to that review, either by CIA or by the SSCI staff, I'll be the first one to say we need to get to the bottom of it.

And if I did something wrong, I will go to the president, and I will explain to him exactly what I did, and what the findings were. And he is the one who can ask me to stay or to go.

Golly! We would never do any such thing as spy!
And even if we get caught, only the President can make me leave, not the Committee.

But I'm most excited that Brennan chose to troll yours truly to introduce his talk.

Now just over a year ago, I had the privilege of placing my hand on the very first printed copy of the Constitution, a draft edited and annotated personally by George Washington himself that is one of the most treasured items held in the National Archives. With my hand on that document, Vice President Biden swore me in as the director of the Central Intelligence Agency.

I chose to take my oath on that precious piece of history as a clear affirmation of what the Constitution means to all of

us at the agency. We have no higher duty than to uphold and defend the rule of law as we strive every day to protect our fellow citizens. Like so many things involving, CIA, though, **people read nefarious intentions into my decision to take my oath on an early draft of the Constitution that did not contain the Bill of Rights**, our Constitution's first 10 amendments.

So at the risk of disappointing any conspiracy theorists who might be here today, let me assure all of you that I, along with my CIA colleagues, firmly believe in and honor not only the Constitution, but also the Bill of Rights, as well as all subsequent amendments to our Constitution. I just happen to be guilt of being an ardent admirer of George Washington and of the historical foundations of this great country. [my emphasis]

You'll recall that I was among the first to point out that John Brennan staged a photo op at his swearing in, and either botched the photo op or unveiled his real beliefs, because he swore to protect and defend a Constitution that includes no First or Fourth Amendment.

Take that Dianne Feinstein! You may have accused John Brennan of violating Articles I, II, and III today. But Brennan's still responding to me busting him for violating the First and Fourth Amendment.

HOW TO AVOID RUBBER-STAMPING ANOTHER

DRONE EXECUTION: LEAVE

NPR's Carrie Johnson reports that OLC head Virginia Seitz quietly left OLC before Christmas.

Virginia Seitz, who won Senate confirmation after an earlier candidate under president Obama foundered, resigned from federal service after two-and-a-half years on the job. The timing is unusual because her unit plays a critical role in drawing the legal boundaries of executive branch action—at a time when President Obama says he will do more to bypass a divided Congress and do more governing by way of executive order.

And while DOJ's official line is that Seitz left entirely for personal reasons, two sources told Johnson the ongoing discussions about whether to drone kill another American were another factor.

Two other sources suggested that aside from the tough work, another issue weighed heavily on her mind over the last several months: the question of whether and when the US can target its own citizens overseas with a weaponized drone or missile attack. American officials are considering such a strike against at least one citizen linked to al Qaeda, the sources said.

While a "law enforcement" source (but wait! the entire point of drone assassinations is they replace law enforcement with intelligence entirely!) suggests the decision has not yet been made.

A law enforcement source told NPR the controversy over the use of drones against Americans in foreign lands did

not play a major role in Seitz's decision to leave government, since the OLC is continuing to do legal analysis on the issue and there was no firm conclusion to which she may have objected or disagreed.

Which is sort of funny, because Kimberly Dozier's report on the American in question says DOD, at least, has made its decision.

But one U.S. official said the Defense Department was divided over whether the man is dangerous enough to merit the potential domestic fallout of killing an American without charging him with a crime or trying him, and the potential international fallout of such an operation in a country that has been resistant to U.S. action.

Another of the U.S. officials said the Pentagon did ultimately decide to recommend lethal action.

And remember, as I've pointed out, this potential drone execution target is differently situated from Anwar al-Awlaki, in that there appears to be no claim this one is targeting civilians in the US.

But let's take a step back and consider some other interesting details of timing.

First, on November 29 of last year, Ron Wyden, Mark Udall, and Martin Heinrich released a letter they sent to Eric Holder asking for more clarity on when the President could kill an American.

