IT'S NOT JUST THE SHELL GAME OF MOVING OSAMA BIN LADEN RECORDS–IT'S RETROACTIVE CLASSIFICATION OF THEM

Congratulations to the AP, which has caught up to the reporting I did a month ago on the way SOCOM purged their own systems of Osama bin Laden photos (and, apparently, records) and moved them to the CIA.

But it appears that this shell game involved more than just moving all these records to CIA. It appears CIA had to retroactively classify at least the photographs.

As you recall, Judicial Watch (as well as a bunch of other entities) had FOIAed any pictures of the raid. It its motion for summary judgment, JW made several complaints about the government's FOIA response:

- The search, particularly at DOD, was inadequate.
- The government declarations didn't adequately specify what was included in the pictures (I suspect this was done to hide trophy pictures not shown to Congress or, possibly, even the President).
- The government declarations don't prove that all the photos could cause

exceptionally grave harm.
- The description of the classification process was inadequate.

It is the last of these that is most interesting, given the apparent fact that DOD transfered all its photos to CIA (plus my suspicion that a lot of these are trophy photos, not official operational photos).

> First, Defendants fail to identify who classified the records. Director Bennett testifies as to who generally has the authority to classify information as TOP SCERET and who generally has the authority to delegate such authority. Bennett Decl. at ¶¶ 14-15. In addition, Director Bennett states that the "Director of the CIA has delegated original TOP SECRET classification authority to me. As an original classification authority, I am authorized to conduct classification reviews and to make original classification decisions." Id. at ¶ 18. Yet, Director Bennett does not testify that he personally classified the records. Nor does he state that any other authorized official actually classified the records. If an individual without the proper authority classified the records, Defendants have not complied with the procedural requirements of EO 13526.
>
> Second, Director Bennett does not specifically testify as to when the 52 records were classified. Director Bennett only states that as of September 26, 2011, the 52 records are currently and properly classified. Yet, the day Director Bennett drafted and signed his declaration is inconsequential. The operative date as to whether the classification occurred according to

> proper procedures is the date of classification. As stated above, different procedures exist for records that were classified prior to or subsequent to the receipt of a FOIA request. Once a FOIA request has been received, a government agency can only classify material "if such classification meets the requirements of this order and is accomplished on a document-by-document basis with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.4 of this order." EO 13526, § 1.7(d) (emphasis added). The raid and the creation of the records occurred on May 1, 2011. Bennett. Decl. at 4, n. 2. Plaintiff and others submitted FOIA requests for the records as early as May 2, 2011.5 As stated above, President Obama explained around 1:00 p.m. on May 4, 2011 that he had made the decision to not release post mortem photographs of bin Laden. In addition, then-Director Panetta stated on the evening of May 3, 2011 that at least some of the photographs would be released. In other words, as of the morning of May 4, 2011, no decision had been reached. Since Plaintiff sent its FOIA request on May 2, 201, it is more than likely that the records were classified after a FOIA request for the records was received. Yet, Defendants have not presented any evidence as to whether the 52 records were classified between their creation and the President's comments, or after the President's comments and prior to September 26, 2011. In addition, if the records were classified after a FOIA request was received, Defendants have failed to demonstrate that the 52 records were classified on a document-by-document basis. Also, as stated

> above, Defendants have not presented any evidence of who classified the records. Therefore, Defendants have also failed to demonstrate whether the records were classified with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.4 of this order. [my emphasis]

In response to this motion, CIA submitted a second declaration that still doesn't explain how the photos first got classified (though it does provide additional evidence that it happened retroactively).

> At the time of Mr. Bennett's declaration, these records were marked "TOP SECRET" and were otherwise maintained in a manner that satisfied the procedural requirements of the Executive Order under the circumstances.1 Since then the CIA has, out of an abundance of caution, taken additional steps to ensure that each of these records contains all of the markings required by the Executive Order and its implementing directives, including information that reveals the identity of the person who applied derivative classification markings, citations to the relevant classification guidance and reasons for classification, and the applicable declassification instructions.
>
> As for Plaintiff's inquiry concerning the identity of the original classification authority (OCA), after the CIA received these records, they were derivatively classified in accordance with the guidance provided by the CIA's designated "senior agency official," as authorized by Part 2 of the Executive Order. The CIA official who provides this classification

> guidance — and is therefore the OCA for these records — is the CIA's Director of Information Management Services, who is the authorized OCA who has been designated to direct and administer the CIA's program under which information is classified, safeguarded, and declassified. When Mr. Bennett, who is himself an OCA acting under the direction of the CIA Director, later reviewed each of these records for the purpose of this litigation, he reaffirmed that these prior classification determinations were correct and that the records continued to meet the criteria of the Order.
>
> 1 Contrary to Plaintiff's suggestion, after their creation these extraordinarily sensitive images were always considered to be classified by the CIA and were consistently maintained in a manner appropriate for their classification level. [my emphasis]

After JW noted that if the photos were classified after their FOIA, they would have had to have been classified on a photo by photo basis by the Director of CIA, Deputy Director, or a Senior Agency Official in charge of classifications, the CIA responded by saying that, after the CIA got the photos (which by all appearances happened after the FOIA), they were derivatively classified in accordance with the SAO's guidance.

