

THE BOMB ROBOT DRONE KILLING PRECEDENT

As you've no doubt heard, sniper(s) attacked the police protecting a Black Lives Matter protest in Dallas last night, killing 5 cops. Dallas Police have released the name of one perpetrator, who was killed by police: Micah Johnson. Johnson was apparently an Army veteran; he was what experts deemed "tactically professional" based on review of the attack.

The entire attack was a tragic escalation of racial tensions in this country.

In a press conference today, Dallas Police Chief David Brown revealed this about the stand-off with Johnson:

Let me walk through the stand-off that had occurred—or was occurring—at El Centro on the second floor. The college there in downtown Dallas. We cornered one suspect and we tried to negotiate for several hours. Negotiations broke down. We had an exchange of gunfire with the suspect. We saw no other option but to use our bomb robot and place a device on its extension for it to detonate where the suspect was. Other options would have exposed our officers to grave danger. The suspect is deceased as a result of detonating the bomb. The reporting that the suspect killed himself is not accurate. We've confirmed that he's been deceased because of the detonation of the bomb.

This is the first known killing by a weaponized drone as part of policing in the United States.

The use of the bomb robot in this operation raises several tactical questions. It is possible – though unlikely – that the weaponized

drone was present for negotiations, which would raise interesting questions about those discussions (three other people are in custody and they are not cooperating; Johnson claimed, apparently falsely, that he operated alone).

I'm more interested in the tactical question of delivering a lethal bomb rather than something that might have demobilized him – perhaps tear gas?– and permitted police to take him alive.

Those questions about the tactical use of this robot will be answered as the police release more details.

There is, of course, the larger question of what kind of precedent this serves. I've long been on the record arguing that a targeted killing in the US would look more like the killing of Luqman Abdullah or Fred Hampton. But the use of a wheeled robot changes that possibility.

Remember, the logic of the Anwar al-Awlaki memos depend on two things: law enforcement precedents authorizing the use of force when officers – or innocent bystanders – lives are at risk.

Even in domestic law enforcement operations, the Court has noted that “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.” *Garner*, 471 U.S. at II. Thus, “if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of ~erious physical harm, deadly force may be used if necessary to prevent escape and if, where feasible, some warning has been given.” *Id.* at 11-12.

Given the attacks on other officers and the exchange of gunfire before using the robot, DPD will easily reach the bar of imminent threat

(even though they might have been able to use non-lethal means).

The other thing included in the Awlaki memos (though in unredacted form, in Harold Koh's comments rather than the OLC memos) is language finding that the use of drones don't make a legal difference in use of force calculations.

Second, some have challenged *the very use of advanced weapons systems*, such as unmanned aerial vehicles, for lethal operations. But the rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict— such as pilotless aircraft or so-called smart bombs— so long as they are employed in conformity with applicable laws of war. Indeed, using such advanced technologies can ensure both that the best intelligence is available for planning operations, and that civilian casualties are minimized in carrying out such operations.

In other words, there's little reason to believe this use of force will be legally questionable, at all. Which means there's little question that it might be used a precedent by other police departments. (And let it be noted that Dallas is considered a far better run police department on such issues than other big cities, much less other less professional offices.) And given the way the Executive has already blurred the line between police usage and intelligence usage, we might expect the same to happen in the future.

There may have been other options available here (and note, in the press conference the mayor thanked the FBI, so it's not clear whether DPD made this decision on their own), but this will be deemed reasonable.

Which doesn't mean other, unreasonable uses of

this precedent aren't coming down the pike.

Update: Dallas police have now said that they think Johnson was the only shooter. I'm not sure whether that means the other three suspects were not accomplices at all or helped in some way that did not involve shooting.

Still, consider that Johnson's military experience was as a mason, not any kind of highly skilled soldier. He managed to do a great deal of damage working off his reserve training.

THE CIA IS PREVENTING CONGRESS FROM LEARNING THAT THE WORST ALLEGATIONS AGAINST HILLARY PERTAIN TO DRONES

You probably heard that Jim Comey testified to the House Oversight Committee for over four hours today. You'll see far less coverage of the second panel in that hearing, the testimony of Inspector Generals Steve Linick (from State) and Charles McCullough (from the IC).

In addition to OGR Chair Jason Chaffetz suggesting the committee convene a secrecy committee akin to the one Senator Daniel Patrick Moynihan convened back in the 1990s (which would be very exciting), McCullough revealed something rather startling regarding a letter he sent to Congress back in January (this was first reported by Fox). The letter was his official notice to Congress that some of the information in Hillary's emails was claimed by an agency he didn't name to be Special Access.

To date, I have received two sworn declarations from one IC element. These declarations cover several dozen emails containing classified information determined by the IC element to be at the CONFIDENTIAL, SECRET, and TOP SECRET/SAP levels. According to the declarant, these documents contain information derived from classified IC element sources. Due to the presence of TOP SECRET/SAP information, I provided these declarations under separate cover to the Intelligence oversight committees and the Senate and House leadership.

By sending the email, McCullough made the SAP information very public, without providing information about whether the claim was very credible.

Shortly after the Fox report, Politico reported that the emails pertained to CIA drone strikes and related fallout in Pakistan.