[W]e have concluded that the limits and boundaries of the President's power to authorize the deliberate killing of Americans need to be laid out with much greater specificity. It is extremely important for both Congress and the public to have a fully understanding of

what the executive branch thinks the President's authorities are, so that lawmakers and the American people can decide whether these authorities are subject to adequate limits and safeguards.

Retrospectively, it seems this letter may have pertained to this new execution target, particularly given the different circumstances regarding his alleged attacks against the US. I might even imagine this serving as a public demand that DOJ not simply rely on the existing Awlaki drone assassination memo, creating the need to do a new one.

Now consider how (currently acting OLC head) Caroline Krass' confirmation hearing plays in. On December 17, Wyden asked her who had the authority to withdraw an OLC opinion (the opinion in question pertains to common commercial services in some way related to cybersecurity, but I find it interesting in retrospect).

Wyden: But I want to make sure nobody else ever relies on that particular opinion and I'm concerned that a different attorney could take a different view and argue that the opinion is still legally valid because it's not been withdrawn. Now, we have tried to get Attorney General Holder to withdraw it, and I'm trying to figure out – he has not answered our letters – who at the Justice Department has the authority to withdraw the opinion. Do you currently have the authority to withdraw the opinion?

Krass: No I do not currently have that authority.

Wyden: Okay. Who does, at the Justice Department?

Krass: Well, for an OLC opinion to be withdrawn, on OLC's own initiative or on

the initiative of the Attorney General would be extremely unusual.

She said she did not “currently have that authority.” Was she about to get that authority in days or hours?

Then finally there are the implications for Krass’ confirmation. The leaks about this current drone execution target almost certainly came from Mike Rogers’ immediate vicinity. He’s torqued because Obama’s efforts to impose some limits on the drone war have allegedly made it more difficult to execute this American with no due process.

And while Rogers doesn’t get a vote over Krass’ confirmation to be CIA General Counsel, Dianne Feinstein and Saxby Chambliss do. And their efforts to keep CIA in the drone business may well have an impact on – and may have been motivated by – our ability to assassinate Americans.

I don’t recall Krass getting questions that directly addressed drone killing, though she did get some that hinted at the edges of such questions, such as this one:

Are there circumstances in which a use of force, or other action, by the U.S. government that would be unlawful if carried out overtly is lawful when carried out covertly? Please explain.

ANSWER: As a matter of domestic law, I cannot think of any circumstances in which a use of force or other action by the U.S. government that would be unlawful if carried out overtly would be lawful when carried out covertly, but I have not studied this question.

This seems to be a question she would have had to consider if she had any involvement in OLC’s consideration of a new drone execution memo.

All that said, she hasn’t yet gotten her vote

(though any delay may arise from holds relating to the Senate Torture Report).

It just seems likely that – as we did in May 2005 when Steven Bradbury reapproved torture in anticipation of a promotion to head OLC – we’re faced yet again with a lawyer waiting for a promotion being asked to give legal sanction to legally suspect activity. My impression is that Krass has far more integrity than Bradbury (remember, she’s the one who originally imposed limits on the Libya campaign), so I’m only raising this because of the circumstances, not any reason to doubt her character.

It just seems like if you need lawyers to rubber stamp legally suspect activities, there ought to be more transparency about what promotions and resignations are going on.

CHELSEA MANNING WONDERS WHETHER SHE COULD HAVE GOTTEN ANWAR AL- AWLAKI’S TREATMENT

In accepting the Sam Adams prize, Chelsea Manning raised the ACLU/NYT lawsuits for the OLC memo authorizing the killing of Anwar al-Awlaki. (h/t Kevin Gosztola)

In doing so, she borrows an argument about separation of power and secrecy Judge Colleen McMahon made in her opinion on the FOIA.

Here’s McMahon:

As they gathered to draft a Constitution for their newly liberated country, the Founders – fresh from a war of independence from the rule of a King

they styled a tyrant- were fearful of concentrating power in the hands of any single person or institution, and most particularly in the executive. That concern was described by James Madison in Federalist No. 47 (1788):

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny

The magistrate in whom the whole executive power resides cannot of himself ... administer justice in person, though he has the appointment of those who do administer it.

