ANWAR AL-AWLAKI: TWO DAYS FROM FINALIZED 302 TO OLC AUTHORIZATION FOR EXECUTION

Because of the delay in writing up the FBI record of Umar Farouk Abdulmutallab's interrogations, the OLC memo authorizing Anwar al-Awlaki's killing was written just two days after the FBI memo it was partly based on.

TARGETED KILLING

September 17, 2001: George Bush signs Memorandum of Notification (henceforth, Gloves Come Off MON) authorizing a range of counterterrorism techniques, including torture and targeted killing.

September 18, 2001: Congress passes the Authorization to Use Military Force.

November 3, 2002: US citizen Kamal Derwish killed in drone purportedly targeting Abu Ali al-Harithi.

Late 2008: Ruben Shumpert reported killed in Somalia.

June 24, 2009: Leon Panetta gets briefed on assassination squad program.

June 26, 2009: HPSCI passes a funding authorization report expanding the Gang of Eight briefings.

July 8, 2009: The Administration responds with an insulting appeal to a "fundamental compact" between Congress and the President on intelligence matters.

July 8, 2009: Silvestre Reyes announces CIA lied to Congress.

October 26, 2009: British High Court first orders British government to release language on Binyam Mohamed's treatment.

October 28, 2009: FBI kills Imam Luqman Asmeen Abdullah during Dearborn, MI arrest raid.

October 29, 2009: Hearing on declassifying mention of Gloves Come Off MON before Judge Alvin Hellerstein; in it, Hellerstein reveals NSA James Jones has submitted declaration to keep mention of MON secret.

November 5, 2009: Nidal Hasan attacks Fort Hood, killing 13.

December 24, 2009: JSOC tries but fails to hit Anwar al-Awlaki. On that day, the IC did not yet believe him to be operational.

December 25, 2009: With Umar Farouk Abdulmutallab attack, FBI develops full understanding of Awlaki's operational goals.

January 2, 2010: In conversation with David Petraeus, Yemeni President Ali Abdullah Saleh speaks as if Awlaki, whom he refers to as a cleric, not an AQAP member, was a designated target of December 24 attack.

January 13, 2010: ACLU FOIAs for information on drone killing.

6 months before July 16, 2010 memo: First David Barron drone killing memo.

January 18, 2010: DOJ prepares talking points for Eric Holder to brief Obama on targeted killing.

January 19, 2010: Eric Holder meeting with Obama.

January 19, 2010: State adds AQAP and Nasir al-Wuhayshi and Said al-Shihri — but not Anwar al-Awlaki — to FTO.

January 25, February 15, 2010: According to much

later decrypted emails British Airways Engineer Rajib Karim and Awlaki discuss attacks on British Airways.

January 26, 2010: Dana Priest reports Awlaki was already on JSOC targeted killing list, CIA considering adding him.

January 28, 2010: AUSA Sean Lane asks Hellerstein for two more weeks (until February 12) to comply with order in torture FOIA case.

January 29, 2010: DOD denies ACLU's request for expedited processing/waiver. Abdulmutallab starts cooperating with FBI.

February 2010: Date on one of two OLC memos shared with Intelligence Committees in February 2013.

February 1, 2010: FBI informs Senate Intelligence Committee Abdulmutallab now cooperating.

February 3, 2010: Dennis Blair acknowledges drone program in Congress, explaining in part "We target them for taking action that threatens Americans or has resulted in it."

February 5, 2010: Umar Farouk Abdulmutallab confession still consistent with "Abu Tarak" ordering plot, not Awlaki.

February 9, 2010: Potential Adbulmutallab confirmation Awlaki picked the target.

February 9, 2010: ODAG sends OLC two emails regarding language in January 18 talking points for Holder.

February 10, 2010: British Government releases language revealing they warned that Binyam Mohamed's pre-OLC memo treatment might constitute torture.

February 17, 2010: Lane asks Hellerstein to stay his order regarding the Gloves Come Off MON language until he decides the ACLU's motion to reconsider.

February 19, 2010: Second OLC memo authorizing

Awlaki kiling.

February 23, 2010: Abdulmutallab says he was not motivated by hatred of the US. This contradicts with his statement at sentencing.

March 1-3, 2010: Hilton submits a new declaration regarding the Gloves Come Off MON language, claiming new factual developments in the case; US Attorney Preet Bharara also submitted a letter urging Hellerstein to reconsider his ruling in light of the new facts.

March 9, 2010: CIA issues Glomar in Drone FOIA.

March 25, 2010: Harold Koh discusses targeted killing, implicitly discussing Awlaki.

March 29-30, 2010: Emails between OLC and attorneys from various agencies on potential statement on legal basis against US citizens in certain circumstances.

April 2010: Anwar al-Awlaki put on CIA kill list.

April 9, 2010: Govt gets extension in Drone FOIA to May 6.

April 16, 2010: Abdulmutallab's interrogators ask about Awlaki's martyrdom.

April 29, 2010: End date of earlier March 29 email chain on targeted killing.

Around June 2010: OLC completes Awlaki memo.

June 1, 2010: ACLU files amended complaint in Drone FOIA adding CIA.

June 11, 2010: NYT's Scott Shane FOIAs DOJ OLC for memos on targeted killings.

June 24, 2010: David Barron announces his departure.

July 2010: According to recent reports, the date on the Barron/Lederman OLC memo.

July 20, 2010: Marty Lederman announces his departure.

July 16, 2010: Treasury puts Awlaki on Specially Designated Terrorist list; drone memo written.

August 2010: Stuart Delery becomes Senior Counselor to Holder.

August 27, 2010: Osama bin Laden questions whether Awlaki should take on greater leadership role without first being tested in battle.

August 30, 2010: Nasser al-Awlaki sues to prevent government from killing Anwar unless he presented imminent threat.

September 13, 2010: Abdulmutallab fires his lawyers, tries to plead guilty.

September 14, 2010: DOJ considers, then decides against, charging Anwar al-Awlaki

October 2, 2010: Hellerstein orders DOJ to release Gloves Come Off MON language.

October 10-11, 2010: Emails between OLC, Attorney General's Office, and other National Security Lawyers on targeting US citizens.

October 16, 2010: Jabir al-Fayfi returns to Saudi Arabia and provides details of toner cartridge plot, naming others as more central leaders in plot.

October 21, 2010: Govt requests delay on FOIA discussion about MON itself pending decision on MON language.

November 8, 2010: Hearing in Nasser al-Awlaki suit on targeted killing.

December 7, 2010: Judge John Bates dismisses Awlaki suit.

February 2011: Ron Wyden asks DNI Clapper for information on Awlaki targeting.

March 24, 29, 2011: Department of State tries to get Awlaki to come to Embassy in Sanaa with ploy involving passport.

April 2011: Wyden calls Eric Holder and asks that OLC memos be provided to Congress.

May 5, 2011: US drone strike barely misses Awlaki

May 18-20, 2011: Emails between NSC, DOJ, and Legislative Affairs on draft legal analysis pertaining to lethal force against US citizen; one version includes Civil division; most include National Security Council.

May 2011: DOJ provides some information to Wyden, but doesn't answer his questions.

June 23, 2011: Memo from Mike Mullen to National Security Legal Advisor on effect of US citizenship on targeting enemy belligerents.

September 9, 2011: Judge Rosemary Collyer grants CIA summary judgment in Drone FOIA.

September 16, 2011: John Brennan speech lays out new standard for imminence.

September 23, 2011: Government moves to protect something in Abdulmutallab case apparently tied to Awlaki.

September 30, 2011: Anwar al-Awlaki and Samir Khan killed in drone strike.

October 4, 2011: During jury selection, Abdulmutallab yells out, "Anwar is alive," suggesting he had been told Awlaki had been killed.

October 5, 2011: Chuck Grassley requests targeted killing memo.

October 7, 2011: NYT's Charlie Savage FOIAs OLC for memos on targeting killings.

October 8, 2011: Savage publishes detailed description of June 2010 OLC memo.