CIA doesn't say whether that official reviewed the photos individually or not. Nor does it explain who wrote "TOP SECRET" on them, without adding all the other required classification markers.

And note how the CIA claims these photos "were always considered to be classified" by them — but not necessarily by SOCOM, which originally had the photos. But they don't even claim they were always considered to be Top Secret.

Now, it's likely that the actual documents pertaining to the OBL raid (if SOCOM had any) were treated somewhat more regularly. At the very least, it's less likely the SEALs who participated in the raid would have trophy documents!

But as far as the photos are concerned, it appears that the shell game included not just the purging of the documents from SOCOM's servers and transferring them to CIA, but also in retroactive classification — which may or may not have complied with regulations — after they got to CIA.

THE 2009 DRAFT NSA IG REPORT MAKES NO MENTION OF ONE ILLEGAL PRACTICE

The 2009 Draft NSA IG Report released by the Guardian last week — and related reporting from Barton Gellman — seem to clarify and confirm what I've long maintained (12/19/05; 7/29/07; 7/30/07): that one part of the illegal wiretap program that Jack Goldsmith and Jim Comey found "illegal" in 2004 was data-mining of Americans.

> Eight days later on 19 March 2004, the President rescinded the authority to collect bulk Internet metadata and gave NSA one week to stop collection and block access to previously collected bulk Internet metadata. NSA did so on 26 March 2004. To close the resulting collection gap, DoJ and NSA immediately began efforts to recreate this authority in what became the PR/TT order.

Mind you, this bulk collection resumed after

Colleen Kollar-Kotelly signed an order permitting NSA to collect the same data under a Pen Register/Trap & Trace order on July 14, 2004.

> The FISC signed the first PR/TT order on 14 July 2004. ALthough NSA lost access to the bulk metadata from 26 March 2004 until the order was signed, the order essentially gave NSA the same authority to collect bulk Internet metadata that it had under the PSP, except that it specified the datalinks from which NSA could collect, and it limited the number of people that could access the data.

Indeed, we know the program was expanded again in 2007, to get 2 degrees of separation deep into US person Internet data. The Obama Administration claims it ended this in 2011, though there are also indications it simply got moved under a new shell.

Mystery solved, Scoob!

Not so fast.

It appears the bulk Internet metadata collection and mining is just one of two practices that Goldsmith and Comey forced Bush to at least temporarily halt in 2004. But the second one is not mentioned at all in the NSA IG Report.

I first noted that Bush made two modifications to the program in this post, where I noted that 6 pages (11-17) of Jack Goldsmith's May 6, 2004 OLC opinion on the program described plural modifications made in March and one other month in 2004 (I correctly surmised that they had actually shifted parts of the program under parts of the PATRIOT Act, and that they had narrowed the scope somewhat, though over-optimistically didn't realize that still included warrantless collection of known domestic content).

But there's actually a far better authority than Goldsmith's heavily redacted opinion that

confirms Bush made two modifications to the program in this period.

Dick Cheney.

When his office disclosed to Patrick Leahy in 2007 what documents it had regarding authorizations for the illegal wiretap program, it listed two modifications to the program: the one on March 19 described in detail in the NSA IG Report, plus one on April 2.

> [Cheney Counsel Shannen] Coffin's letter indicates that Bush signed memos amending the program on March 19 and April 2 of that year.

But there's no hint of a second modification in the NSA IG Report.

That could mean several things. It could mean the April 2 modification didn't involve the NSA at all (and so might appear in a one of the other Agency IG Reports at the time — say, DNI — or might have been completed by an Agency, like some other part of DOD, that didn't complete an IG Report). It could mean that part of the program was eliminated entirely on April 2, 2004. Or it could mean that in an effort to downplay illegality of the program, the IG simply didn't want to talk about the worst prior practice eliminated in the wake of the hospital confrontation.

Goldsmith's opinion does seem to indicate, however, that the modification pertained to an issue similar to the bulk metadata collection. He introduces that section, describing both modifications, by saying "it is necessary to understand some background concerning how the NSA accomplishes the collection activity authorized under" the program.

That may still pertain to the kind of data mining they were doing with the Internet metadata. After all, the fix of moving Internet metadata collection under the PR/TT order only eliminated the legal problem that the telecoms

were basically permitting the government to steal Microsoft and Yahoo Internet content from their equipment. There still may have been a legal problem with the kind of data mining they were doing (perhaps arising out of Congress' efforts in that year's NDAA to prohibit funding for Total Information Awareness).

Whatever it is, one thing is clear. Even with the release of the unredacted Draft NSA IG Report, we still aren't seeing all the details on what made the program so legally problematic.

Maybe it's something the Senate Judiciary Committee might ask Jim Comey during his FBI Director confirmation hearing?

WHAT HAPPENED TO THAT THIRD BRANCH OVERSIGHT?

Judge Colleen Kollar-Kotelly is pissed.