[snip]

The Framers – who were themselves susceptible to being hanged as traitors by the King of England during the Revolutionary War – were as leery of accusations of treason as they were of concentrating power in the hands of a single person or institution. As a result, the Constitution accords special protections to those accused of the most heinous of capital crimes; Article 3, Sec. 3 sets the procedural safeguard that, “No Person shall be convicted of treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”

Interestingly, the Treason Clause appears in the Article of the Constitution concerning the Judiciary – not in Article 2, which defines the powers of the Executive Branch. This suggests that the Founders contemplated

that traitors would be dealt with by the courts of law, not by unilateral action of the Executive. As no less a constitutional authority than Justice Antonin Scalia noted, in his dissenting opinion in *Hamdi*, 542 U.S. at 554, “Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime.”

Here’s Manning:

The founders of America – fresh from a war of independence from King George III – were particularly fearful of concentrating power. James Madison wrote that “the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”(1)

[snip]

When drafting Article III of the American Constitution, the founders were rather leery of accusations of treason, and accorded special protections for those accused of such a capital offense, providing that “[n]o person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”

For those of you familiar with the American Constitution, you may notice that this provision is under the Article concerning the Judiciary, Article III, and not the Legislative or Executive Articles, I and II respectively. And, historically, when the American government accuses an American of such

crimes, it has prosecuted them in a federal criminal court.

After having repeated McMahon's lesson on the checks our Founders gave Article III courts over the President, Manning described how frustrated McMahon was in not being able to release the OLC memo to ACLU and NYT.

In a recent Freedom of Information Act case(2) – a seemingly Orwellian “newspeak” name for a statute that actually exempts categories of documents from release to the public – a federal district court judge ruled against the New York Times and the American Civil Liberties Union. The Times and the ACLU argued that documents regarding the practice of “targeted killing” of American citizens, such as the radical Sunni cleric Anwar Nasser al-Aulaqi were in the public's interest and were being withheld improperly.

The government first refused to acknowledge the existence of the documents, but later argued that their release could harm national security and were therefore exempt from disclosure. The court, however, felt constrained by the law and “conclud[ed] that the Government [had] not violated the FOIA by refusing to turn over the documents sought in the FOIA requests, and [could not] be compelled . . . to explain in detail the reasons why [the Government's] actions do not violate the Constitution and laws of the United States.”

However, the judge also wrote candidly about her frustration with her sense that the request “implicate[d] serious issues about the limits on the power of the Executive Branch under the Constitution and laws of the United States,” and that the Presidential

“Administration ha[d] engaged in public discussion of the legality of targeted killing, even of [American] citizens, but in cryptic and imprecise ways.” In other words, it wasn’t that she didn’t think that the public didn’t have a right to know – it was that she didn’t feel that she had the “legal” authority to compel disclosure.

Against that background, Manning notes that she was charged with treasonable offense, and wonders whether under the Awlaki precedent she could have been drone killed, just like Awlaki.

I was accused by the Executive branch, and particularly the Department of Defense, of aiding the enemy – a treasonable offense covered under Article III of the Constitution. Granted, I received due process. I received charges, was arraigned before a military judge for trial, and eventually acquitted. But, the al-Aulaqi case raises a fundamental question: did the American government, and particularly the same President and Department, have the power to unilaterally determine my guilt of such an offense, and execute me at the will of the pilot of an Unmanned Aerial Vehicle?

She then compares (I think, though the timing on this is perhaps understandably murky) the release of both the OLC memo and follow-up speeches – and its revelation of the powers claimed by the President – with her own releases.

Until documents held by the U.S. Department of Justice’s Office of Legal Counsel were released after significant political pressure in mid-2013, I could not tell you. And, very likely, I do not believe I could speak intelligently of the Administration’s policy on “targeted

killing" today either.

There is a problem with this level of secrecy, obfuscation, and classification or protective marking, in that they supposedly protect citizens of their nation; yet, it also breeds a unilateralism that the founders feared, and deliberately tried to prevent when drafting the American Constitution. Now, we have a "disposition matrix," classified military commissions, and foreign intelligence and surveillance courts – modern Star Chamber equivalents.