October 8, October 18, October 20-25, October 30-November 4, November 6-10, 2011: OLC email discussions about lethal force against US citizen, also including other agencies.

October 11, 2011: In opening argument of Abdulmutallab trial, DOJ claims "Abu Tarak" as the director of Abdulmutallab's attack.

October 12, 2011: Abdulmutallab pleads guilty.

October 14, 2011: Abdulrahman al-Awlaki killed in JSOC drone strike.

October 19, 2011: ACLU FOIAs Anwar al-Awlaki OLC memo, underlying evidence supporting it, and information relating to Samir Khan and Abdullah al-Awalaki; group of OLC personnel meet in Viginia Seitz' office on response, ostensibly to just NYT.

October 27, 2011: OLC denies both NYT requests under FOIA exemptions (b)(1), (b)(3), and (b)(5), and, in response to Shane's request, also notes that with regards to other agencies, "neither confirms nor denies the existence of the documents" in the request.

October 27, 2011: DOJ Office of Information Policy grants ACLU's request for expedited processing but determines the request fell within "unusual circumstances" so it could not meet the statutory deadline.

October 31, 2011: DOD denies ACLU's request for expedited processing and also claimed "unusual circumstances."

November 2011, unknown date: Situation Room meeting at which Principals decide to pursue a "half monty" strategy of limited release of information on Awlaki.

November 2, 2011: State sends two emails to AG, OLC, and various NatSec agencies on draft language on targeted killing.

November 3, 2011: Arbitrary end date DOJ's Office of Information Policy placed on FOIA request for targeted killing documents.

November 4, 2011: NYT appeals its denial.

November 7, 2011: USSOCOM denies ACLU's request for expedited processing and determined the request fell within "unusual circumstances."

November 8, 2011: Stuart Delery drafts white paper.

November 8, 2011: In his opening statement for a DOJ Oversight hearing, Pat Leahy complains the Senate Judiciary Committee had not been given "the legal justification underlying drone strikes against an American citizen overseas."

November 9, 2011: ACLU appeals summary judgment in Drone FOIA.

November 14, 2011: OLC denies ACLU's request under FOIA exemptions (b)(1), (b)(3), and (b)(5).

November 17, 2011: CIA denies ACLU's FOIA "pursuant to FOIA exemptions (b)(1) and (b)(3)" and claims that the "fact of the existence or nonexistence of requested records is currently and properly classified."

December 27, 2011: DOD informs ACLU it could not process the request within statutory timeframe.

January 18, 2012: CIA informs ACLU it would be unable to respond to ACLU's administrative appeal within statutory timeframe.

February 1, 2012: ACLU sues on Anwar al-Awlaki et al FOIA.

February 8, 2012: Ron Wyden follows up on his earlier requests for information on the targeted killing memo with Eric Holder.

February 10, 2012: In sentencing memo for Abdulmutallab, government releases narrative of Abdulmutallab's confession.

February 11, 21, 2012: Email discussions about Jeh Johnson's February 22, 2012 speech.

February 22, 2012: Jeh Johnson speech on targeted killing.

February 27, March 1, 2012: DOD emails discussing content of Eric Holder's March 5, 2012 speech.

March 2012: Stuart Delery becomes PDAAG and Acting AAG at Civil Division.

March 5, 2012: Eric Holder speech lays out

claimed basis for Awlaki killing.

March 7, 2012: Tom Graves (R-GA) asks Robert Mueller whether Eric Holder's criteria for the targeted killing of Americans applies in the US; Mueller replies he'd have to ask DOJ.

March 8, 2012: Pat Leahy renews his request for the OLC memo at DOJ appropriations hearing.

March 9, 2012: 2nd Circuit hearing on Gloves Come Off MON

March 30, 2012: AUSA Sarah Normand asks ACLU to exclude draft legal analyses, email, and other correspondence from TK FOIA

April 3, 2012: ACLU accepts limit on draft legal analyses, but not email and internal communication.

April 4, 2012: Stephen Preston speech lays out CIA's legal authorization to engage in targeted killing.

April 9, 2012: Govt requests 10-day extension on TK FOIA.

April 23, 2012: Govt requests 28-day extension on TK FOIA.

April 30, 2012: John Brennan speech admits we use drones to kill terrorists.

May 21, 2012: 2nd Circuit permits govt to keep mention of Gloves Come Off MON secret; In phone conference, Judge Colleen McMahon extends deadline to June 20, 2012.

June 7, 2012: After Jerry Nadler requests the memo, Eric Holder commits to providing the House Judiciary a briefing—but not the OLC memo—within a month.

June 12, 2012: Pat Leahy renews his request for the OLC memo at DOJ oversight hearing.

June 20, 2012: The government responds to NYT and ACLU lawsuits for memo and other documents related to targeted killing (though several of the declarations supporting that motion,

including the one from DOJ OIP, were not submitted until June 21).

June 22, 2012: According to House Judiciary Committee letter, the date the 7-month old white paper provided to Committee (Dianne Feinstein says both Senate Judiciary and Intelligence Committees received the memo in June 2012 too).

June 27, 2012: In Questions for the Record following a June 7 hearing, Jerry Nadler notes that DOJ has sought dismissal of court challenges to targeted killing by claiming "the appropriate check on executive branch conduct here is the Congress and that information is being shared with Congress to make that check a meaningful one," but "we have yet to get any response" to "several requests" for the OLC memo authorizing targeted killing. He also renews his request for the briefing Holder had promised.

July 18, 2012: ACLU, CCR, and Khan and Awlaki families file wrongful death suit.

July 19, 2012: Both Pat Leahy and Chuck Grassley complain about past unanswered requests for OLC memo. (Grassley prepared an amendment as well, but withdrew it in favor of Cornyn's.) Leahy (but not Grassley) votes to table John Cornyn amendment to require Administration to release the memo.

August 10, 2012: Pat Leahy claims SJC received the white paper in response to his (and Grassley's) initial requests from the previous year: "the Senators has been provided with a white paper we received back as an initial part of the request I made of this administration."

October 18, 2012: Abdulmutallab prosecution team wins AG recognition for balancing intelligence collection and prosecution.

December 4, 2012: Jerry Nadler, John Conyers, and Bobby Scott ask for finalized white paper, all opinions on broader drone program (or at least a briefing), including signature strikes,

an update on the drone rule book, and public release of the white paper.

January 14, 2013: Wyden writes John Brennan letter in anticipation of his confirmation hearing, renewing his request for targeted killing memos.

January 25, 2012: Rand Paul asks John Brennan if he'll release past and future OLC memos on targeting Americans.

February 4, 2013: 11 Senators ask for any and all memos authorizing the killing of American citizens, hinting at filibuster of national security nominees.

February 7, 2013: On morning of Brennan confirmation hearing, Administration provides two OLC memos, withholding 7-8 more.

February 7, 2013: Pat Leahy and Chuck Grassley ask that SJC be able to get the memos that SSCI had just gotten.

February 7, 2013: In John Brennan's confirmation hearing, Dianne Feinstein and Ron Wyden reveal there are still outstanding memos pertaining to killing Americans, and renew their demand for those memos.

February 8, 2013: Bob Goodlatte, Trent Franks, and James Sensenbrenner join their Democratic colleagues to renew the December 4, 2012 request.

February 13, 2013: In statement on targeted killings oversight, DiFi describes writing 3 previous letters to the Administration asking for targeted killing memos.

February 20, 2013: Paul sends **third letter**, repeating his question about whether the President can have American killed inside the US.

February 27, 2013: At hearing on targeted killing of Americans, HJC Chair Bob Goodlatte — and several other members of the Committee — renews request for OLC memos.

March 11, 2013: Barbara Lee and 7 other progressives **ask Obama to release** "in an unclassified form, the full legal basis of executive branch claims" about targeted killing, as well as the "architecture" of the drone program generally.

April 10, 2013: Bob Goodlatte and John Conyers **send Obama a letter** threatening a subpoena if they don't get to see the drone killing memos.