However, the emails now deemed to contain "top secret, special access program" information are in addition to the messages previously disputed between State and the Director of National Intelligence, according to a spokesperson for McCullough. The official said the intelligence community review group is wrapping up its look into the documents and is putting these documents in the SAP category.

The Central Intelligence Agency is the agency that provided the declarations about the classified programs, another U.S. official familiar with the situation told POLITICO Wednesday.

The official, who spoke on condition of anonymity, said some or all of the emails deemed to implicate "special access programs" related to U.S. drone strikes. Those who sent the emails were

not involved in directing or approving the strikes, but responded to the fallout from them, the official said.

The information in the emails “was not obtained through a classified product, but is considered ‘per se’ classified” because it pertains to drones, the official added. The U.S. treats drone operations conducted by the CIA as classified, even though in a 2012 internet chat Presidential Barack Obama acknowledged U.S.-directed drone strikes in Pakistan.

WSJ reported last month that what are presumably the same emails included discussions among State Department officials about upcoming drone strikes.

The vaguely worded messages didn’t mention the “CIA,” “drones” or details about the militant targets, officials said.

The still-secret emails are a key part of the FBI investigation that has long dogged Mrs. Clinton’s campaign, these officials said.

They were written within the often-narrow time frame in which State Department officials had to decide whether or not to object to drone strikes before the CIA pulled the trigger, the officials said.

Law-enforcement and intelligence officials said State Department deliberations about the covert CIA drone program should have been conducted over a more secure government computer system designed to handle classified information.

State Department officials told FBI investigators they communicated via the less-secure system on a few instances,

according to congressional and law-enforcement officials. It happened when decisions about imminent strikes had to be relayed fast and the U.S. diplomats in Pakistan or Washington didn't have ready access to a more-secure system, either because it was night or they were traveling.

In other words, there has been a great deal of reporting on what are almost surely the emails in question, revealing that the key dispute pertains to an issue that CIA likes to pretend we don't all know about, drone strikes in Pakistan.

In today's hearing, McCullough reported that these emails – in addition to being a Special Access Program – are also classified Originator Controlled, ORCON, and the CIA (which he still didn't name) has been refusing to distribute the emails or the statement beyond the original dissemination, the Intel committees and congressional leadership. So, in spite of the fact that numerous members of Congress have asked for more information (including, in today's hearing, Chaffetz), they've been denied it. McCullough explained he had had to get his own staffers read into this, and he has gone back to the CIA (again, which he didn't name) several times, only to have them refuse further distribution.

It may well be that the actual language used in the most sensitive emails revealed highly classified information – or it may be, as the WSJ reported, that State aides used a kind of code hiding the jist of their conversations.

Or it may be that State discussed a particularly controversial drone strike, such as the time CIA launched a drone strike right after Ray Davis was freed from Pakistani custody, which Jim White wrote about in a longer post suggesting CIA used drone strikes to retaliate against Pakistani action we don't like.

Drone strikes in Pakistan by the US have occasionally been interrupted by various diplomatic issues. For example, there was a lull of over a month at the height of negotiations over the release of Raymond Davis. One of the most notorious US drone strikes was on March 17, 2011, the day after Raymond Davis was released. This signature strike killed over 40, and despite US claims (was that you, John Brennan?), that those killed “weren’t gathering for a bake sale” it was later determined that the majority of those killed were indeed civilians at a jirga to discuss local mineral rights. Because it was so poorly targeted, this strike always stood out in my mind as the product of an attitude where high-level US personnel demanded a target, no matter how poorly developed, simply to have something to hit since drone strikes had been on hold over the Davis negotiations and there was a need to teach Pakistan a lesson.

One way or another, though, these are topics that Congress (especially the Foreign Affairs Committees, which almost certainly have been denied these details) should be able to review.

But CIA is – as is their wont – playing classification games to ensure that a broader cross-section of Congress can’t assess how egregious this particular classification violation was.

Which, given CIA’s history, tends to mean either it wasn’t – or CIA has something to hide.

HAPPY FLAG-WAVING

DRONE DOCUMENT DUMP

ODNI (update—and now I Con the Record) has released its report on the number of drone deaths. The overview is that the US intelligence community is reporting (more on that in a second) far, far fewer drone deaths than credible outside researchers do. (TBIJ, New American, Long War Journal)

Summary of U.S. Counterterrorism Strikes Outside Areas of Active Hostilities between January 20, 2009 and December 31, 2015	
Total Number of Strikes Against Terrorist Targets Outside Areas of Active Hostilities	473
Combatant Deaths	2372-2581
Non-Combatant Deaths	64-116

The IC numbers are for strikes occurring outside areas of active hostilities, which currently includes Afghanistan, Iraq, and Syria, but might have – the report doesn't say one way or another – included other places, like Pakistani tribal lands, when these drone strikes happened.

The report acknowledges that this number differs dramatically from these of outside researchers, though it doesn't include a footnote to permit those who don't already know the players to compare, which betrays a real lack of confidence in its own analysis. A footnote would also permit readers to see the degree to which NGOs have done granular analysis, as compared to ODNI's 3 line table.