After spending 2002 to 2006 as Chief Judge of the FISA Court struggling to keep parts of the American legal system walled off from a rogue surveillance program, she read the classified account the NSA's Inspector General wrote of her efforts. And while that report does say Kollar-Kotelly was the only one who managed to sneak a peek at a Presidential Authorization authorizing the illegal program, she doesn't believe it reflects the several efforts she made to reel in the program.

> "In my view, that draft report contains major omissions, and some inaccuracies, regarding the actions I took as Presiding Judge of the FISC and my interactions with Executive Branch officials," Kollar-Kotelly said in a statement to The Post.

> [snip]
>
> Kollar-Kotelly disputed the NSA report's suggestion of a fairly high level of coordination between the court and the NSA and Justice in 2004 to re-create certain authorities under the Foreign Intelligence Surveillance Act, the 1978 law that created the court in response to abuses of domestic surveillance in the 1960s and 1970s.
>
> "That is incorrect," she said. "I participated in a process of adjudication, not 'coordination' with the executive branch. The discussions I had with executive branch officials were in most respects typical of how I and other district court judges entertain applications for criminal wiretaps under Title III, where issues are discussed ex parte."

The WaPo story reporting on her objections makes no mention of the role one FISC law clerk — who got briefed into the program before any of the other FISC judges — played in this process, something I'm pretty curious about.

It does, however, recall two incidents where Kollar-Kotelly took measures to crack down on the illegal program, which Carol Leonnig reported back in 2006.

> Both [Kollar-Kotelly and her predecessor Royce Lamberth] expressed concern to senior officials that the president's program, if ever made public and challenged in court, ran a significant risk of being declared unconstitutional, according to sources familiar with their actions. Yet the judges believed they did not have the authority to rule on the president's power to order the eavesdropping, government sources said, and focused instead on protecting the integrity of the FISA process.

> [snip]
>
> In 2004, [DOJ Office of Intelligence Policy and Review Counsel James] Baker warned Kollar-Kotelly he had a problem with [a "federal screening system that the judges had insisted upon to shield the court from tainted information"]. He had concluded that the NSA was not providing him with a complete and updated list of the people it had monitored, so Justice could not definitively know — and could not alert the court — if it was seeking FISA warrants for people already spied on, government officials said.
>
> Kollar-Kotelly complained to then-Attorney General John D. Ashcroft, and her concerns led to a temporary suspension of the program. The judge required that high-level Justice officials certify the information was complete — or face possible perjury charges.
>
> In 2005, Baker learned that at least one government application for a FISA warrant probably contained NSA information that was not made clear to the judges, the government officials said. Some administration officials explained to Kollar-Kotelly that a low-level Defense Department employee unfamiliar with court disclosure procedures had made a mistake.

Though the NSA IG Report mentions violations that occurred before 2003, it makes no mention of these violations.

What good is an IG Report that gives no idea of how often and persistent violations are?

That said, today's WaPo story provides this as the solution to our distorted view of the FISA Court's role in rubber-stamping this massive dragnet.

> A former senior Justice Department official, who spoke on the condition of anonymity because of the subject's sensitivity, said he believes the government should consider releasing declassified summaries of relevant opinions.
>
> "I think it would help" quell the "furor" raised by the recent disclosures, he said. "In this current environment, you may have to lean forward a little more in declassifying stuff than you otherwise would. You might be able to prepare reasonable summaries that would be helpful to the American people."

Back in 2006, Leonnig noted that the judges didn't believe they had the authority to intervene to stop the dragnet. So what good does a ruling — even two as broad and stunning as the ones that used Pen Registers and Business Records to collect the contact records of all Americans — do to depict the role the Court is in?

The Administration keeps pointing to this narrowly authorized court as real court review. But that's not what it is. And until we have a better sense of how that manifested in the past (and continues to — I'll bet you a quarter that they've moved the Internet data mining to some area outside of court purview), we're not going to understand how to provide real oversight to this dragnet.

We'd be far better off having the FISC provide its own history of these surveillance programs.

OVER 54,000 MORE AMERICANS ADDED TO SECURITY CLEARANCE ROLLS IN LAST YEAR

I've long argued that our security clearance employment system is "an arbitrary system of control that does more to foster cowed national security employees than to foster actual national security."

So I'm none too happy to know more than 50,000 Americans have been added to this arbitrary system in the last year, making up something like 1.6% of all Americans.

> The number of people who are cleared for access to classified information continued to rise in 2012 to more than 4.9 million, according to a new annual reportfrom the Office of the Director of National Intelligence. This is only the third official tally of government-wide security clearance activity ever prepared, and it is the largest reported to date.
>
> The total number of cleared personnel as of October 1, 2012 was 4,917,751. Although the number of contractors who held a clearance declined in 2012, the number of eligible government employees grew at a faster rate, yielding a net increase of 54,199 clearances, or 1.1 percent, from the year before.

I suspect adding 50,000 people to the rolls of clearance holders — whose lives are open to surveillance and from whom minor lies can be an excuse for termination — will simply increase the numbers of elite national security types who avoid pissing off the powerful.