March 27, 2014: Alan Grayson holds hearing with drone victim, calls for more transparency over decision making.

April 4, 2014: Judge throws out wrongful death suit from Awlaki and Khan families.

April 21, 2014: 2nd Circuit orders Administration to release redacted version of OLC memo to ACLU and NYT.

May 5, 2014: Rand Paul issues veto threat for David Barron's confirmation unless Administration releases OLC memo (already ordered for release by 2nd Circuit).

May 20, 2014: The Most Transparent Administration Evah™ announces it will release (what is certain to be a highly redacted version of) the OLC memo.

MIKE ROGERS WANTED TO DRONE KILL AN AMERICAN CITIZEN FOR TRAINING WITH AL QAEDA?

There has been some good commentary on NYT's story on Administration debates over killing

Mohanad Mahmoud al-Farekh, the American citizen who was captured and charged in federal court on April 2, after the Administration considered but then decided against drone-killing him. Both David Cole and Brett Max Kaufman ask raise some important points and questions. Of particular note, they ask what the fuck Mike Rogers was doing pushing DOD and CIA to kill a US citizen.

Yet neither of those pieces gets to something I'm puzzling over. Al-Farekh was charged in EDNY (Loretta Lynch's district), but he was only charged with conspiracy to commit material support for terrorism, a charge that carries a 15 year maximum sentence. Basically, he is accused of conspiring with Ferid Imam who in turn trained Najibullah Zazi and his co-conspirators for their planned 2009 attack on the NY Subway system.

> In approximately 2007, Farekh, an individual named Ferid Imam and a third co-conspirator departed Canada for Pakistan with the intention of fighting against American forces. They did not inform their families of their plan before departing, but called a friend in Canada upon arrival to let him know that he should not expect to hear from them again because they intended to become martyrs. According to public testimony in previous criminal trials in the Eastern District of New York, in approximately September 2008, Ferid Imam provided weapons and other military-type training at an al-Qaeda training camp in Pakistan to three individuals — Najibullah Zazi, Zarein Ahmedzay and Adis Medunjanin — who intended to return to the United States to conduct a suicide attack on the New York City subway system. Zazi and Ahmedzay pleaded guilty pursuant to cooperation agreements and have yet to be sentenced; Medunjanin was convicted after trial and sentenced to life imprisonment. Ferid Imam has also been indicted for his role

> in the plot.

But the evidence laid out in the complaint is rather thin, basically amounting to the second-hand reports that al-Farekh, like Zazi and his friends, traveled to Pakistan for terrorist training.

Were we really going to kill this dude with a drone because he got terrorist training in Pakistan? That's it?

Now, it's quite possible the government is just charging him with the crimes the evidence for which they can introduce in a trial — though note that the government got a FISC warrant to collect on him (though it's possible this is drone-based collection, and so sensitive enough they wouldn't want to use it at trial).

> Drones spotted him several times in the early months of 2013, and spy agencies used a warrant issued by the Federal Intelligence Surveillance Court to monitor his communications.

It's equally possible that al-Farekh will be indicted on further charges, a more central role in plotting attacks out of the tribal lands of Pakistan. Similarly, it's possible that al-Farekh's High Value Interrogation Group interrogation — reported as well in this WaPo story — provided valuable intelligence on other militants that will have nothing to do with his own trial.

Still, both the earlier WaPo story (written in part by Adam Goldman, who wrote the book on the Zazi case) and the NYT story hint that the claims made about al-Farekh's activities in 2013 have proven to be overblown. The WaPo doesn't provide much detail.

> Officials said there were questions about how prominent a role Farekh played in al-Qaeda.

The NYT provides more.

> But the Justice Department, particularly Attorney General Eric H. Holder Jr., was skeptical of the intelligence dossier on Mr. Farekh, questioning whether he posed an imminent threat to the United States and whether he was as significant a player in Al Qaeda as the Pentagon and the C.I.A. described.
>
> [snip]
>
> Once in Pakistan, Mr. Farekh appears to have worked his way up the ranks of Al Qaeda, his ascent aided by marrying the daughter of a top Qaeda leader.
>
> American officials said he became one of the terrorist network's planners for operations outside Pakistan, a position that included work on the production and distribution of roadside bombs used against American troops in Afghanistan.
>
> Some published reports have said that Mr. Farekh held the third-highest position in Al Qaeda, but Americans officials said the reports were exaggerated.
>
> His level in the Qaeda hierarchy remains a matter of some dispute. Several American officials said that the criminal complaint against him underplayed his significance inside the terrorist group, but that the complaint — based on the testimony of several cooperating witnesses — was based only on what federal prosecutors believed they could prove during a trial.

This, then — along with the explicit connection with the Awlaki case, based as it was, at least at first, on Umar Farouk Abdulmutallab's interrogation and all the reasons to doubt it — seems the big takeaway. We almost killed this dude, but now all we can prove is that he

trained in Pakistan.

Ironically, Philip Mudd argues for the NYT that we can't capture these people because we'd have to rely on our intelligence partners.

> But many counterterrorism specialists say capturing terrorism suspects often hinges on unreliable allies. "It's a gamble to rely on a partner service to pick up the target," said Philip Mudd, a former senior F.B.I. and C.I.A. official.

Of course, these are often the same people we rely on for targeting intelligence, including against both Awlaki and al-Farekh. What does it say that we'd believe targeting information from allies, but not trust them to help us arrest the guys they apparently implicate?

Whatever that says, the story thus far (it could change) is that al-Farekh was almost killed on inadequate evidence because CIA and DOD were champing at the bit. That ought to be the big takeaway.

JAMES CLAPPER ADMITS PHONE DRAGNET DATA RETENTION IS ABOUT DISCERNING PATTERNS

In the Q&A portion of a James Clapper chat at Council on Foreign Relations yesterday, he was asked about the phone dragnet and Section 215 (this starts after 48:00).

He made news for the way he warned Congress that

if they take away Section 215 (he didn't specify whether he was talking about just the phone dragnet or Section 215 and the roughly 175 other orders authorized under it) and something untoward happens as a result, they better be prepared to take some of the blame.

> Q: In recent days the government reauthorized the telephone metadata collection program through June 1st, when there's the Sunset date, obviously, of Section 215 of the PATRIOT Act. What do you want to see happen after that?
>
> Clapper: Well, what we have agreed to, Attorney General Eric Holder and I, last September, signed a letter saying that we supported the notion of moving the retention of the data to providers in a bill that was – actually came out of the Senate from Senator Leahy, so we signed up to that. I think that's the only thing that's realistic if we're going to have this at all. In the end, the Congress giveth and the Congress taketh away. So if the Congress in its wisdom decides that the candle isn't worth the flame, the juice isn't worth the squeeze, whatever metaphor you want to use, that's fine. And the Intelligence Community will do all we can within the law to do what we can to protect the country. But, I have to say that every time we lose another tool in our toolkit, you know? It raises the risk. And so if we have – if that tool is taken away from us, 215, and some untoward incident happens which could have been thwarted had we had it I just hope that everyone involved in that decision assumes responsibility. And it not be blamed if we have another failure exclusively on the intelligence community.

At one level, I'm absolutely sympathetic with Clapper's worries about getting blamed if

there's another attack (or something else untoward). In some cases (particularly in the aftermath of the 2009 Nidal Hasan and Umar Farouk Abdulmutallab attacks), politicians have raised hell about the Intelligence Community missing a potential attack. But that really did not happen after the Boston Marathon; contemporaneous polls even said most people accepted that you couldn't prevent every attack. Moreover, in that case, NSA — the entity running the phone dragnet — was excluded from more intensive Inspector General review, as NSA has repeatedly been in the past (including, to a significant extent, the 9/11 attack), even though it had collected data on one or both of the Tsarnaev brothers but not accessed it until after the attack. In other words, NSA tends not to be held responsible even when it is.

Clapper's fear-mongering has gotten most of the attention from that Q&A, even more than Clapper's admission elsewhere that "moderate" in Syria — he used scare quotes — means "anyone who's not affiliated w/I-S-I-L."