Plus, it doesn't acknowledge this discrepancy until after it suggests these other numbers – which I believe are actually more consistent with each other than the IC's numbers are with them – come from terrorist propaganda, a claim it repeats a second time before the end of the 3-page report.

The large volume of pre- and post-strike data available to the U.S. Government can enable analysts to distinguish combatants from non-combatants, conduct

detailed battle damage assessments, and separate reliable reporting from terrorist propaganda or from media reports that may be based on inaccurate information.

In releasing these figures, the U.S. Government acknowledges that there are differences between U.S. Government assessments and reporting from non-governmental organizations. Reports from non-governmental organizations can include both aggregate data regarding non-combatant deaths as well as case studies addressing particular strikes, and generally rely on a combination of media reporting and, in some instances, field research conducted in areas of reported strikes. Although these organizations' reports of non-combatant deaths resulting from U.S. strikes against terrorist targets outside areas of active hostilities vary widely, such reporting generally estimates significantly higher figures for non-combatant deaths than is indicated by U.S. Government information. For instance, for the period between January 20, 2009 and December 31, 2015, non-governmental organizations' estimates range from more than 200 to slightly more than 900 possible non-combatant deaths outside areas of active hostilities.

[snip]

Finally, non-governmental organizations' reports of counterterrorism strikes attributed to the U.S. Government—particularly their identification of non-combatant deaths—may be further complicated by the deliberate spread of misinformation by some actors, including terrorist organizations, in local media reports on which some non-governmental estimates

rely.

The IC report also suggests that it derives such a low civilian casualty figure by defining belligerent broadly, to include people like drivers and cooks – but don't you worry, that doesn't mean that every single military aged male counts as a belligerent (I will check but I suspect the IC's numbers likely could not be so low without counting some women as belligerents, which might happen if they do things like cook).

Non-combatants are individuals who may not be made the object of attack under applicable international law. The term "non-combatant" does not include an individual who is part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of U.S. national self-defense. Males of military age may be non-combatants; it is not the case that all military-aged males in the vicinity of a target are deemed to be combatants.

[snip]

The U.S. Government draws on all available information (including sensitive intelligence) to determine whether an individual is part of a belligerent party fighting against the United States in an armed conflict; taking a direct part in hostilities against the United States; or otherwise targetable in the exercise of national self-defense. Thus, the U.S. Government may have reliable information that certain individuals are combatants, but are being counted as non-combatants by nongovernmental organizations. For example, further analysis of an individual's possible membership in an organized armed group may include, among other things: the extent to which an

individual performs functions for the benefit of the group that are analogous to those traditionally performed by members of a country's armed forces; whether that person is carrying out or giving orders to others within the group; or whether that person has undertaken certain acts that reliably connote meaningful integration into the group.

The ACLU is due to get more documents from the precipitating FOIA that may explain better how broadly the government has defined belligerent (remember—these strikes are all in areas outside of active hostilities).

Perhaps the most interesting part of the report is this repeated language:

a summary of information *provided to the*
DNI

The assessed range of non-combatant
deaths *provided to the* DNI

The information that was *provided to the*
DNI

based on the information *provided to the*
DNI

according to information *provided to the*
DNI

That is, the ODNI may be releasing this information. But they're sure as hell not vouching for it. I find that particularly interesting given that, in May, I had to explain to ODNI that the National Security Letter numbers they were getting (and publishing in transparency reports) from FBI were probably unreliable.

These numbers don't even, apparently, reflect the kind of rigor that would involve an outside agency reviewing the CIA's numbers. Instead, the CIA (and presumably, in more limited cases, DOD)

provided numbers to ODNI, and ODNI is – as ordered by the President – passing those numbers on.

At least you can be sure this isn't *terrorist* propaganda.

Update: Micah Zenko gets at what I find to be the most striking aspect of this: the disparity between the number of strikes. Averaging the 3 main trackers, Zenko figures there were 578 strikes, as compared to the claimed ODNI number of 473. This is a huge discrepancy (the government only counts 82% of what the NGOs collectively count as strikes).

Such a big discrepancy may come from various places, two obvious ones being strikes considered to be in areas of active hostilities (say, the Pakistani border) not being counted in the ODNI tally, or strikes conducted by the home country (chiefly, Pakistan or Yemen, but I'd include Saudi Arabia in there). Given how low the civilian casualties are, then, it's possible ODNI is counting as domestic the most lethal strikes.

WHEN DOES A RANDOM TAXI DRIVER BECOME A LAWFUL COMBATANT?

A couple of weeks ago, I wrote a post questioning the Obama Administration's logic in killing the leader of the Afghan Taliban in a drone strike in Pakistan. It turns out that the Defense Department also employed some very suspect reasoning surrounding the drone strike.

On June 1 (apologies for the delay, but as most of you know, our site was hacked and has migrated to a new host) Brigadier General Charles H. Cleveland, who heads the US effort in

Afghanistan, took part in a press conference in which he was patched into Washington via a video link from Kabul. At the end of the transcript, we have a very telling exchange:

Q: General, Lucas Tomlinson, from Fox News. Just a quick follow-up to Louis' question. Were you or General Nicholson concerned that Mullah Mansur was in Iran? And are you concerned about Iran sheltering Taliban officials? Thank you.