Meanwhile, Josh Gerstein has an excellent report

on what's at stake in the Conyers v. Department of Defense lawsuit, in which two relatively low level DOD employees are fighting to retain their Merit Systems Protect Board protections in spite of the government deeming their jobs "sensitive."

> The Justice Department and Defense Department are arguing that federal employees like commissary managers and accountants, who don't have access to classified information, can be demoted or effectively fired without recourse to the usual avenues of appeal if their jobs are designated as "sensitive." The ripple effect of that — critics say it would effectively strip huge numbers of federal workers of civil service protections by treating them like those who have access to the nation's most vital secrets — could hollow out legal protections that have allowed whistleblowers to speak out with less fear of being fired.

As I've noted, DOD argues that even those who sell Gatorade on military bases should receive no protections in case they're deemed a security threat. Which means people like Rhonda Conyers and Devon Northover, the plaintiffs in this case, can be fired for holding unpopular views, because that might make them untrustworthy to sell service members Gatorade.

This is a creeping system by which more and more lucrative (and semi-lucrative, in the case of "sensitive") jobs are subjected to arbitrary political whims.

And it's growing.

TOMMY VIETOR AND I EXCHANGE ON THE RECORD NON-DICKISH COMMENTS

Back in the days, just weeks ago, when Tommy Vietor was the National Security Council Spokesperson, I tended to attribute the dickish comments made by Senior Administration Officials in articles in which he was also quoted to him.

When he left, we had this exchange on Twitter.

I will say this for him. He's a good sport.

I don't envy his position trying to claim the Obama Administration lives up to its self-billing as the Most Transparent Administration Evah™, based on releasing White House visitor logs.

All that said, I would have added two points to the exchange above.

First, the Administration is not conducting counterterrorism exclusively under the AUMF.

Obama's own Administration went to the mat in 2009 to prevent a short phrase — maybe 6 words — from being released under FOIA making it clear that torture was originally conducted under the September 17, 2001 Gloves Come Off Memorandum of Notification on President Bush's authorization alone. And they managed to win that battle by arguing the MON — which authorizes targeting killing, among other things — is still active.

So, no, Tommy, the Administration is not operating — not exclusively anyway — under the AUMF.

Also, what the fuck kind of democracy are we if we require lawsuits for basic democracy to take place? It's all well and good of Vietor to say we (only Trevor Timm of the three of us really has the funds to sue sue sue, and even then, only in selective situations) should just sue our way to democracy. But the law says we shouldn't have to sue.

Anyway, it was a particularly fun appearance, and great to be on with Kevin Gosztola and Trevor Timm as well.

THE AUTHOR OF THE WHITE PAPER, STUART DELERY, ARGUES SELECTIVE, MISLEADING DISCLOSURES SHOULD NOT BE CHECKED BY FOIA

As I noted in this post, Daniel Klaidman has identified the author of the targeted killing white paper as Stuart Delery.

At the time he wrote the white paper, Delery was Senior Counselor to Attorney General Eric Holder. Last March, he became Principal Deputy Assistant Attorney General in the Civil Division of DOJ and, in the absence of an Assistant AG (or, as far as I can tell, even a nominee, in which case this feels a lot like what George Bush did with Steven Bradbury when he left the

Acting head in charge for years on end), the Acting head of the Civil Division.

As I also noted, Delery actually argued the government's case in the ACLU's Drone FOIA on September 20, 2012. Now, that's the ACLU's other drone FOIA, not the one specifically requesting information that should have included the unclassified white paper Delery wrote if DOJ had answered the FOIA in good faith.

Nevertheless, it asked for closely related information:

> The Request seeks a variety of records relating to the use of unmanned aerial vehicles to conduct targeted killings, including the legal basis for the strikes and any legal limits on who may be targeted; where targeted drone strikes can occur; civilian casualties; which agencies or other non-governmental entities may be involved in conducting targeted killings; how the results of individual drone strikes are assessed after the fact; who may operate and direct targeted killing strikes; and how those involved in operating the program are supervised, overseen or disciplined.

At the time ACLU submitted the request on January 13, 2010, Delery was in the Deputy Attorney General's Office. DOJ responded to its part of the FOIA on February 3, 2010 — 16 days after DOJ worked on a briefing on targeted killing Eric Holder would make to President Obama and 15 days after he delivered that briefing — by claiming only FBI would have responsive records. When FBI searched its records it found none. DOJ made that initial response 6 days before someone in DAG — Delery's office — wrote an email to OLC about the Holder briefing.

So while DOJ's non-responsiveness in the drone FOIA is not as egregious as it was in the Awlaki FOIA, it's still clear that the department

Delery worked in, if not (as in the Awlaki FOIA) Delery's work itself, was shielded from FOIA by a disingenuous FOIA response.

Yet Delery, the Acting head of the Civil Division, nevertheless decided he should argue the government's case. Technically, Delery was arguing for CIA's right to pretend it hadn't confirmed its role in drone strikes in spite of repeated public statements doing just that, so he wasn't defending the non-disclosure of his Department's work, per se. Still, it's not generally considered good form for a lawyer to argue a matter in which he has been so closely involved. He did so, however, at a time before we knew just how centrally involved he was in this matter.