I am now accepting this award, through my friend, former school peer, and former small business partner, Aaron, for the release of a video and documents that "sparked a worldwide dialogue about the importance of government accountability for human rights abuses," it is becoming increasingly clear to me that the dangers of withholding documents, legal interpretations, and court jurisprudence from the public that pertain to the right to "life, liberty, and property" of a state's citizens is as fundamental and important to protecting against such human rights abuses.

Of course, we still don't know what happened to Anwar al-Awlaki; the White Paper leaves many of the key details obscure. Even as the government prepares to execute another of its citizens.

But in comparing her own releases with the government's refusal to reveal precisely how they decided to execute an American with no due process, Manning points to where this has already gone.

And she makes a compelling case that the government's claims of secrecy cannot be trusted.

WHITE HOUSE, CONGRESS ARGUING OVER WHICH SENATE COMMITTEE SHOULD FAIL IN DRONE OVERSIGHT

Ken Dilanian has a very interesting article in the Los Angeles Times outlining the latest failure in Congress' attempts to exert oversight over drones. Senator Carl Levin had the reasonable idea of calling a joint closed session of the Senate Armed Services and Intelligence Committees so that the details of consolidating drone functions under the Pentagon (and helping the CIA to lose at least one of its paramilitary functions) could be smoothed out. In the end, "smooth" didn't happen:

An effort by a powerful U.S. senator to broaden congressional oversight of lethal drone strikes overseas fell apart last week after the White House refused to expand the number of lawmakers briefed on covert CIA operations, according to senior U.S. officials.

Sen. Carl Levin (D-Mich.), who chairs the Armed Services Committee, held a joint classified hearing Thursday with the Senate Intelligence Committee on CIA and military drone strikes against suspected terrorists.

But the White House did not allow CIA officials to attend, so military counter-terrorism commanders testified on their own.

But perhaps the White House was merely retaliating for an earlier slight from Congress:

In May, the White House said it would seek to gradually move armed drone operations to the Pentagon. But lawmakers added a provision to the defense spending bill in December that cut off funds for that purpose, although it allows planning to continue.

Dilanian parrots the usual framing of CIA vs JSOC on drone targeting:

Levin thought it made sense for both committees to share a briefing from generals and CIA officials, officials said. He was eager to dispel the notion, they said, that CIA drone operators were more precise and less prone to error than those in the military.

The reality is that targeting in both the CIA and JSOC drone programs is deeply flawed, and the flaws lead directly to civilian deaths. I have noted many times (for example see [here](#) and [here](#) and [here](#)) when John Brennan-directed drone strikes (either when he had control of strike targeting as Obama's assassination czar at the White House or after taking over the CIA and taking drone responsibility with him) reeked of political retaliation rather than being logically aimed at high value targets. But those examples pale in comparison to Brennan's "not a bake sale" strike that killed 40 civilians immediately after Raymond Davis' release or his personal intervention in the peace talks between Pakistan and the TTP. JSOC, on the other hand, has input from the Defense Intelligence Agency, which, as Marcy has noted, has its own style when it comes to "facts". On top of that, we have the disclosure from Jeremy Scahill and Glenn Greenwald earlier this week that JSOC will target individual mobile phone SIM cards rather than people for strikes, without confirming that the phone is in possession of the target at the

time of the strike. The flaws inherent in both of these approaches lead to civilian deaths that fuel creation of even more terrorists among the survivors.

Dilanian doesn't note that the current move by the White House to consolidate drones at the Pentagon is the opposite of what took place about a year before Brennan took over the CIA, when his group at the White House took over some control of JSOC targeting decisions, at least with regard to signature strikes in Yemen.