BRIG. GEN. CLEVELAND: Yes, Lucas. Thank you very much.

You know, our — our real focus on it, again, continue to be Afghanistan and I know it sounds like I'm dodging your question and I don't mean to, but again, you know, the location of Mullah Mansur and where he was either before or during the strike, et cetera, are really questions that probably the team back in Washington, D.C., has got a better answer for you.

Our real role, again, as I think you're well aware — Mullah Mansur was a threat to U.S. forces, he was an obstacle to peace. An opportunity presented, the president made a decision and he was targeted and he was killed. And so really, the rest of the aspect of that really is better to answer — better answered back in Washington, D.C.

Q: And lastly, was the taxi cab driver — was he part of the Taliban, too? Did he — did he have that same threat to U.S. forces?

BRIG. GEN. CLEVELAND: So bottom line is we are confident, Lucas, in our targeting and we are confident that he was a lawful combatant.

General Cleveland's response to Tomlinson here would have us think that Mohammad Azam, the taxi

driver who was killed along with Mansour, was a member of the Taliban who posed a direct threat to the US. That would seem to make him an appropriate target for killing.

It seems that a suitable reference on which to rely for DoD's thinking on combatants is to go back to William Haynes' memo dated December 12, 2002 and titled "Lawful Combatants". This memo comes from Haynes as General Counsel to DoD and is addressed to a Roundtable assembled by the Council on Foreign Relations. It appears that this exercise was geared toward providing legal cover for the Bush Administration's "new" reading of international law and especially its attempts to shield prisoners from the Geneva Conventions.

In the memo, Haynes says this with regard to combatants:

An "enemy combatant" is an individual who, under the laws and customs of war, may be detained for the duration of an armed conflict. In the current conflict with al Qaida and the Taliban, the term includes a member, agent, or associate of al Qaida or the Taliban. In applying this definition, the United States government has acted consistently with the observation of the Supreme Court of the United States in *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942): "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war."

"Enemy combatant" is a general category that subsumes two sub-categories: lawful and unlawful combatants. See *Quirin*, 317 U.S. at 37-38. Lawful combatants receive prisoner of war (POW) status and the protections of the Third Geneva Convention. Unlawful combatants do not

receive POW status and do not receive the full protections of the Third Geneva Convention. (The treatment accorded to unlawful combatants is discussed below).

The President has determined that al Qaida members are unlawful combatants because (among other reasons) they are members of a non-state actor terrorist group that does not receive the protections of the Third Geneva Convention. He additionally determined that the Taliban detainees are unlawful combatants because they do not satisfy the criteria for POW status set out in Article 4 of the Third Geneva Convention. Although the President's determination on this issue is final, courts have concurred with his determination.

So according to the 2002 DoD interpretation of a "determination" by President George W. Bush, members of the Taliban are enemy combatants. But they also are unlawful combatants instead of lawful combatants, so that is one bit of misleading information from Cleveland.

A much bigger problem, though, is that from all appearances, Mohammad Azam was not a driver affiliated with the Taliban and certainly not Mansour's personal driver. The Guardian looked carefully into the circumstances of how Azam came to be driving Mansour and it appears that Azam was randomly assigned to drive Mansour:

It was a series of chance occurrences that led to Azam finding one of the US's most wanted men sitting in his white Toyota Corolla.

Azam got much of his work through a small local transport company owned by Habib Saoli, which has its office near the exit of the Iranian-Pakistani border facility that straddles the border.

Mansoor emerged from that building

shortly after 9am on 21 May, returning to Pakistan after a long visit to Iran which, it has been reported, was for both medical attention and to visit members of his family.

/snip/

He immediately began looking for a ride for the 600km journey to the city of Quetta.

Said Ahmed Jan, an employee of a bus company, was trying to fill up the final seats of his Quetta-bound minibus but Mansoor wasn't interested.

"He said, 'I want to go in a car', so I called Habib and asked him to provide a car," said Jan. "Habib took a little commission and gave the job to Azam."

It's very hard to see how a taxi driver randomly assigned to transport a legitimate target of the Defense Department suddenly becomes transformed into a lawful combatant himself. Despite Cleveland's assurance to the contrary, I seriously doubt that DoD considered Azam a lawful combatant at the time they authorized the strike. The most logical assumption is that DoD came to the decision that Azam's life was acceptable collateral damage for taking out Mansour. Cleveland simply lacked the honesty to deliver that sad truth.

There also may be legal reason for this lie, however, since Azam's family has started the paperwork within Pakistan to sue the US over his death. It will be interesting to see whether the case proceeds, especially in light of the previous ruling in the Peshawar High Court that US drone strikes in Pakistan are war crimes.

Postscript: I suppose that one might argue that Cleveland was referring to Mansour rather than Azam when he was making his assurance that "he was a lawful combatant", but then that says Cleveland completely ignored the question about

the status of Azam.

NSA KILLS PEOPLE BASED ON METADATA, BUT CAN'T PRESERVE ITS OWN PERSONNEL METADATA FOR A SIMPLE FOIA

Over at Vice News, I've got a story with Jason Leopold on 800 pages of FOIAed documents from the NSA pertaining to their response to Edward Snowden. Definitely read it (but go back Monday to read it after VICE has had time to recover from having NSA preemptively release the documents just before midnight last night).