With all that in mind, I thought I'd look at what Delery said to the DC Circuit.

> MR. DELERY: May it please the Court, Stuart Delery for the Appellee, CIA.
>
> This Court in several cases has identified two important interests that the strict test for official confirmation serves. It protects the Government's vital interest in information related to national security and foreign affairs, and it advances FOIA's interest in disclosure by not punishing officials for attempting to educate the public on matters of public concern because otherwise officials would be reluctant to speak on important national security matters.
>
> Here, the Government has acknowledged that the United States makes efforts to target specific terrorists as part of its counter-terrorism operations, that as part of those operations or, in some cases, those operations involve the use of remotely piloted aircraft or drones, and it's also described the legal framework and standards that apply in this context in a series of speeches and

> interviews including by the President's counter-terrorism advisor, John Brennan, but also the Attorney General, the legal advisor to the State Department, the General Council of DOD, and as has been referenced in yesterday's or the recent exchange of 28J letters including a recent interview by the President. But, there's been no official acknowledgment one way or the other about whether the CIA is involved in these particular operations. [my emphasis]

Delery suggests that a series of Leon Panetta comments (both before and after he moved from CIA to DOD) making the CIA's role in drone killing clear should not amount to confirmation that the CIA is involved in drone killing because, he says, FOIA's interest in disclosure should not punish public officials for attempting to educate the public.

Or, to put it another way, the Administration giving a bunch of self-serving speeches should not then make the topic of those speeches subject to FOIA because, in Delery's mind, that would work contrary to FOIA's support for disclosure because it would punish officials for giving self-serving speeches.

He then proceeds to name the speeches in question. Or most of them. While he mentions the speeches John Brennan, Eric Holder, Harold Koh, and Jeh Johnson gave, he neglects to mention the speech Stephen Preston — the General Counsel of the Agency Delery technically represented in this hearing — gave.

That's utterly consistent with the CIA's apparent Glomaring of the speech in the Awlaki FOIA. Except in this case, it is even more egregious because Preston's speech clearly spoke about both hypothetical lethal force covert ops (the Awlaki killing) and the non-hypothetical Osama bin Laden targeted killing. In this suit, the CIA should not be able to Glomar this speech. Effectively, the government maintains

the CIA can make a public speech about a topic, but not acknowledge it in FOIA because then we could connect the speech up with the topic it was about. Or something like that.

All that said, remember how misleading the speeches Delery did name were. None of them mention signature strikes; John Brennan's in particular suggests the strikes are limited to targeted strikes.

> Yes, in full accordance with the law—and in order to prevent terrorist attacks on the United States and to save American lives—the United States Government conducts targeted strikes against specific al-Qa'ida terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones. And I'm here today because President Obama has instructed us to be more open with the American people about these efforts.

Furthermore, we now know what Delery, better than almost anyone else, has known for some time: Eric Holder's public speech resembles the white paper (and therefore presumably the underlying OLC memo authorizing targeted killing of Awlaki) in most respects. Except that Holder,

- Hid one of the biggest concerns about targeted killing, the possibility it would constitute murder
- Hid concerns that targeted killing would constitute a war crime
- Hid a claim that a broadly defined interpretation of imminent threat would limit the application of the Fourth Amendment in a targeted killing of an

American
- Claimed the program was subject to a great deal of oversight that it appears not to have been

In other words, Delery argued to the DC Circuit that the government should be able to make deceptive speeches to the public — in the name of educating the public! — without having those speeches trigger FOIA requirements that might allow citizens to fact check those speeches.

And the treatment of the unclassified white paper — it was provided to four committees in Congress only after the government's response to the other ACLU FOIA was complete, so the government hid how Holder's speech differed from the underlying memo even from Congress for months (in the case of Committees with oversight) and years (in the case of the rest of Congress). Then, when it became convenient, it was leaked, after two FOIAs requesting it had been stalled or denied. The White House Press Secretary then told reporters to go read the white paper that had been withheld in FOIA but then conveniently leaked. Thus, the white paper serves as Exhibit A in the government's self-serving dribbling out of information, in violation of the spirit of FOIA.

Which is interesting, because here's how Delery responded to questions about the Administration's rampant leaking.

> JUDGE GRIFFITH: I'm interested in the leaks question. Could you address that? What are we to make of these allegations of a serious pattern in strategy of leaks at the highest levels of the CIA and the Government as being a selective disclosure and it, in fact, works as an sources in media reports.
>
> JUDGE GRIFFITH: Are you aware of any case in which we have been confronted with allegations of such widespread —