But on the phone dragnet, I found this a far more intriguing exchange.

> Q: And just to be clear, with the private providers maintaining that data, do you feel you've lost an important tool?
>
> Clapper: Not necessarily. It will depend though, for one, retention period. I think, given the attitude today of the providers, they will probably do all they can to minimize the retention period. Which of course, from our standpoint, lessens the utility of the data, because you do need some — and we can prove this statistically — *you do need some historical data in order to, if you're gonna discern a pattern*. And again, 215 to me, is much like my fire insurance policy. You know, my house has never burned down but every year I buy fire insurance just in case.

In general, discussions about why the NSA needs 5 years of phone dragnet have used a sleeper argument: a suspect might have spoken to someone of interest 4 years ago, which would be an important connection to identify and pursue. But that's not what Clapper says here. They need years and years of our phone records not to find calls we might have made 5 years ago, but to "discern patterns."

Well, that changes things a bit, and may even suggest how they're actually using the phone dragnet.

While we know they have, at times, imputed some kind of meaning to the lengths of calls — for a while they believed calls under 2 minutes were especially suspicious until they realized calls to the pizza joint also tend to be under 2 minutes — there's another application where pattern analysis is even more important: matching burner phones. You need a certain volume of past calls to establish a pattern of a person's calls so as to be able to identify another unrelated handset that makes the same pattern of calls as the same person.

Connection chaining, not contact chaining.

Clapper's revelation that they need years of retention for pattern analysis, not for contact chaining, seems consistent with the language describing the chaining process under USA Freedom Act.

> (I) using the specific selection term that satisfies the standard required under subsection (b)(2)(C)(ii) as the basis for production; and
>
> (II) using call detail records with a direct connection to such specific selection term as the basis for production of a second set of call detail records;

That is, they'd be getting all the calls the target had made, as well as all the calls an

identifiable target's associate *or additional phone* had made.

And remember, one of the NSA's two greatest "successes" with the phone dragnet — when they found that Adis Medunjanin, whom they already knew to be associated with Najibullah Zazi, had a phone they hadn't known about — involves burner matching. That match took place at an important moment, too, when the NSA had turned off its automatic correlation process (which uses a dedicated database to identify the other known identities of a person in a chain), and when its queries were as closely controlled as they ever have been in the wake of the massive violations in 2009. At a time when they were running a bare bones phone dragnet, they were still doing burner matching, and considered that a success.

Now, let me be clear: matching the burner phones of real suspects is a reasonable use for a phone dragnet, though the government ought to provide more clarity about whether they're matching solely on call patterns or on patterns of handset use, including on the Internet. It'd also be nice if anyone caught in this fashion had some access to the accuracy claims the government has made and the basis used to make those accuracy claims (for one incarnation of the Hemisphere dragnet, DEA was claiming 94% accuracy, based of 10 years of data and, apparently, multiple providers). And this points to the importance of retaining FISC review of the targets, because people for whom there is not reasonable articulable suspicion of ties to terrorism ought to be able to use burner phones.

James Clapper's office has gone to great lengths to try to hide any mention of pattern analysis in declassified discussions of the phone dragnet. Apparently, Clapper doesn't think that detail needs to be classified anymore.

THE PRIVILEGES WAGING A "WAR" ON TERROR THEREBY ACCORDS AQAP

"Hey, William Shirer? It's J. Edgar here. I think you're disgusting for reporting from Nazi Germany."

Actually, I have no idea what J. Edgar Hoover thought of William Shirer's reporting from Nazi Germany. I don't even know whether Hoover ever spoke to Shirer. But I'm trying to imagine what it would feel like for the FBI Director to publicly call out one of the most invaluable journalists — and after that, historians — during World War II and tell him his work was disgusting.

It's an image conjured up by this Jack Goldsmith response to my earlier post on Jim Comey's suggestion that the NYT was "disgusting" for giving an AQAP member anonymity to clarify which Parisian terrorists they have ties with and with they do not.

> Marcy Wheeler implies that Comey here "bullies" the *NYT*. No, he criticized it and "urge[d]" it to "reconsider." He made no threat whatsoever, and he had no basis to make one. That is not bullying. Wheeler is on stronger ground in pointing out that the USG speaks to the press through anonymous sources all the time, including in its claims about civilian casualties in drone strikes. I don't like press reliance on anonymous sources. But I also don't think that the U.S. government and its enemy in war, AQAP, are on the same footing, or should be treated the same way in *NYT* news coverage. (Imagine if the *NYT* said: "A

> source in the child exploitation ring told the *New York Times* on condition of anonymity that his group was responsible for three of the child kidnappings but had nothing to with the fourth.”)
> The *NYT* appears to think they are on the same footing and should be treated the same when it comes to anonymous sources. Comey disagrees, and there is nothing wrong with him saying so publicly. The press is immune from many things, but not from criticism, including by the government.

For what it’s worth, I actually can imagine it might be incredibly important for a newspaper to give criminals anonymity to say something like this, particularly if the newspaper could vet it. It might well save lives by alerting cops they were looking for two child exploitation rings, not one. As with the NYT quote, which alerts authorities that the threat is a lot more nebulous than declaring it AQAP might make it seem.

Yet Goldsmith is involved in a category error by comparing AQAP to a gang. Sure, they are thuggish and gang-like (albeit less powerful than some Mexican cartels).

But the US does not consider them a gang. It considers them, legally, an adversary in war (just ask Anwar al-Awlaki, who was killed based on such an assertion). And there is a very long and noble history of journalists reporting from both sides in time of war, through whatever means (though as with Shirer, the journalists ultimately need to judge whether they’re still able to do independent reporting). Indeed, having journalists who could make some claim to neutrality has been fundamentally important to get closer to real understanding. More recently, Peter Bergen’s reporting — including his secure meeting with Osama bin Laden — was crucially important to US understanding after 9/11, when few knew anything about bin Laden.

And the logic behind giving an AQAP source anonymity — and secure communications — is particularly powerful given that the US shows no respect for journalists' (or human rights workers' or lawyers') communications in its spying. Nor does it consider anyone "in" a terrorist group, whether they be propagandists, cooks, or drivers, illegitimate for targeting purposes. Thus, any non-secure communication can easily lead immediately to drone killing. But killing this one guy talking to NYT, however much that might make Jim Comey feel good, is not going to solve the problem of Muslims in the west choosing to declare allegiance to one or another Islamic extremist group before they go on a killing spree. Hell, if some of the claims floating around are correct, killing Awlaki hasn't even diminished his ability to inspire murder.

In the case of Yemen (or Pakistan, or Somalia, or Syria) in particular, just speaking to a journalist can put someone in grave danger. For example, I've long wondered whether problematizing the US government claims about Umar Farouk Abdulmutallab in Jeremy Scahill's book made Mullah Zabara, who at least accepted AQAP's role in his province, a target for assassination. Nevertheless, I'm grateful to him (and Scahill) for revealing Abdulmutallab was staying at Fahd al-Quso's farm, which presented a critical counter detail to some of the government's claims accepted credulously in the press.

The US government and the US public is far, far too ignorant about the people we're fighting. A little better insight into their views would help us all. If journalists have to use secure communications and extend anonymity to get that — and ethically, there may be little else they can do — then they should do that.

We are not winning this conflict, and we won't win it, so long as we try to criminalize the adversary's propaganda rather than offer a more compelling ideology than they are to those

they're successfully recruiting. And this urge for someone as powerful as Jim Comey to get snitty when the NYT reports not ideology, but information, from AQAP reveals nothing more than an impotence to wage that ideological battle.

WHY THE BARGAIN REWARD FOR IBRAHIM AL-ASIRI?

For 5 years, Ibrahim al-Asiri has been the chief boogeyman in US efforts to scare Americans about terrorism from AQAP (and to justify huge outlays for dumb machines TSA can use). Almost yearly, the CIA leaks to ABC News that Asiri has mastered yet another new scary feat, such as surgically implanting bombs in someone's stomach cavity. More recently, the story has been that Asiri trained some of the western terror recruits in Syria (never mind McClatchy's report the real threat stems from a French defector).