But for now I wanted to point out something crazy.

There were some funny things about the documents handed over to Leopold, some of which I'll get into over time. By far the funniest is their claim that this email, from SV2 to SV and cc'ed to SV4:

From: [redacted] NSA-SV2 USA CIV
Sent: Thursday, April 10, 2014 11:00 AM
To: [redacted] NSA-SV USA CIV
Cc: [redacted] NSA-SV4 USA CIV
Subject: FW: (U) Information Regarding My Contact w/Leaker in April 2013
Importance: High (b)(7)P.L. 88-36
Below text duplicated in DOCID 4294921

Is the same as this email, from E63 to SV and cc'ed to SV43.

DOCID: 4294921

[redacted] NSA-DJ4 USA CIV

From: [redacted] NSA-E63 USA CIV
Sent: Thursday, April 10, 2014 11:00 AM
To: [redacted] NSA-SV USA CIV
Cc: [redacted] NSA-SV43 USA CIV
Subject: FW: (U) Information Regarding My Contact w/Leaker in April 2013
Importance: High

We asked them about that – it was one of the few questions from a list of very detailed questions they actually gave us answers to. Here's how they explained it.

Due to a technical flaw in an operating system, some timestamps in email headers were unavoidably altered. Another artifact from this technical flaw is that the organizational designators for records from that system have been unavoidably altered to show the current organizations for the individuals in the To/From/CC lines of the header for the overall email, instead of the organizational designators correct at the time the email was sent.

Remember, this is the agency that “kills people based on metadata,” per its former Director, Michael Hayden.

But “due to a technical flaw in an operational system,” it could not preserve the integrity of either the time or the aliases on emails obtained under FOIA.

Update: I asked Douglas Cox, who works on these kinds of issues at CUNY School of Law, about this. Here's what he had to say:

This is an illustration of why most federal agencies are still “print and file” for email preservation purposes, because many can't seem to properly preserve email in electronic format. Agencies are supposed to be managing emails electronically by the end of this year, but there are doubts many will get there that soon.

If they had a hard copy version and then screwed up the original electronic version by bringing it on to the live system, that would account for differing headers in copies of “same” email, which is bad enough. To the extent they did not have hard copy and they screwed up

the only copy in electronic form that is clearly worse. It does raise a real issue.

But your point is right on, even in more mundane contexts not involving drone strikes it is remarkable the disconnect between standards agencies impose and those they practice. When you are producing docs to a govt agency in response to doc requests, eg, you often have to abide by exacting standards in format including careful capture of metadata, but with FOIA you get things like this.

The artifact in the email – which comes from a string that shows the Compliance training woman modifying her version of the face-to-face interaction with Snowden a year after it happens – must reflect who was printing out documents in timely fashion for the FOIA, and who wasn't (or perhaps which communications threads they figured they'd include and which they wouldn't). It may also reflect which of these people are actually complying with Federal Records Act guidelines.

MULLAH MANSOUR DRONE STRIKE: IMPORTANT MILESTONE OR RADICALIZING EVENT?

How much more ironic could it be? More than 43 years after the last Americans evacuated Vietnam, ending our disastrous occupation there, the dateline reads Hanoi on President Barack Obama's statement today on the US drone strike

that killed Mullah Akhtar Muhammad Mansour. Mansour was the head of Afghanistan's Taliban but was in Pakistan at the time the US killed him with a drone, striking a similarity to the US "secret" bombing of Cambodia during the Vietnam war.

From today's New York Times, we have parts of Obama's statement:

Calling the death "an important milestone," President Obama said in a statement, released just as he was meeting with top officials in Vietnam, that the United States had "removed the leader of an organization that has continued to plot against and unleash attacks on American and coalition forces."

"Mansour rejected efforts by the Afghan government to seriously engage in peace talks and end the violence that has taken the lives of countless innocent Afghan men, women and children," Mr. Obama continued in the statement. "The Taliban should seize the opportunity to pursue the only real path for ending this long conflict – joining the Afghan government in a reconciliation process that leads to lasting peace and stability."

So Obama is saying that the Taliban should respond to our extrajudicial killing of their leader by reconciling with the Afghan government (chosen in large part by John Kerry) and working toward peace. What are the odds of that happening? Max Abrahms has some very important points to make on that topic:

Dr Max Abrahms, from Northeastern University in Boston, said the US Government does not look carefully enough at the strategic implications of its strikes on extremist leaders.

He said he had done a number of studies

on leadership decapitation of a militant group and he had not found a statistically significant reduction in the amount of violence perpetrated by the group after a leader was removed.

"In fact these decapitation strikes can actually be counter-productive, because one of the assumptions of the targeted killing campaigns is that the replacement of the leader that you killed will be more moderate," Dr Abrahms said.

"And yet I find just the opposite to be true. The replacement is even more extreme.

"So for that reason, in the immediate aftermath of a successful targeted killing, like over this weekend, the group's violence tends to become even more extreme, in the sense that it's even more likely to attack civilian targets."

And so our circle of irony is complete. Obama's statement on the killing of Mansour, released from Vietnam, shows that US military misadventures still rely on faulty logic when major moves are made. A strike made to make the Taliban more peaceful seems virtually certain to result in more indiscriminate killing of civilians.