> MR. DELERY: Right.
>
> JUDGE GRIFFITH: — and strategic leaking at such a high level? Are you aware of any case that's like this? I'm not.
>
> MR. DELERY: I think there certainly are other cases.
>
> JUDGE GRIFFITH: Like this.
>
> MR. DELERY: Other cases involve widespread alleged leaking. I don't think that this particular allegation necessarily is the same. I also emphasize that it's an allegation. The Court when discussing the part of the official confirmation test that suggests that some evidence of bad faith might lead to a different result has never looked at this question. It was also made clear that that inquiry goes to whether there's a basis to believe the national security judgment reflected in the declarations has not been met, and has emphasized that speculation isn't enough, that the plaintiff seeking the information in FOIA needs to come forward with some evidence.
>
> JUDGE GRIFFITH: These are allegations. But, the allegations are that senior CIA officials leaked information about a CIA drone program to the New York Times, the Wall Street Journal, a number of other major media sources. So, the common sense of this is we'd have to be left to believe that all of those outlets are, in fact, misinformed or lying.
>
> MR. DELERY: Right. Well, I think a few additional points. One is these, well, as a factual matter, for example, when asked about this allegation directly, the President made a statement back in June saying that that was not the case. And so, you're confronted here with unsupported allegations in connection with litigation. You have a record and

> declaration from the CIA saying that the information being sought here, whether these documents exist, remains a classified fact, and I don't think there's any support in the Court's cases to find that fact pattern sufficient to justify a further inquiry. In effect, it turned FOIA litigation into a leak investigation, and the question I would have is what's the rule that would be articulated about what threshold would trigger that kind of inquiry, and beyond that, how would it proceed? It doesn't seem like a workable result. The Court has never conceived –
>
> JUDGE GRIFFITH: But, on the other hand, aren't we, if we're to apply FOIA, aren't we to work to resolve, to work to prevent efforts to get around FOIA through strategic leaks. Right?
>
> MR. DELERY: I think what the Court has said is that the purpose of FOIA litigation is to determine whether a particular document should or shouldn't be released not to identify whether a certain fact is or isn't true. [my emphasis]

Delery totally ignores Thomas Griffith's point, that FOIA was enacted to avoid precisely what has happened in this case, the self-interested dribbling out of information that serves as much to confuse as to "educate" the public. He invokes Obama's comment – exactly parallel to some Bush made during the Valerie Plame leak case – assuring that no sanctioned leaks had happened; it turns out they had. And then Delery again asserts that the sole role of Courts in FOIAs is to determine whether documents can be withheld, not to allow citizens to use FOIAs to test the Executive Branch's truth claims. (In a case argued in February, a lawyer reporting to Delery went even further, arguing that Courts should only rubber-stamp every Executive claim that a document can't be released.)

Stuart Delery, a man whose own work product on this issue was shielded by DOJ's egregious non-response to an ACLU FOIA, says citizens shouldn't be able to use FOIA to check the veracity of public claims the Executive Branch makes.

Happy Transparency Week: This guy is one of the most senior officials in the Department of Justice.

COURTS WON'T BE REVIEWING LEGALITY OF COUNTERTERRORISM PROGRAMS ANYTIME SOON

By a 5-4 party line vote, SCOTUS denied standing in Amnesty v. Clapper today.

The majority opinion, written by Sam Alito, emphasizes separation of power.

> The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.
>
> [snip]
>
> In keeping with the purpose of this doctrine, "[o]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."

> [snip]
>
> and we have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs,

It uses a high standard for the imminence of harm, including what I consider a highly ironic passage, considering the Administration's own standards for imminence.

> "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." Id., at 565, n. 2 (internal quotation marks omitted). Thus, we have repeatedly reiterated that "threatened injury must be certainly impending to constitute injury in fact," and that "[a]llegations of possible future injury" are not sufficient.

It even says it can't use in camera review in this case, because doing so would establish a precedent terrorists could use to find out whether they're being wiretapped.

> It was suggested at oral argument that the Government could help resolve the standing inquiry by disclosing to a court, perhaps through an in camera proceeding, (1) whether it is intercepting respondents' communications and (2) what targeting or minimization procedures it is using. See Tr. of Oral Arg. 13–14, 44, 56. This suggestion is puzzling. As an initial matter, it is respondents' burden to prove their standing by pointing to specific facts, Lujan v. Defenders of Wildlife, 504 U.

> S. 555, 561 (1992), not the Government's burden to disprove standing by revealing details of its surveillance priorities. Moreover, this type of hypothetical disclosure proceeding would allow a terrorist (or his attorney) to determine whether he is currently under U. S. surveillance simply by filing a lawsuit challenging the Government's surveillance program. Even if the terrorist's attorney were to comply with a protective order prohibiting him from sharing the Government's disclosures with his client, the court's postdisclosure decision about whether to dismiss the suit for lack of standing would surely signal to the terrorist whether his name was on the list of surveillance targets.

Ultimately, though, it said the plaintiff's fears were too speculative to amount to standing.

It does so by ignoring — and indeed, misrepresenting — the details presented about what is new in this program. Here's how Stephen Breyer, in his dissent, describes them.

> The addition of §1881a in 2008 changed this prior law in three important ways. First, it eliminated the require ment that the Government describe to the court each specific target and identify each facility at which its sur veillance would be directed, thus permitting surveillance on a programmatic, not necessarily individualized, basis. §1881a(g). Second, it eliminated the requirement that a target be a "foreign power or an agent of a foreign power." Ibid. Third, it diminished the court's authority to insist upon, and eliminated its authority to supervise, instance-specific privacy-intrusion minimization procedures (though the Government still must use court-approved general

> minimization procedures). §1881a(e).