Which is why I'm surprised that the Rewards for Justice announcement including him yesterday only offered $5 million for his capture (as compared to Nasir al-Wuhayshi — though admittedly Wuhayshi is actually the leader of AQAP, contrary to what the press implies).

Just as interesting is the description the Rewards for Justice announcement and an earlier terrorist designation uses for Asiri. Both make absolutely no mention of the UndieBomb 1.0, toner cartridge, or UndieBomb 2.0 plots in which Asiri has always been claimed to be a central figure.

Instead, State mentions only Asiri's alleged attempt to kill our chief Saudi intelligence partner, Mohammed bin Nayef, with a bomb hidden in his brother's rectum. Or maybe underwear. Details, as they always are with Asiri, are

fuzzy.

> The Secretary of State has designated al-Qa’ida in the Arabian Peninsula (AQAP) operative and bomb maker Ibrahim Hassan Tali al-Asiri under E.O. 13224, which targets terrorists and their supporters. This action will help stem the flow of finances to al-Asiri by blocking all property subject to U.S. jurisdiction in which al-Asiri has an interest and prohibiting all transactions by U.S. persons with al-Asiri. AQAP has previously been designated by the United States under Executive Order 13224 and as a Foreign Terrorist Organization.
>
> Al-Asiri is an AQAP operative and serves as the terrorist organization’s primary bomb maker. Before joining AQAP, al-Asiri was part of an al-Qa’ida affiliated terrorist cell in Saudi Arabia and was involved in planned bombings of oil facilities in the Kingdom.
>
> Al-Asiri gained particular notoriety for the recruitment of his younger brother as a suicide bomber in a failed assassination attempt of Saudi Prince Muhammed bin Nayif. Although the assassination attempt failed, the brutality, novelty and sophistication of the plot is illustrative of the threat posed by al-Asiri. Al-Asiri is credited with designing the remotely detonated device, which contained one pound of explosives concealed inside his brother’s body.
>
> Al-Asiri is currently wanted by the Government of Saudi Arabia. In addition, Interpol has published an Orange Notice warning the public about the threat posed by him.

Remember, even by the time Asiri was designated as a terrorist in 2011, US prosecutors were well on their way to prosecuting Umar Farouk Abdulmutallab in his attempt to take down a Detroit-bound jet; Abdulmutallab was charged with conspiracy, and FBI allegedly found Asiri's fingerprint on the bomb. Plus, they had Abdulmutallab's confession implicating Asiri.

And yet … not a mention of these things in State's descriptions of Asiri.

WHY WAS CIA ASSESSING WHETHER THEY COULD DRONE-KILL ANWAR AL-AWLAKI?

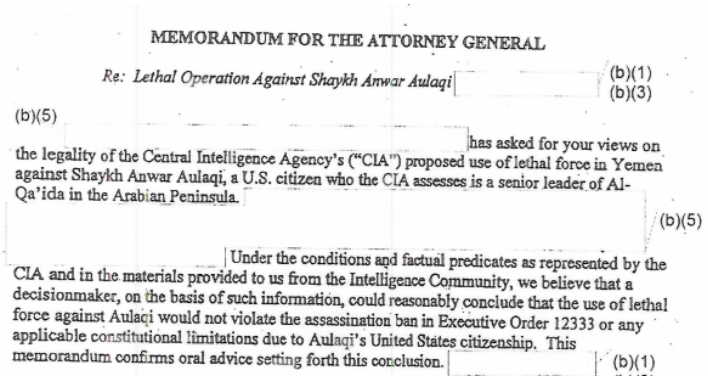
For years, defenders of the drone killing of Anwar al-Awlaki have always pointed to the second confession Umar Farouk Abdulmutallab made, implicating Awlaki in each and every part of his plot.

There were always problems with that. Several pieces of evidence indicate the drone attack on December 24, 2009 that missed Awalaki had specifically targeted him; at that point, the government did not consider Awlaki operational. Abdulmutallab made 3 confessions, and only the one made to the High Value Interrogation Group (HIG) after a month of isolation and in the context of a (I've heard second-hand, unbelievably generous) plea deal that was never finalized implicated Awlaki in planning his attack. Claims Awlaki helped Abdulmutallab make his martyrdom video don't explain why AQAP's best English language propagandist would make a video with a man schooled in English in Arabic.

Subsequent evidence suggests actions attributed to Awlaki in that confession were probably taken by Fahd al-Quso and Nasir al-Wuhayshi.

In other words, there are a lot of holes in the confession always used to justify Awlaki's drone killing. Abdulmutallab's second confession should be treated the same as his first and third ones: a narrative crafted by someone who has a big incentive to shade the truth, and therefore of dubious reliability.

The release of yesterday's ridiculously cursory OLC memo authorizing the drone killing of Anwar al-Awlaki introduces one more reason to doubt the narrative that claims Abdulmutallab's second confession provided justification for Awlaki's killing.



MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Lethal Operation Against Shaykh Anwar Aulaqi (b)(1) (b)(3)

(b)(5)

has asked for your views on the legality of the Central Intelligence Agency's ("CIA") proposed use of lethal force in Yemen against Shaykh Anwar Aulaqi, a U.S. citizen who the CIA assesses is a senior leader of Al-Qa'ida in the Arabian Peninsula.

(b)(5)

Under the conditions and factual predicates as represented by the CIA and in the materials provided to us from the Intelligence Community, we believe that a decisionmaker, on the basis of such information, could reasonably conclude that the use of lethal force against Aulaqi would not violate the assassination ban in Executive Order 12333 or any applicable constitutional limitations due to Aulaqi's United States citizenship. This memorandum confirms oral advice setting forth this conclusion. (b)(1)

The memo relies not on what FBI has told OLC. It relies on CIA's assessment that Awlaki is "a senior leader of al-Qa'ida in the Arabian Peninsula" based on "factual predicates as represented by the CIA and in the materials provided to use from the Intelligence Community."Abdulmutallab's second confession might be included in those materials provided from the IC. Even though the confession was obtained as part of a criminal investigation, the FBI is part of the IC, so broadly speaking that second confession would qualify, I guess.

But the assessment came not from FBI, which had the lead investigating the Undiebomb attack, but from the CIA. Which ought to give you pause, given that just months before this memo was

written, the intelligence community's partners had convinced the US that they hadn't killed a Bedouin clan in the al-Majala strike. Indeed, the intelligence relating to Awlaki seemed to be consistently stinky until such time as the CIA set up its own drone base in Saudi Arabia in mid-2011.

Besides, what are we executing American citizens based on the CIA's assessment for anyway?

At least according to David Barron, the case against Awlaki came not from FBI, but from CIA. That doesn't mean CIA didn't have evidence supporting its claims (and remember, CIA has a role in HIG, as does JSOC). But it does suggest Abdulmutallab's second confession may not have the role the defenders of Awlaki's execution like to cling to.

FACT-CHECKING 9/11 ANNIVERSARY REPORT ON INFO AND DRAGNETS WITH 9/11 REPORT

In Salon, I point out something funny about the report released on Tuesday to mark the 10 year anniversary of the release of the 9/11 Commission report. The report says we must fight the "creeping tide of complacency." But then it says the government has done almost everything the 9/11 Commission said it should do.

> There is a "creeping tide of complacency," the members of the 9/11 Commission warned in a report released on Tuesday, the 10-year anniversary of the release of their original report. That complacency extends not just to terrorism. "On issue after issue – the resurgence and

> transformation of al Qaeda, Syria, the cyber threat — public awareness lags behind official Washington's." To combat that "creeping tide of complacency," the report argues, the government must explain "the evil that [is] stalking us."
>
> Meanwhile, the commissioners appear unconcerned about complacency with climate change or economic decline.
>
> All that fear-mongering is odd, given the report's general assessment of counterterrorism efforts made in the last decade. "The government's record in counterterrorism is good," the report judged, and "our capabilities are much improved."

