

ANWAR AL-AWLAKI ASSASSINATION: DOUBLE SECRET ILLEGITIMACY

Frances Fragos Townsend is distraught that the media are not using the government's euphemism for the Anwar al-Awlaki assassination.

Awalaki op was NOT assassination; nor a targeted killing; nor a hit job as media keeps describing! Was a legal capture or kill of AQ enemy.

My favorite bit is how that "capture or kill" rolls right into her tweet, a false foundation stone for the shaky logic that there's a legal distinction between an operation in which there was never any consideration of capture, and an assassination.

But her panic that the media is not using the preferred semantics to describe the Awlaki assassination reflects a seemingly growing concern among all those who have participated in or signed off on this assassination about its perceived legitimacy.

In addition to Townsend, you've got DiFi and Saxby Chambliss releasing a joint statement invoking the magic words, "imminent threat," "recruiting radicals," and even leaking the state secret that Yemen cooperated with us on it. You've got Mike Rogers asserting Awlaki, "actively planned and sought ways to kill Americans." All of these people who have been briefed and presumably (as members of the Gang of Four) personally signed off on the assassination, citing details that might support the legality of the killing.

In his effort to claim the assassination was just, Jack Goldsmith gets at part of the problem. He makes the expected arguments about

what a careful process the Obama Administration uses before approving an assassination:

- Citing Judge John Bates' punt to the political branches on the issue, all the while claiming what Bates referred to as an "assassination" is not one
- Arguing that killing people outside of an area against which we've declared war is legal "because the other country consents to them or is unable or unwilling to check the terrorist threat, thereby bringing America's right to self-defense into play"
- Asserting that Administration strikes "distinguish civilians from attack and use only proportionate force"

But, as Goldsmith admits,

Such caution, however, does not guarantee legitimacy at home or abroad.

And while his argument self-destructs precisely where he invokes the Administration's claims over any real proof, Goldsmith at least implicitly admits the reason why having Townsend and Chambliss and DiFi and Rogers and himself assuring us this attack was legal is not enough to make it legitimate: secrecy.

[T]he Obama administration has gone to unusual lengths, **consistent with the need to protect intelligence**, to explain the basis for and limits on its actions.

[snip]

It can perhaps release a bit more information about the basis for its targeted strikes. It is doubtful, however, that more transparency or more elaborate legal arguments will change many minds, since the goal of drone critics is to end their use altogether (outside of Afghanistan). [my emphasis]

As Goldsmith's own rationalization for the legality of this attack makes clear, the attack is only legal if Yemen consents OR is unable OR unwilling (leaving aside the question of imminence, which at least DiFi and Chambliss were honest enough to mention). So too must the attack distinguish between a civilian—perhaps someone engaging in First Amendment protected speech, however loathsome—and someone who is truly operational.

And while the government may well have been able to prove all those things with Awlaki (though probably not the imminence bit Goldsmith ignores), it chose not to.

It had the opportunity to do so, and chose not to avail itself of that opportunity.

The Administration very specifically and deliberately told a court that precisely the things needed to prove the operation was legal—whether Yemen was cooperating and precisely what Awlaki had done to amount to operational activity, not to mention what the CIA's role in this assassination was—were state secrets. Particularly given the growing number of times (with Reynolds, Arar, Horn, al-Haramain, and Jeppesen) when the government has demonstrably invoked state secrets to hide illegal activity, the fact that the government has claimed precisely these critical details to be secret in this case only make its claims the killing was legal that much more dubious.

Critical thinkers must assume, given the government's use of state secrets in recent

years, that it invoked state secrets precisely because its legal case was suspect, at best.

Aside from John Brennan spreading state secrets, the Administration has tried to sustain the fiction that these details are secret in on the record statements, resulting in this kind of buffoonery.

Jake Tapper: You said that Awlaki was demonstrably and provably involved in operations. Do you plan on demonstrating –

MR. CARNEY: I should step back. He is clearly – I mean “provably” may be a legal term. I think it has been well established, and it has certainly been the position of this administration and the previous administration that he is a leader in – was a leader in AQAP; that AQAP was a definite threat, was operational, planned and carried out terrorist attacks that, fortunately, did not succeed, but were extremely serious – including the ones specifically that I mentioned, in terms of the would-be Christmas Day bombing in 2009 and the attempt to bomb numerous cargo planes headed for the United States. And he was obviously also an active recruiter of al Qaeda terrorists. So I don’t think anybody in the field would dispute any of those assertions.

Q You don’t think anybody else in the government would dispute that?

MR. CARNEY: Well, I wouldn’t know of any credible terrorist expert who would dispute the fact that he was a leader in al Qaeda in the Arabian Peninsula, and that he was operationally involved in terrorist attacks against American interests and citizens.

Q Do you plan on bringing before the public any proof of these charges?