By contrast, Alito claims the new program only allows the government to target individuals (h/t Julian Sanchez who first pointed this out).

By looking at the new aspects of the program, Breyer shows that the plaintiffs' communications could now be collected whereas before they wouldn't have been.

> First, the plaintiffs have engaged, and continue to engage, in electronic communica tions of a kind that the 2008 amendment, but not the prior Act, authorizes the Government to intercept. These com munications include discussions with family members of those detained at Guantanamo, friends and acquaintances of those persons, and investigators, experts and others with knowledge of circumstances related to terrorist activ ities. These persons are foreigners located outside the United States. They are not "foreign power[s]" or "agent[s] of . . . foreign power[s]." And the plaintiffs state that they exchange with these persons "foreign intelligence infor mation," defined to include information that "relates to" "international terrorism" and "the national defense or the security of the United States."
>
> [snip]
>
> The upshot is that (1) similarity of content, (2) strong motives, (3) prior behavior, and (4) capacity all point to a very strong likelihood that the Government will intercept at least some of the plaintiffs' communications, including some that the 2008 amendment, §1881a, but not the pre 2008 Act, authorizes the Government to intercept

Much of the rest of Breyer's dissent pertains to

Alito's inconsistency on applying standing (without saying, which I would, that Alito seems to value the standing of property owners more than owners of less tangible rights). After doing so, Breyer argues at least some of the plaintiffs have standing.

> In sum, as the Court concedes, see ante, at 15–16, and n. 5, the word "certainly" in the phrase "certainly impending" does not refer to absolute certainty. As our case law demonstrates, what the Constitution requires is something more akin to "reasonable probability" or "high probability." The use of some such standard is all that is necessary here to ensure the actual concrete injury that the Constitution demands. The considerations set forth in Parts II and III, supra, make clear that the standard is readily met in this case

Ultimately, that's what this decision is about: standing. But it will serve as a precedent for a number of other counterterrorism cases — including the NDAA one working through the 2nd. Which, given any more particularized suit would be thrown out under state secrets claims, means it will be almost impossible to get SCOTUS to review counterterrorism programs anytime soon.

Mind you, Alito says this ruling in no way insulates this program from judicial review, because the FISA Court conducts such a review.

> Second, our holding today by no means insulates §1881a from judicial review. As described above, Congress created a comprehensive scheme in which the Foreign Intelligence Surveillance Court evaluates the Government's certifications, targeting procedures, and minimization procedures—including assessing whether the targeting and minimization procedures comport with the Fourth Amendment. §§1881a(a), (c)(1), (i)(2), (i)(3). Any dissatisfaction that

> respondents may have about the Foreign Intelligence Surveillance Court's rulings—or the congressional delineation of that court's role—is irrelevant to our standing analysis. [my emphasis]

There are a lot of problems with that, with respect to this program, particularly given that court has no oversight over what the government does with intercepts after they've collected them (which gets to Breyer's point about minimization).

But Alito is right on one point. A big part of the problem in this case (as in the NDAA case, frankly) is that Congress wanted to create a review-free program that gutted citizens' rights. This review-free process is by design.

And they're about to do it again with targeted killing.

Update: ACLU's Jameel Jaffer emphasizes the degree to which this punts our rights back to the political classes as well.

> "It's a disturbing decision. The FISA Amendments Act is a sweeping surveillance statute with far-reaching implications for Americans' privacy. This ruling insulates the statute from meaningful judicial review and leaves Americans' privacy rights to the mercy of the political branches," said ACLU Deputy Legal Director Jameel Jaffer,

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DID ADMINISTRATION STALL CONGRESSIONAL

OVERSIGHT JUST TO BEAT ACLU IN COURT?

In an interview with WSJ last March, White House Counsel Kathryn Ruemmler said that publicly explaining the drone program would be "self-defeating."

> White House Counsel Kathy Ruemmler acknowledged Mr. Obama has developed a broader view of executive power since he was a senator. In explaining the shift, she cited the nature of the office.
>
> "Many issues that he deals with are just on him, where the Congress doesn't bear the burden in the same way," she said. "Until one experiences that first hand, it is difficult to appreciate fully how you need flexibility in a lot of circumstances."
>
> [snip]
>
> Ms. Ruemmler said Mr. Obama tries to publicly explain his use of executive power, but says certain counterterrorism programs like the drone campaign are exceptions. Opening them to public scrutiny would be "self-defeating," she said.

At the time, I thought she was treating the NYT and ACLU as "the public." After all, in a debate over releasing the targeted killing memos in the situation room in November 2011, she had warned that releasing the memo might weaken the government's position in litigation, presumably the FOIA battle with the two entities.