Because I know how much Marcy enjoys miraculous "left behind" documents, I couldn't resist following up on a Twitter reference I saw flit by yesterday about how a passport for Mansour somehow survived the conflagration in the taxi in which Mansour met his death by drone. By following it, though, I found even more deep irony in the drone strike. This article by ToloNews carries a photograph of a pristine-looking passport. Compare that with the photo in the New York Times article linked above with the burned out wreckage of the vehicle Mansour was

said to have been in when hit. How could the passport have survived?

But wait, there's more! ToloNews tells us that the passport has Mansour's name and carries a valid Iranian visa. Furthermore:

Meanwhile, a number of analysts said the Taliban in recent months tried to extend relationships with Iran and Russia to fight Daesh and that there is a possibility that Mansour traveled to Iran to escape ISI and talk with Iranian officials.

"Iran is afraid of Daesh presence in Afghanistan, because Daesh is an enemy to Iranian clerics; therefore, Iran wants to eliminate Daesh with the help of the Taliban. Previously, Taliban had strong affiliation to Saudi Arabia, but now there is a rift between Iran and Saudi Arabia and Iran wants to expand its influence on the group [Taliban]," political analyst Shafiq Hamdam said.

So while Mansour and his group have continued to reject peace talks with the Afghan government, at least some observers believe that he was in the process of trying to join the fight against Islamic State. And it may well be that he died because of that effort. Here's a map of the region, showing that the site of the drone attack, Ahmad Wal, lies about 100 miles away from Quetta (where the Afghan Taliban has long been believed to be headquartered) along the highway that is the most direct route to Iran from Quetta.

DOJ PLACES DAVID

BARRON'S ANWAR AWLAKI MEMOS ON THE "NOT SELECTED FOR PUBLICATION"

Sometime between March 27 and April 15 of last year, the Office of Legal Counsel posted the two memos David Barron wrote authorizing the execution of Anwar al-Awlaki (February 19, 2010; July 16, 2010) on its list of memos "Not selected for publication" in its reading room. The website explains that these are memos that have been posted through discretionary release, but "may not reflect the Office's current views."

Consistent with the President's FOIA memorandum dated January 21, 2009, and the Attorney General's FOIA guidelines dated March 19, 2009, OLC sometimes releases requested records as a matter of discretion, even if they fall within the scope of a FOIA exemption or have not been the subject of a FOIA request. To make such documents generally available when they are the subject of repeated requests or may be of public or historical interest, the Office may post them in this electronic reading room. Documents posted in this electronic reading room are being disclosed through

discretionary release, but they have not been selected for official publication and thus they are not included among the Office's formal published opinions. Although these records may be of public or historical interest, the views expressed in some of these records may not reflect the Office's current views.

Of course, a number of the memos (most but not all of which are tied to the war on terror) weren't released at DOJ's discretion. Rather, some of these memos (including the two Awlaki ones) were released after DOJ tried to suppress them, only to have a Federal judge force their release.

I've got a call in to see if OLC has some easy explanation. But I'm wondering if it means DOJ may have thought better of now Circuit Court judge David Barron's advice that you can kill an American citizen with no real due process.

Particularly given the timing, I'm wondering whether any change in DOJ's views about these memos would affect American citizens overseas, such as Liban Haji Mohamed, a Somali American who was put on the Most Wanted List last year, then detained (never to publicly have shown up in an American court) on March 2, 2015. Unlike Anwar al-Awlaki, Mohamed (who is the brother of Gulet Mohamed, who has had a whole different set of problems with the government) has actually been indicted.

ACLU's Jameel Jaffer points to a potentially more cynical (and therefore likely) explanation though. As he noted last year, at about the same time DOJ was deeming the Barron memos discretionary releases, it submitted a filing in

their lawsuit against ACLU, insisting that having been ordered by a court to release the memo doesn't count as official disclosure. In a footnote of the April 2 filing, DOJ claimed,

We further note that the Court's release of the OLC-DOD Memorandum and its order compelling disclosure by the government of additional information would not themselves constitute an independent official disclosure or waiver by the government that would strip protection from otherwise exempt information and material.

That is, during precisely the time period when it was deeming this memo discretionary on its website, it was making that argument to the courts.

So I assume they believe they still have the right to execute American citizens at their discretion. *And* keep their rationale for doing so secret.

FRIDAY MORNING: ALL THAT JAZZ

If you have to ask what jazz is, you'll never know. — Louis Armstrong

It's Friday. Don't ask, just play.

If you thought FBI vs Apple was part of a plan to break Silicon Valley on encryption, it was

This will be the big buzz today: a secret "decision memo" reveals the government set out to access encrypted user data while putting on a good front about its relations with software companies. No information available about the

source (or timing) of the memo; wouldn't it be ironic if this secret memo had been hacked from a smartphone user's data?

The Atlantic looks at the government's attempt to force Apple to write code for their purposes as conscription. The secret memo bolsters this argument.

Looks like Apple may also claim the government is compelling speech. They've pulled out the big guns by hiring lawyers Ted Olson and Theodore Boutrous to work on this case.