In the end, though, it's hard to see how getting all drone functions within the Pentagon and under Senate Armed Services Committee oversight will improve anything. Admittedly, the Senate Intelligence Committee is responsible for the spectacular failure of NSA oversight and has lacked the courage to release its thorough torture investigation report, but Armed Services oversees a bloated Pentagon that can't even pass an audit (pdf). In the end, it seems to me that this entire pissing match between Congress and the White House is over which committee(s) will ultimately be blamed for failing oversight of drones.

DISAPPEARED PAKISTANI DRONE ACTIVIST PLANNED ICC TESTIMONY

[youtuber
youtube='http://www.youtube.com/watch?v=JqX1jLSw
3t0']

Update February 14: *Khan has been freed! The Express Tribune reports that he was beaten and*

tortured, but is now free after being blindfolded and pushed out of a van.

In a very interesting development, Al Jazeera is reporting that disappeared drone activist Karim Khan had planned to testify before the International Criminal Court in The Hague on his trip to Europe which had been planned to begin on February 15. Khan was abducted from his home on February 5 and it is widely believed that Pakistan's intelligence service was behind the abduction.

Khan made a very dramatic entrance into the world of drone activism in November of 2010, when he sued the US for \$500 million after his son and brother were killed in a drone strike in their home village of Mir Ali in North Waziristan. In the lawsuit, Khan named the Islamabad CIA station chief:

A North Waziristan tribesman, whose brother and teenage son were killed in a drone strike last year, said on Monday that he would sue all those US officials supposedly in control of the predator's operations in Pakistan.

Karim Khan, a local journalist from Mirali town of the lawless tribal district, had sent a \$500 million claim for damages to the US Defence Secretary Robert Gates, CIA chief Leon Panetta and its station head in Islamabad Jonathan Banks.

Khan described how Banks' activities lead to the deaths of innocent civilians:

He told journalists that CIA Islamabad's chief Jonathan Banks buys information from his local agents in the area to guide the drone strike.

However, he added that this information is wrong and misleading in most occasions causing the deaths of many innocent tribesmen.

Khan's attorney throughout this process has been Shahzad Akbar. Akbar also represents Noor Khan, whose case in the Peshawar High Court resulted in the ruling that US drone strikes within Pakistan are illegal and constitute war crimes.

The fact that Akbar has gotten this ruling seems to me to add significance to the Al Jazeera report, which appears to cite Akbar as the source of the disclosure that Khan was to testify at the ICC:

A Pakistani court has ordered the country's intelligence agencies to produce a prominent anti-drone campaigner, who was abducted last week, by February 20, or to categorically state that they are not holding him, the activist's lawyers say.

Speaking to Al Jazeera on Wednesday, Shehzad Akbar, the head of Karim Khan's legal team, called Khan's abduction from his Rawalpindi home late on February 5 "a signature government abduction", alleging that Pakistan's powerful intelligence agencies were responsible for the disappearance.

Khan had been due to fly to Europe on February 15, on a trip that would see him testify before members of the European Parliament in Brussels, UK legislators in London and the International Criminal Court in The Hague, on the US' use of drone strikes in Pakistan's tribal areas.

The court which issued the ruling for the ISI to present Khan was the Lahore High Court:

Lahore High Court (LHC) Rawalpindi bench on Wednesday issued notices to security agencies to submit their reply in a case related to disappearance of an anti-drone activist as it ordered to present the man at the next hearing.

LHC Justice Shehzad Ahmad Khan was hearing a plea filed by the family of Karim Khan, who went missing a few days back.

During the proceedings, the police denied their involvement in the disappearance. "Khan was picked up by persons wearing police uniform but he is not in our custody," the police report claimed.

On this, the court sought reply from all intelligence agencies and ordered them to present Khan on February 20, the next date of hearing.

But the court had actually called for Khan to be produced yesterday, as well:

Khan's brother-in-law Dil Bar Jan, who lodged a police report over the disappearance, said the family was very worried about what would happen to him.

"We haven't done anything that is anti-state, nor do any of us have bad intentions towards anyone," he told AFP. "We're from an educated family, we're all government employees, I myself am a teacher. We can't think of doing something wrong."