If the government has done a good job of implementing the 9/11 Commission recommendations but the terror threat is an order of magnitude worse now, as the report claims, then those recommendations were not sufficient to addressing the problem. Or perhaps the 13 top security officials whom the Commission interviewed did a slew of other things — like destabilizing Syria and Libya — that have undermined the apparatus of counterterrorism recommended by the original 9/11 Commission?

Which is a polite way of saying the 10-year report is unsatisfying on many fronts, opting for fear-mongering than another measured assessment about what we need to do to protect against terrorism.

Perhaps that's because, rather than conduct the public hearings with middle-level experts, as it boasted it had done in the original report, it instead privately interviewed just the people who've been in charge for the last 10 years, all of whom have a stake in fear and budgets and several of whom now have a stake in profiting off fear-mongering?

Suffice it to say I'm unimpressed with the

report.

Which brings me to this really odd detail about it.

The report takes a squishy approach to Edward Snowden's leaks. It condemns his and Chelsea Manning's leaks and suggests they may hinder information sharing. It also suggests Snowden's leaks may be impeding recruiting for cybersecurity positions.

But it also acknowledges that Snowden's leaks have been important to raising concerns about civil liberties — resulting in President Obama's decision to impose limits on the Section 215 phone dragnet.

> Since 2004, when we issued the report, the public has become markedly more engaged in the debate over the balance between civil liberties and national security. In the mid-2000s, news reports about the National Security Agency's surveillance programs caused only a slight public stir. That changed with last year's leaks by Edward Snowden, an NSA contractor who stole 1.7 million pages of classified material. Documents taken by Snowden and given to the media revealed NSA data collection far more widespread than had been popularly understood. Some reports exaggerated the scale of the programs. While the government explained that the NSA's programs were overseen by Congress and the courts, the scale of the data collection has alarmed the public.
>
> [snip]
>
> [I]n March, the President announced plans to replace the NSA telephone metadata program with a more limited program of specific court-approved searches of call records held by private carriers. This remains a matter of contention with some intelligence professionals, who expressed to us a

> fear that these restrictions might hinder U.S. counterterrorism efforts in urgent situations where speedy investigation is critical.

Having just raised the phone dragnet changes, the report goes on to argue "these programs" — which in context would include the phone dragnet — should be preserved.

> We believe these programs are worth preserving, albeit with additional oversight. Every current or former senior official with whom we spoke told us that the terrorist and cyber threats to the United States are more dangerous today than they were a few years ago. And senior officials explained to us, in clear terms, what authorities they would need to address those threats. Their case is persuasive, and we encountered general agreement about what needs to be done.
>
> Senior leaders must now make this case to the public. The President must lead the government in an ongoing effort to explain to the American people—in specific terms, not generalities—why these programs are critical to the nation's security. If the American people hear what we have heard in recent months, about the urgent threat and the ways in which data collection is used to counter it, we believe that they will be supportive. If these programs are as important as we believe they are, it is worth making the effort to build a more solid foundation in public opinion to ensure their preservation.

This discussion directly introduces a bizarre rewriting of the original 9/11 Report.

Given how often the government has falsely claimed that we need the phone dragnet because

it closes a gap that let Khalid al-Midhar escape you'd think the 9/11 Commission might use this moment to reiterate the record, which shows that the government had the information it needed to discover the hijacker was in the US.

Nope.

It does, however, raise a very closely related issue: the FBI's failure to discover Nawaf al Hazmi's identity. Here's a claim the 9/11 Anniversary report makes immediately after defending the NSA's dragnets, in a section defending information sharing.

> Before 9/11, the government had a weak system for processing and using the vast pool of intelligence information it possessed. One striking example of this inadequacy: In January 2000, the NSA acquired information that could have helped identify one of the eventual hijackers, Nawaf al Hazmi. This information was not shared with other agencies because no agency made a specific request for it. Such failures underscore that intelligence-sharing among agencies is critically important and will not happen without leadership driving it.

Here's what the original 9/11 Report had to say about this.

> On January 8, the surveillance teams reported that three of the Arabs had suddenly left Kuala Lumpur on a short flight to Bangkok.47 They identified one as Midhar. They later learned that one of his companions was named Alhazmi, although it was not yet know that he was "Nawaf."
>
> [snip]
>
> The Counterterrorist Center (CTC) had briefed the CIA leadership on the gathering in Kuala Lumpur, and *the*

> *information had been passed on to Berger and the NSC staff and to Director Freeh and others at the FBI (though the FBI noted that the CIA had the lead and would let the FBI know if a domestic angle arose).*
>
> [snip]
>
> Several weeks later, CIA officers in Kuala Lumpur prodded colleagues in Bangkok for additional information regarding the three travelers. 52 In early March 2000, Bangkok reported that Nawaf al-Hazmi, now identified for the first time with his full name, had departed on January 15 on a United Airlines flight to Los Angeles. As for Khalid al Midhar, there was no report of his departure even though he had accompanies Hazmi on the United flight to Los Angeles.53 No one outside the Counterterrorist Center was told any of this. The CIA did not try to register Mihdhar or Hazmi with the State Department's TIPOFF watchlist—either in January, when word arrived of Mihdhar's visa, or in March, when word came that Hazmi, too, had a U.S. visa and a ticket to Los Angeles.54
>
> None of this information—about Midhar's U.S. visa or Hazmi's travel to the United States—went to the FBI, and nother mroe was done to track any of the three until January 2001, when the investigation of another bombing, that of the USS Cole, reignited interest in Khallad. (181-182) [my emphasis]

Thus far, it overstates that none of the information about Hazmi's identity was shared. The January intelligence that he attended the meeting Kuala Lumpur was passed along at high levels to FBI, and FBI responded by stating that if the event came to have a domestic component, they should let FBI know.

That part — the intelligence obtained in March 2000 that showed there was a domestic component — did not get passed on right away.

But it is also not true that no one ever asked for this information, as the 9/11 Commission report makes clear. After a CIA officer accidentally copied USS Cole case officer Steve Bongardt on an email indicating Mihdhar (and by association Hazmi) was in the US, Bongardt asked for the intelligence (this also appears on pages 249-250 of Ali Soufan's *The Black Banners*).

> "Jane" sent an email to the *Cole* case agent explaining that according to the [FBI's National Security Law Unit], the case could be opened only as an intelligence matter, and that if Mihdhar was found, only designated intelligence agents could conduct or even be present at any interview. She appears to have misunderstood the complex rules that could apply in this situation.81
>
> [snip]
>
> Because Mihdhar was being sought for possible connection to or knowledge of the *Cole* bombing, he could be investigated or tracked under the existing *Cole* criminal case. No new criminal case was needed for the criminal agent to begin searching for Mihdhar. And as NSA had approved the passage of its information to the criminal agent, he could have conducted a search using all available information. As a result of this confusion, the criminal agents who were knowledgeable about al Qaeda and experienced with criminal investigative techniques, including finding suspects and possible criminal charges, were thus excluded from the search.83

The 9/11 Report does show that CIA did not alert US law enforcement immediately upon finding a

suspect moving into the US (but then again, FBI did not alert various agencies of Tamerlan Tsarnaev's movements, nor CIA and State of Umar Farouk Abdulmutallab's, the former of which the Anniversary report notes). But the January 2000 intelligence was shared with the FBI. And in August 2001, one of the people best prepared to search for Mihdhar and Hazmi specifically asked for more information, but was (contrary to the requirements of "the wall") denied.

All these issues, of course, are unrelated to the dragnet as it currently exists. The info sharing about leads (including the terror watchlist released yesterday, which I will return to) and the now-demolished wall between intelligence and law enforcement are the issues that prevented, correctly or not, wider sharing before 9/11. And the reference to it appears in the info sharing section, not the (immediately preceding) section defending the dragnet.

All that said, it would be more useful for this fear-mongering report to acknowledge that we continue to have information sharing issues, especially of the dragnet intelligence it claims is so important.