Whiny telcos upset with Facebook eating their lunch with WhatsApp messaging

Like they couldn't have seen this coming? Telcos in parts of the world like Central America and Europe have long charged uncompetitive rates for poor messaging service. Enter Facebook, which snapped up WhatsApp and integrated the messaging app in its social media platform. Facebook members now have a free messaging platform that works almost globally. The telcos are now upset that Facebook has eaten their text messaging profits. *¡Qué lástima!* Though I admit I wonder if part of this grouching is really a front for governments who don't like WhatsApp's threat to intelligence access via telcos' messaging services.

Citigroup's Corbat gets a 27% pay increase

Too Big to Fail pays very well, for a very few. For Citigroup's CEO Michael Corbat, it pays roughly \$16.5 million this past year, up from \$13 million the previous year. Corbat's raise rewards him for Citibank's improved fortunes, based in part on cutting less profitable businesses – like exiting retail banking in Argentina and Brazil.

Mercedes sued for not-so-clean diesel emissions

In a slightly different situation than with automaker VW, Daimler's Mercedes is accused of selling diesel powered vehicles that do not meet emissions standards at low temperatures. The lawsuit was filed yesterday in New Jersey by a vehicle owner in Illinois, based on information

published in Der Spiegel and the results of a study conducted by independent testing agency TNO for the Dutch Ministry of Infrastructure and the Environment. The problem at the heart of the suit:

“...the device in Mercedes’s diesel models turns off pollution controls at temperatures below 50 degrees Fahrenheit (10 Celsius), allowing the autos to violate emissions standards, according to the complaint.”

Mercedes did not disclose to buyers that its BlueTec technology, a system relying on use of urea-based NOX reduction, emitted NOX levels well above emissions standards at low temperatures. I would not be surprised to see more cases soon against Daimler and its Mercedes brand as BlueTec technology has been used in both passenger vehicles and commercial trucks for most of the last ten years.

On our mind: SKYNET

We haven’t forgotten the issue of U.S. military killing innocents *Oops!* from the sky based on metadata. Worth reading:

- The NSA’s SKYNET program may be killing thousands of innocent people (Ars Technica)
- Has a rampaging AI algorithm really killed thousands in Pakistan? (The Guardian)

A “machine learning algorithm”? Imagine this in self-driving cars, hijacked via backdoors by hackers and governments. The ethics behind this technology must be widely debated in public now, before it moves beyond its already-abused role in drone-based warfare.

Should be an entertaining Friday; watch for government spokespersons to indulge in a lot of fancy-footwork jazz today.

ONE REASON CIA IS CLAIMING DRONE EMAILS ARE TOP SECRET: ACLU'S FOIA

The NYT has a really helpful description of the emails to Hillary that intelligence agencies are claiming are Top Secret. It explained how several of the emails almost certainly couldn't derive from the intelligence the agency claimed they came from, such as this one on North Korea.

The fourth involved an email sent by Kurt M. Campbell, the assistant secretary of state for Asian affairs, shortly after a North Korean ballistic missile test in July 2009. The email has not yet been made public, even in redacted form, but the State Department has challenged an assertion from the National Geospatial-Intelligence Agency, which gathers data through satellite images, that the email included information that came from a highly classified program.

In a letter this past Dec. 15 to Senator Bob Corker, the Tennessee Republican who is chairman of the Senate Foreign Relations Committee, a State Department official said that the information could not have been based on N.G.A.'s intelligence because Mr. Campbell did not receive any classified intelligence briefings for what was a new job for him until a few days after the North Korean test.

I believe the NGA was dawdling on signing a sworn declaration about this email, unlike the CIA (whose Martha Lutz has signed her name to

many a wacky claim).

Unsurprisingly, the NYT reports that the bulk of the emails in question pertain to the drone program, specifically in Pakistan.

The Obama administration's decision to keep most internal discussions about that program – including all information about C.I.A. drone strikes in Pakistan – classified at the “top secret” level has now become a political liability for Mrs. Clinton's presidential campaign.

[snip]

Several officials said that at least one of the emails contained oblique references to C.I.A. operatives. One of the messages has been given a designation of “HCS-0” – indicating that the information was derived from human intelligence sources – a detail that was first reported by Fox News. The officials said that none of the emails mention specific names of C.I.A. officers or the spy agency's sources.

The government officials said that discussions in an email thread about a New York Times article – the officials did not say which article – contained sensitive information about the intelligence surrounding the C.I.A.'s drone activities, particularly in Pakistan.

The officials said that at least one of the 22 emails came from Richard C. Holbrooke, who as the administration's special envoy for Afghanistan and Pakistan would have been intimately involved in dealing with the ramifications of drone strikes. Mr. Holbrooke died in December 2010.

Reading these passages and the article in general made me realize something: The reason

the CIA is insisting these are classified is almost certainly because of the ACLU's two FOIAs for drone information. In the Awlaki-focused one, the ACLU (and NYT) succeeded in arguing that past public statements from people like Leon Panetta constituted a waiver of the classification of the CIA's involvement in the program. Any public dissemination of other official Administration figures discussing the drone program would provide ACLU another opportunity to go to the judges in these cases and demand further disclosure about CIA's involvement in the drone program.