A court has asked police to produce Khan, who is in his fifties, on Wednesday. His lawyer Shahzad Akbar said he was pinning his hopes on public pressure to force the government to release him.

"This is a completely illegal disappearance, which means some kind of pressure is being applied through his disappearance to the other drone victims," Akbar said.

When it comes to governments applying pressure, Akbar certainly knows what he is talking about.

He was blocked from entering the US when his visa application was held up for over a year. The US finally relented and issued the visa after a spate of bad press about their arbitrary behavior.

Khan's disappearance is a cause for great concern in Europe. Reprieve reports on the efforts European leaders have undertaken to push for Khan's release:

Yesterday (February 11), Tom Watson MP, Chair of the UK's All Party Parliamentary Group on Drones and a former British defence minister, wrote to Pakistan's Prime Minister, Nawaz Sharif, and British Foreign Secretary William Hague, concerning Mr Khan's case.

Meanwhile, in response to questions in the Dutch Parliament, the country's Minister for International Development said Mr Khan's case had been raised with Pakistan's Ambassador to the Netherlands, and would be raised again at bilateral meetings between the two countries due to take place later this month. Dutch MP Harry van Bommel has also written to Mr Sharif asking him to investigate Mr Khan's disappearance.

In Germany, Bundestag member Hans-Christian Ströbele has written to Mr Sharif to ask him to "urgently investigate Mr. Khan's disappearance [and] locate which Pakistani entity has detained him." MP Stroebele has also urged the German Foreign Minister to raise the case of Kareem Khan with his Pakistani counterpart.

Mr Watson said: "I am extremely concerned for the safety of drone victim and journalist Kareem Khan whom I invited to speak to MPs this month. Kareem was seized last week and his family still have had no news of his

whereabouts. Given the timing, I am concerned that there may be a connection between his disappearance and his intention to speak to Members of Parliament. I urge both the UK and Pakistani Governments to do everything in their power to secure Kareem's release, and support his visit to Parliament."

The Reprieve report also mentions that a judgement is due soon in a Pakistani court regarding Khan's case against drone strikes.

For more information on Khan's situation, see this long segment from yesterday's episode of Democracy Now.

THE DRONE ASSASSINATE AMERICANS OVERSEAS THAT WANT TO KILL AMERICANS OVERSEAS PLAN

Kimberly Dozier reports – based primarily on 4 US Officials (AKA members of Congress or their staffers) and one Senior Administration Official probably located near DOJ – that the Obama Administration is trying to decide whether to drone kill another American citizen with no due process again.

She obviously got the story because Mike Rogers wants to suggest Obama's increased caution of late, including his decision to shift drones from CIA to DOD control – has impeded this opportunity to off an American with no due

process.

And many people discussing the story suggest this case follows the example of Anwar al-Awlaki.

But it appears not to, in at least one very important respect.

According to Dozier's description, this person is not targeting Americans in the US; he is targeting Americans overseas (given her descriptions, I'm guessing he's targeting Americans in Afghanistan from Pakistan, though it's possible he's in North Africa).

An American citizen who is a member of al-Qaida is **actively planning attacks against Americans overseas**, U.S.

officials say, and the Obama administration is wrestling with whether to kill him with a drone strike and how to do so legally under its new stricter targeting policy issued last year.

[snip]

Four U.S. officials said the American suspected terrorist is in a country that refuses U.S. military action on its soil and that has proved unable to go after him. And President Barack Obama's new policy says American suspected terrorists overseas can only be killed by the military, not the CIA, creating a policy conundrum for the White House.

Two of the officials described **the man as an al-Qaida facilitator who has been directly responsible for deadly attacks against U.S. citizens overseas and who continues to plan attacks against them that would use improvised explosive devices**.

But one U.S. official said the Defense Department was divided over whether the man is dangerous enough to merit the potential domestic fallout of killing an

American without charging him with a crime or trying him, and the potential international fallout of such an operation in a country that has been resistant to U.S. action.

Another of the U.S. officials said the Pentagon did ultimately decide to recommend lethal action.