MR. CARNEY: Again, the question makes us – has embedded within it assumptions about the circumstances of his death that I'm just not going to address.

Q How on earth does it have – I really don't understand. How does – he's dead. You are asserting that he had operational control of the cargo plot and the Abdulmutallab plot. He's now dead. Can you tell us, or the American people – or has a judge been shown –

MR. CARNEY: Well, again, Jake, I'm not going to go any further than what I've said about the circumstances of his death and –

Q I don't even understand how they're tied.

MR. CARNEY: – the case against him, which, again, you're linking. And I think that –

Q You said that he was responsible for these things.

MR. CARNEY: Yes, but again –

Q Is there going to be any evidence presented?

MR. CARNEY: I don't have anything for you on that.

Q Do you not see at all – does the administration not see at all how a President asserting that he has the right to kill an American citizen without due process, and that he's not going to even explain why he thinks he has that right is troublesome to some people?

MR. CARNEY: I wasn't aware of any of those things that you said actually happening. And again, I'm not going to address the circumstances of Awlaki's

death. I think, again, it is an important fact that this terrorist, who was actively plotting – had plotted in the past, and was actively plotting to attack Americans and American interests, is dead. But I’m not going to – from any angle – discuss the circumstances of his death.

Obama, too, tried to sustain the fiction that the government (aside from John Brennan) can’t share these details, though his discussion of cooperation with Yemen seems to violate the terms of Robert Gates’ state secrets invocation.

Michael Smerconish: Now comes the news that we’ve taken out Anwar al-Awlaki.

Did you give that order?

Obama: **I can’t talk about the operational details**, Michael. This is something that we had been working with the Yemeni government on for quite some time. There’s been significant cooperation at the intelligence levels with a lot of countries in the region. We are very pleased that Mr. Awlaki is no longer going to be in a position to directly threaten the United States homeland as well as our allies around the world. This is the guy who was at the forefront of ordering the Christmas Day bomber to carry out his plan. They had put bombs in cartridges, printer cartridges, that were set to go off in US cargo planes and had it not been for outstanding intelligence work and cooperation with some of our partners that could have been a catastrophe. So this was a guy who was operationally involved in trying to kill Americans and the fact that he is now no longer around to initiate the kind of propaganda that also was recruiting people all around the world to [aid?] that murderous cause is I think very good for American security. [my emphasis]

Not only Obama's elision between Awlaki and the "they" who tried to use cartridges to bomb planes discredit his claim, so does the proliferation of executive branch officials providing these details behind the veil of anonymity. That anonymity serves not only to hide the Administration's obvious selective prosecution of just some leaks, but also deploys reporters' reinforcement of the secrecy system as stand-in for any real scrutiny of the case.

You know, just the way the government used secrecy to lie us into the Iraq War?

The whole charade is made the more ridiculous given the counter-example of the Osama bin Laden killing. Sure, in that case, too, John Brennan led the brigade of boastful blabberers, both on and off the record. In that case, revealing the secrets of an uncontroversial but operationally more sensitive killing have had real repercussions for our relations with Pakistan (though perhaps useful ones, in that it forces us to deal with their duplicity) and may hurt the SEALs' effectiveness. By contrast, the Administration is trying much harder to pretend it's not leaking the details of the Awlaki death, in spite of the fact that Yemen leaked the details even before we did (President Saleh has obvious reasons to want to own this operation).

I guess it's a lot easier to transparently leak real details when only a very few people challenge the legal legitimacy of an operation, even if doing so does more damage to national security.

And finally there's the other lesson gleaned from comparing this to the OBL killing. I may not approve of the way they've gone about killing Anwar al-Awlaki. But a lot of voters do. And if the Administration were able to stop this charade of secrecy, then it could more loudly boast that Obama has a much bigger dick than even Dick Cheney (or whatever it is that killing terrorists proves). But because they've invested in this secrecy charade rather than making a

public case for the legitimacy of this killing, they can't even get maximum political benefit from it, at a time when Obama badly needs some political wins. With the OBL killing, the White House fostered a narrative of Obama making the hard decision; here, Obama makes a weaselly non-answer about that decision to preserve the charade of secrecy.

Again, the legitimacy problems of the Awlaki killing are either self-inflicted (in that the Administration has solid proof but has created unnecessary legal reasons why it won't share that proof) or there's a real reason why they're engaging in this secrecy charade: because they don't have the proof.

This Administration has long reveled in the power their asymmetric invocation of secrecy grants them. But in this instance, that asymmetry works against them, because every effort they've made to defend the Awlaki assassination has instead undermined its legitimacy.

Update: I originally asked why the fourth Gang of Four member, who I misstated was Silvestre Reyes, hadn't commented. That is now Dutch Ruppersberger. He has made public statements (including stating that Samir Khan was "collateral damage"), but not issued a formal press release.