Over the years, the Obama Administration has gone to great lengths to defeat the ACLU in its various FOIAs, from having National Security Advisor Jim Jones get involved in the torture FOIA to delaying congressional oversight into the Awlaki killing. Here, it appears they're even willing to damage Hillary's campaign to serve as the inheritor to Obama's legacy to thwart the ACLU.

WHAT AGENCY IS CLAIMING HILLARY RECEIVED SAP EMAILS?

The political world is a-twitter over the latest in the Hillary email scandal, Fox News' report that there were emails sent to Hillary classified at the Special Access Program level. To Fox's credit, Catherine Herridge liberated the letter itself.

To date, I have received two sworn declarations from one IC element. These declarations cover several dozen emails containing classified information determined by the IC element to be at the CONFIDENTIAL, SECRET, and TOP

SECRET/SAP levels. According to the declarant, these documents contain information derived from classified IC element sources. Due to the presence of TOP SECRET/SAP information, I provided these declarations under separate cover to the Intelligence oversight committees and the Senate and House leadership.

Note, the letter makes clear that those reporting Hillary had two SAP emails may not be correct: Charles McCullough's letter doesn't say how many emails were SAP and how many were CONFIDENTIAL. And the letter is conveniently written in a form that can be shared with the press without key information that would allow us to test the claims made in it.

For example, one critical detail in assessing claims about classification pertains to which IC element claims Hillary received SAP email.

That's relevant because some agencies have more credibility in their classification claims than others. If this is CIA making the claim, for example, we should assume it's bogus, because CIA – and its Chief of Litigation Support, Martha Lutz – routinely makes bogus claims.

I described, for example, how Lutz shamelessly claimed documents dating to 1987 on dialing a rotary phone were appropriately retroactively classified SECRET after 2006 to back the only piece of evidence admitted at trial that Jeffrey Sterling mishandled classified information.

Martha Lutz, the CIA's Chief of Litigation Support and the bane of anyone who has FOIAed the CIA in the last decade, was on the stand, a tiny woman with a beehive hairdo and a remarkably robust voice. After having Lutz lay out the Executive Orders that have governed classified information in the last two decades and what various designations mean, the government

introduced four documents into evidence – three under the silent witness rule – and showed them to Lutz.

“When originally classified were these documents properly classified as secret,” the prosecution asked of the three documents.

“They weren’t,” Lutz responded.

“But they are now properly classified secret?”

“Yes,” Lutz answered.

[snip]

[T]he defense explained a bit about what these documents were. Edward MacMahon made it clear the date on the documents was February 1987 – a point which Lutz apparently missed. MacMahon then revealed that the documents explained how to use rotary phones when a CIA officer is out of the office.

That’s a big part of why Sterling is sitting in prison right now: because Lutz was willing to claim, under oath, that a 28-year old document on dialing rotary phones still (rather, newly) needed to be protected as SECRET.

But it’s not just this one case: pretty much everyone who has FOIAed CIA in recent years has a Martha Lutz story, because the agency has such a consistent history of making transparently false classification claims to hide CIA’s activities, even those that are widely known.

Just as an example, the torture program was (and possibly the still-classified aspects continue to be) a SAP. Keep that – and the many publicly known details, such as that Alfreda Bikowsky was central to some of the biggest abuses about torture, that CIA managed to bury in the Torture Report not because they’re secret but because having them officially discussed puts CIA at legal risk – in mind as everyone wags around

that SAP label. If CIA is making the SAP claim, the claim itself should be suspect, because there's such an extensive history of CIA making such claims when they were transparently bogus. Earlier in this FOIA, CIA claimed that Hillary's staffers could only learn about the Pakistani drone program from classified information, when you're actually better off learning about such things from Pakistani and NGO reporting; in the end McCullough sided with CIA, not because it made sense, but because that's how classification works.

I'm on the record as thinking Hillary's home brew server was an abuse of power and really stupid to boot. But I'm also really hesitant to make blind claims from unnamed Original Classification Authorities on faith, because the record shows that those claims are often completely bogus.

Hillary receiving a SAP email may say terrible things about her aides. Alternately, it may reinforce the case that the CIA is an out-of-control agency that makes ridiculous claims of secrecy to avoid accountability. We don't know which of those things this story supports yet.

Update: Told ya.

The Central Intelligence Agency is the agency that provided the declarations about the classified programs, another U.S. official familiar with the situation told POLITICO Wednesday.

The official, who spoke on condition of anonymity, said some or all of the emails deemed to implicate "special access programs" related to U.S. drone strikes. Those who sent the emails were not involved in directing or approving the strikes, but responded to the fallout from them, the official said.

The information in the emails "was not obtained through a classified product, but is considered 'per se' classified" because it pertains to drones, the

official added. The U.S. treats drone operations conducted by the CIA as classified, even though in a 2012 internet chat Presidential Barack Obama acknowledged U.S.-directed drone strikes in Pakistan.

The source noted that the intelligence community considers information about classified operations to be classified even if it appears in news reports or is apparent to eyewitnesses on the ground.

Update: I meant to link this earlier. It's a complaint submitted to IS00 from Katherine Hawkins detailing all the things CIA kept classified in the Torture Report that aren't, or were improperly classified.