The officials said the suspected terrorist is well-guarded and in a fairly remote location, so any unilateral attempt by U.S. troops to capture him would be risky and even more politically explosive than a U.S. missile strike.

Say what you will about the quality of the evidence against Awlaki, they government at least claimed he was behind the UndieBomb and Toner Cartridge attacks, both targeted at American civilians in the US.

Even in the case of Kamal Derwish (whom we killed in 2002 under our prior "sitting next to a baddie" standard), we believed he was training people domestically.

By all appearances, this person is targeting US service members. And if they're anywhere but Afghanistan (though I suspect they **are** in Afghanistan, especially given the reference to IEDs), they're operating with a somewhat dubious claim to legally approved military actions.

No US citizen has the right to join the other side in a war, which (if this is Afghanistan/Pakistan) seems to be what has happened. But using a drone to target an American operating in a sovereign country we pretend not to be at war with because he is targeting **military targets** is a different legal case than the one against Awlaki.

Sure, Awlaki started us down a slippery slope. But we appear to have slid further down that slope.

DEATH BY GEOLOCATION: “WE’RE GOING AFTER THEIR PHONES”

In December, I talked about the role I thought SIGINT played in drone targeting (here, noting that the same analysis that picks key pirates out of a database might choose to kill them).

[I]t is very easy to see what kind of role metadata analysis would play in the early stages of targeting a signature strike, because that’s precisely how the intelligence community identify the nodes that, McNeal tells us, they’re often targeting when they conduct signature strikes. Wiretap the person at that node and you may learn a lot (that’s also probably the same kind of targeting they do to select potential informants, as we know they do with metadata), kill that person and you may damage the operational capabilities of a terrorist (or pirate) organization.

When the WaPo reported on NSA’s role in drone killing, it focused on how NSA collected content associated with a known target – Hassan Ghul – to pinpoint his location for drone targeting.

But NSA probably plays a role in the far more controversial targeting of people we don’t know for death, with precisely the kind of contact chaining it uses on US persons.

It turns out I overestimated the role of HUMINT in the targeting process.

In their first story at the Intercept, Glenn Greenwald and Jeremy Scahill describe drone killing being done almost entirely on SIGINT.

What's more, he adds, the NSA often locates drone targets by analyzing the activity of a SIM card, rather than the actual content of the calls. Based on his experience, he has come to believe that the drone program amounts to little more than death by unreliable metadata.

"People get hung up that there's a targeted list of people," he says. "It's really like we're targeting a cell phone. We're not going after people – we're going after their phones, in the hopes that the person on the other end of that missile is the bad guy."

[snip]

The former JSOC drone operator estimates that the overwhelming majority of high-value target operations he worked on in Afghanistan relied on signals intelligence, known as SIGINT, based on the NSA's phone-tracking technology.

"Everything they turned into a kinetic strike or a night raid was almost 90 percent that," he says. "You could tell, because you'd go back to the mission reports and it will say 'this mission was triggered by SIGINT,' which means it was triggered by a geolocation cell."

Their source argues the reliance exclusively on SIGINT is particularly bad for JSOC in Yemen.

As the former drone operator explains, the process of tracking and ultimately killing a targeted person is known within the military as F3: Find, Fix, Finish. "Since there's almost zero HUMINT operations in Yemen – at least involving JSOC – every one of their strikes relies on signals and imagery

for confirmation: signals being the cell phone lock, which is the 'find' and imagery being the 'unblinking eye' which is the 'fix.'" The "finish" is the strike itself.

"JSOC acknowledges that it would be completely helpless without the NSA conducting mass surveillance on an industrial level," the former drone operator says. "That is what creates those baseball cards you hear about," featuring potential targets for drone strikes or raids.

I've been pointing out JSOC's inaccuracy for some time.

In fact, this may explain Dianne Feinstein's efforts to ensure CIA retains control of drone targeting.

Of course, the HUMINT CIA gets – in both Pakistan and Yemen – has proven highly susceptible to manipulation by our partners on the ground. So it's not clear that's any better either.

All this Intelligence and so little actual intelligence.