Indeed, one thing the report doesn't note is that NSA had information on both Abdulmutallab and Tsarnaev before their attacks — incidents that raise questions about the efficacy of the dragnet. Rather than misrepresenting what it described in the earlier report, then, the Anniversary Report would be better served to challenge what Keith Alexander told it, to assess whether the dragnet in its current form really serves our counterterrorism purposes.

Alas, it chose instead to repeat Alexander's fear-monger claims.

AQAP DRONE STRIKES OBAMA'S AWLAKI DRONE STORY

Two days before the Administration was due to release a memo laying out its rationale for drone-killing American citizen Anwar al-Awlaki, AQAP released a video that challenges the narrative the Administration has used for doing so.

As Gregory Johnsen reports, the memo shows (see correction below) ~~former Gitmo detainee Said al-Shihri~~ embracing Umar Farouk Abdulmutallab, then whispering in his ear.

In the video, Shihri says he was the head of external operations — the title the US always used to describe Anwar al-Awlaki.

> The video says that it was Shihri — not Awlaki — who was "responsible for external operations against America." For years, the Obama administration has argued the opposite, claiming that Awlaki was directing AQAP's efforts against the U.S., including the failed underwear bomb on an airliner over Detroit on Christmas Day 2009.
>
> On the day Awlaki was killed, Obama called him "the leader of external operations for al-Qaeda in the Arabian Peninsula" and said he "directed" the 2009 attack. The video appears to refute both claims, giving credit to Shihri, the former Guantanamo Bay detainee.
>
> Halfway through the video there is a

> clip of Shihri embracing Umar Farouk Abdulmutallab, the underwear bomber in the Christmas Day attack, and whispering in his ear as a narrator reads that the attack was conducted "under the direct supervision of (Shihri) and a number of his brothers in the section in charge of external operations."

While there may be some disagreement about how best to translate Shihri's role — "directed" or "supervised" — this video clearly says that Shirhi was in charge, directly to the contrary to the narrative DOJ released purportedly summarizing Abulmutallab's confession (the one that conflicted in key ways with his two other confessions).

What Johnsen doesn't say — but is clear from comparison — is that that embrace took place while Abdulmutallab was dressed to make his martyrdom video.

Compare this frame, which appears just after the embrace in the new video (at 21:54),

With this one from Abdulmutallab's martyrdom video (at 0:52).

That's important because arranging to make the

martyrdom video is one of the tasks DOJ's narrative says Awlaki did.

> Awlaki told defendant that he would create a martyrdom video that would be used after the defendant's attack. Awlaki arranged for a professional film crew to film the video. Awlaki assisted defendant in writing his martyrdom statement, and it was filmed over a period of two to three days. The full video was approximately five minutes in length.

~~Shihri's presence at the making of Abdulmutallab's martyrdom video doesn't refute~~ the claim that Awlaki had a role in making it (though none of the experts I have asked has ever given a remotely credible explanation why AQAP's greatest English-language propagandist and someone formally schooled in English would make a martyrdom video in Arabic). But it does place him there, suggesting Awlaki was not the only one directing the production of the video, if he had a role at all.

This video definitely doesn't prove that Awlaki didn't have an operational role in the UndieBomb attack. But it shows that the narrative the government released — which Abdulmutallab's lawyer said had been made in the context of a plea deal never finalized and which the government agreed not to rely on at the trial, where it could have been challenged — neglects not just the role of Fahd al-Quso, but also Said al-Shihri. It is, at the very least, incomplete in some important ways.

And yet that is the only public "proof" the government has ever released that justified their execution of Anwar al-Awlaki.

Update: Apparently al-Shihri isn't the one portrayed in this video, Nasir al-Wuhayshi is. In which case this connection is not meaningful.

WORKING THREAD: THE AWLAKI MEMO

The Awlaki Memo has just been released. This post will be a working thread. Note, page numbers will be off the page numbers of the memo itself (starting at PDF 61).

Pages 1-11: Barron takes 11 pages to lay out both the claims the government made about Anwar al-Awlaki and the request for an opinion. All of that is redacted.

Page 12: This memo is particularly focused on 18 USC 1119, which OLC only treated because Kevin Jon Heller raised it in a blog post. Note that OLC splits its consideration of whether DOD could kill Awlaki (which it probably could) from its consideration whether CIA could (which is far more controversial). The memo seems to have been written so as to authorize both DOD and CIA to carry out the operation, whichever got around to it. Also note the memo assumes the earlier Barron memo that authorizes this secret due process gimmick.

Page 13: OLC's analysis is closely tied to legislative history, which is fine. Except that DOJ routinely ignores legislative history when it doesn't serve its purposes.

Page 15: Footnote 12 argues that after invoking public authority jurisdiction the government doesn't have to say what happened to the law:

> There is no need to examine whether the criminal prohibition has been repeated, impliedly or otherwise, by some other statute that might potentially authorize the governmental conduct, including teh authorizing statute that might supply the predicate for the assertion of the public authority justification itself.

Nothing is cited to defend this proposition. It seems like a giant hole in the opinion, though I await the lawyers to tell me whether that's the case.

Page 15: Note the government has redacted all the other memos listed in Fn14 where it has exempted itself from criminal law.

Page 16: The government only leaves Nardone unredacted in FN15 among laws where Congress has limited Congressional action. That seems … odd.

Page 17: Note that part of FN 20 is redacted. This seems to justify other claims OLC made that something wasn't illegal.

Page 18: Note the redaction describing the kind of CIA operation here. I'd be curious whether it used Traditional Military Activities or paramilitary, as the distinction is a crucial one but one that often gets ignored.

Page 19: Note how the language on "jettison[ing] public authority justification" as if it existed prior to 1119 for both DOD and CIA.

Page 19: This is likely one reason why Ron Wyden keeps asking for more specifics:

> Instead, we emphasize the sufficiency of the facts that have been represented to us here, without determining whether such facts would be necessary to the conclusion we reach.

Page 21: Note that one of the things OLC concludes — rather than restates — in the redacted 11 pages that start the opinion is the AUMF language. It appears by reference in this form.

> And, as we have explained, *supra* at 9, a decision-maker could reasonably conclude that this leader of AQAP forces is part of al-Qaida forces. Alternatively, and as we have further explained, *supra* at 10 n 5, the AUMF applies with respect to forces "associated with" al-Qaida that

> are engaged in hostilities against the U.S. or its coalition partners, and a decision-maker could reasonably conclude that the AQAP forces of which al-Aulaqi is a leader are "associated with" Al Qaeda forces for purposes of the AUMF.

Two things about this: by this point (July 2010), the government had already gotten away with this "associated forces" claim in Gitmo habeas filings. But if that's what they rely on, why not leave it unredacted? (Note, they do cite it on the next page, but not in this discussion.)

Also, note they don't describe whether they concluded Awlaki was a leader, or whether they just accepted the government's assertion?

Later on that page it says:

> Based upon the facts represented to us, moreover, the target of the contemplated operation has engaged in conduct as part of that organization that brings him within the scope of the AUMF. High-level government officials have concluded, on the basis of al-Aulaqi's activities in Yemen, that al-Aulaqi is a leader of AQAP whose activities in Yemen pose a "continued and imminent threat" of violence to Untied States persons and interests. Indeed, the facts represented to us indicate that al-Aulaqi has been involved, through his operational and leadership roles within AQAP, in an abortive attack within the United States and continues to plot attacks intended to kill Americans form his base of operations in Yemen.

This is interesting for several reasons. First, it emphasizes reliance on the facts presented. But this is an area where DOJ has lied (they've lied to me, for example). It's an area where Umar Farouk Abdulmutallab's 3 public confessions

conflict. So it is not an area where they should be trusted.

Note, they call the UndieBomb attack an "abortive" attack, which I find an interesting (though in no way erroneous) word choice for unsuccessful.

Also note they claim Awlaki "continues to plot attacks." Remember they had Jabir al-Fayfi infiltrated into AQAP at this time. But also remember that reports after Fayfi came out pinned the blame for the toner cartridge plots more heavily on other AQAP members.

Page 23: Note how the memo applies the not-on-battlefield justification for detention to not-on-battlefield justification for killing. There seems to be a necessary logical step missing.

Page 23: Also note how sometimes the memo devolves into calling Awlaki "part of the forces of an enemy organization." Not only does that make me wonder whether the language on "leader" was always what it currently is, but also this seems to mean this killing authority would apply to more junior members of an AUMF group.

Page 23: Included a memo authorizing the killing of someone not wearing a uniform about whom there is conflicting information about membership: "When a person takes up arms or merely dons a uniform as a member of the armed forces, he automatically exposes himself to enemy attack."

Page 24: The memo describes Yemen as "far from the most active theater of combat between the United States and al-Qaida."

Page 24: Footnote 30 reiterates that this only applies to the circumstances presented, which is something footnote 1 apparently deals with as well (as all footnotes 1 in OLC memos likely do).

Page 24: OLC is secretly trolling the other branches:

> nearly a decade after its enactment, none of the three branches of the United States Government has identified a strict geographical limit on the permissible scope of the authority the AUMF confers on the President with respect to this armed conflict.

That's absolutely right! Now let's see if it inspires SASC to get to work on that front. Though as I noted in my working thread on the white paper, its citation to letters from the executive branch to Congress, and its silence on Tom Daschle's objections, are problematic.

Also note, this memo is not referenced in the white paper (see the equivalent section in paragraph 7).

> DOD May 18 Memorandum for OLC, at 2 (explaining that U.S. armed forces have conducted [redacted] AQAP targets in Yemen since December 2009, and that DoD has reported such strikes to the appropriate congressional oversight committees.

I find that mighty interesting as the primary audience for the white paper was Congress, especially given that we know the government doesn't brief the committees on all the lethal operations they conduct. Did they claim to OLC they have briefed Congress when they hadn't?

Page 25: Interested in the "where the principal theater of operations is not within the territory of the nation that is a party to the principal theater of operations." Will have to ask the lawyers wtf that means in context. Also, at the time one could have argued that Saleh was playing both sides.

Page 25: Just remarking, again, that they used Cambodia to justify this, as if that weren't a warning.

Page 27: I look forward to what the lawyers say

about FN 35, but it seems like it should get some of their other terror claims in trouble.

Page 27: Wondering whether the "operation in Yemen" information should have included analysis of Djibouti and Saudi Arabia's role?

Page 27: Note the "continuously planning" argument is in the redacted section.

Page 29: As you read the language on avoiding civilian casualties, remember that there are reasons to believe Awlaki's son was taken out intentionally.

Page 30: Note the big redaction after the section on Awlaki "offering to surrender." This must be particularly interesting since the footnote introduces the notion of laying down arms.

Page 30: OLC took 10.5 pages to decide it was okay for DOD to kill Awlaki, which is relatively uncontroversial (especially given that the general due process concerns appear to have been dealt with in the first Awlaki memo). It took 5 pages deciding it was okay for CIA to do so. Granted, much of the DOD logic must be repeated, but not all of it can be. And the CIA application was why the memo was written.

Page 30-32: This redaction is the heart of the memo — the heart of the memo's secret refutation to this blog post. Compare the length of this section with the blog post it responds to.

Page 32: Note the redaction describing the CIA action. I raise the same point raised above, wrt page 18. It may be OLC is saying that because CIA engages in (either) Traditional Military Activities or paramilitary activities, it gets public authority. But the discussion seems to have made no mention of the National Security Act.

Also note footnote 43, which betrays real doubt and no authority.

> We note, in addition, that the "lawful conduct of war" variant of the public

> authority justification, although often described with specific reference to operations conducted by the armed forces, is not necessarily limited to operations by such forces; some descriptions of that variant of the justification, for example, do not imply such a limitation. *See, e.g., Frye*, 10 Cal. Rptr. 2d at 221 n.2 ("homicide done under a valid public authority, such as execution of a death sentence of killing an enemy in a time of war"); Perkins & Boyce, *Criminal Law* at 1093 ("the killing of an enemy as an act of war and within the rules of war.")

I'll have to go find these cites, but they appear to be totally inapt to the move OLC is making here, which is particularly telling.

Page 33: In one short paragraph, OLC basically says that the CIA case is like the DOD one, which it's not. (Again, there's a longish redaction, between the m-dashes, that seems to qualify this as a certain kind of CIA action.) But then in one long footnote, the memo argues that unprivileged combatants are not breaking the law. Which is — as Kevin Jon Heller noted on Twitter — actually not what the government maintains (just as Omar Khadr, because he was convicted on these terms).

> DOD's current Manual for Military Commissions does not endorse the view that the commission of an unprivileged belligerent act, without more, constitutes a violation of the international law of war.

Page 34: This is fairly momentous language, because it presents the notion that CIA should be permitted to do anything with respect to an American DOD can do:

> Nor does it indicate that Congress, in closing the identified loophole, meant

> to place a limitation on the CIA that would not apply to DoD.

Maybe the following redacted passage explains why CIA is permitted to operate outside of the law that the National Security Act does not permit to act under. But on its face this language is fairly dangerous.

Page 34: Note the memo describes the CIA operation as "virtually identical," but not entirely so. Also note the redaction of language saying CIA would carry out the attack in "accord with [redacted]," which may well refer to the Presidential Finding. If it does, then this memo says a President can authorize the CIA killing of an American on his say-so.

Page 34: Note that footnote 45 invokes a 1984 OLC memo that wrote its justification for non-application of Neutrality Act to people like Oliver North when raising funds for Iran-Contra. You gotta love memos that rely on both State's self-justification for bombing Cambodia and OLC's self-justification for ignoring Congressional laws on funding the Contras.

Page 35: Told you the memo included a passage on conspiracy to kill.

Page 35: If I'm not mistaken, FN 46 is to the redacted passage. There are missing citations to other law enforcement related precedents, which might be in there but if so they should be unclassified.

Page 36: I love the language at the end of the first paragraph that says because one law doesn't prohibit the CIA (and DOD) to kill and American, another law probably doesn't.

Page 36: Shorter David Barron: 956(a) only applies to terrorists, so therefore it can't be applied to US conducting asymmetric attacks overseas. Also, it's a really nice touch that the legislative record comes from then-Senator Joe Biden. And it's also a nice touch that Tom Daschle's legislative comments on legislation

from 1995 are included in this memo but not in the discussion about the AUMF.

Page 38: Note they now claim Awlaki's involvement in armed combat involves "planning and recruiting for terrorist attacks." Based on what Dennis Blair said in a February 2010 hearing, I think the original basis for targeting Awlaki was largely if not exclusively for his recruiting role. But that's very hard to separate from a First Amendment function, which they don't deal with here.

Page 38: Note in their discussion of the earlier Barron memo, they redact key bits that the White Paper includes. (See for example the second pages 7 and 8). Some of the White Paper logic may have been developed in connection with John Brennan's 2011 speech on such issues (which the White Paper cites. Which might mean — though might not — that their logic on imminence changed over time.

Page 38: The redaction at the bottom page hides what in the White Paper is a sentence saying that Americans don't have immunity. It must also hide some discussion of due process generally.

Page 39: The redactions appear to relate to a balancing test. But the logic between Hamdi and the "continued" and "imminent" language is rather interesting. So are the other jumps between that and the last paragraph on page 40 — these are contiguous in the white paper.

Page 40: Have we seen this Israeli decision as the basis for what amounts to feasible capture?

Page 40: The redactions of the source for the "continue to monitor whether changed circumstances" are interesting — it may be the Barron memo (I'll check the court filing). In any case, it's interesting that it's not the DOD memo, which may be the most recent support for this memo.

Page 41: The redacted line after the Fourth Amendment intro is interesting because the white paper states clearly there that this would not

be unreasonable seizure. The redactions in the last paragraph are similar.