> The CIA and other elements of the intelligence community were opposed to any disclosures that could lift the veil of secrecy from a covert program. Others, notably the Justice and State departments, argued that the killing of

> an American citizen without trial, while justified in rare cases, was so extraordinary it demanded a higher level of public explanation. Among the proposals discussed in the fall: releasing a “white paper” based on the Justice memo, publishing an op-ed article in The New York Times under Holder’s byline, and making no public disclosures at all.
>
> The issue came to a head at a Situation Room meeting in November. At lower-level interagency meetings, Obama officials had already begun moving toward a compromise. David Petraeus, the new CIA director whose agency had been wary of too much disclosure, came out in support of revealing the legal reasoning behind the Awlaki killing so long as the case was not explicitly discussed. Petraeus, according to administration officials, was backed up by James Clapper, the director of national intelligence. (The CIA declined to comment.) The State Department, meanwhile, continued to push for fuller disclosure. One senior Obama official who continued to raise questions about the wisdom of coming out publicly at all was Janet Napolitano, the Homeland Security director. She argued that the calls for transparency had quieted down, as one participant characterized her view, so why poke the hornet’s nest? Another senior official expressing caution about the plan was Kathryn Ruemmler, the White House counsel. She cautioned that the disclosures could weaken the government’s stance in pending litigation. *The New York Times* has filed a lawsuit against the Obama administration under the Freedom of Information Act seeking the release of the Justice Department legal opinion in the Awlaki case. [my emphasis]

But having now updated my timeline of the over 14 requests members of Congress have made for the targeted killing memos, she seems to lump Congress with the ACLU and NYT.

More troubling, though: it appears the White House stalled its response to Congress for almost nine months simply to gain an advantage in the ACLU FOIA lawsuits.

Here are the relevant dates:

> October 5, 2011: Chuck Grassley requests targeted killing memo.
>
> November, 2011, unknown date: Situation Room meeting regarding targeted killing memo.
>
> November 3, 2011: Arbitrary end date DOJ's Office of Information Policy placed on FOIA request for targeted killing documents.
>
> November 8, 2011: In his opening statement for a DOJ Oversight hearing, Pat Leahy complained the Senate Judiciary Committee had not been given "the legal justification underlying drone strikes against an American citizen overseas."
>
> November 8, 2011: According to House Judiciary Committee letter, the date on the white paper it later received.
>
> February 8, 2012: Ron Wyden follows up on his earlier requests for information on the targeted killing memo with Eric Holder.
>
> 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).
>
> 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."

Grassley requested the memo(s) just 6 days after Anwar al-Awlaki was killed; over a week before 16-year old American citizen Abdulrahman was killed. By November, the White House determined that releasing a white paper would present a middle ground. At least according to Jerry Nadler and friends, that memo was completed on November 8, 2011.

But then DOJ and the White House waited, ignoring Leahy's renewed call for the memo that same day.

The DOJ and the White House waited, ignoring Ron Wyden's request the following February.

DOJ only finally provided this woefully inadequate white paper to the committees overseeing DOJ and the CIA the day after the Administration had provided the NYT and ACLU with their FOIA request. And not only did they impose an arbitrary date on the ACLU's request to ensure it would not return this white paper — which was an unclassified document clearly responsive to the ACLU request (the NYT request specified OLC memos, so the white paper might not have been included) — but it stamped it draft so when NYT's Scott Shane asked for it specifically, they could deny it on deliberative grounds.

Note, when DOJ responded to ACLU's allegation that its search was inadequate, the FOIA officer

blamed people who worked in Eric Holder and the Deputy Attorney's offices (several of the key people involved have moved on; one of those may be — though I am not certain — Lisa Monaco, who will replace Brennan in the White House after he gets confirmed at CIA).

Consider what this appears to mean. The White House and DOJ appear to have delayed the time when key oversight committees in Congress could begin to exercise oversight over the targeted killing of Americans — including Abdulrahman al-Awlaki, who was still alive when the first request was made — until such time as it had dealt with the ACLU.

They appear to have stalled almost nine months because they didn't want to respond in good faith to the ACLU FOIA lawsuit.

Remember, one of the key John Brennan speeches in this whole process — one the white paper points to as public notice that people like Anwar al-Awlaki might be targeted under the twisted definition of "imminent threat" — also suggests that if the government doesn't respond to FOIA requests with a presumption of disclosure it will help the terrorists win.

Perhaps tellingly, while the speech bragged about Congress' effort to impose new disclosure requirements on the Executive, Brennan said nothing about the value of Congressional oversight; on the contrary, he complained that Congress was reining in the Executive Branch's "flexibility."

JOHN BRENNAN, UNPLUGGED

As a special service to emptywheel readers, I am going to provide an abridged version of John Brennan's answers to Additional Prehearing

Questions in advance of his confirmation hearing on Thursday.

Q1 Bullet 3: 7 CIA officers died in Khost in a suicide bombing that was direct retaliation for our drone attack on a funeral, and then another drone attack on a thuggish enemy of Pakistan and his young wife. Let's discuss this event as a counterintelligence event, shall we?

A: I have been impressed with CIA's counterintelligence briefings.

Q6 Bullet 1: What principles should determine whether we conduct covert action under Title 50, where they're legally supposed to be, or Title 10, where we've been hiding them?

A: Whatever works. But tell Congress!

Q6 Bullet 3: Should we reevaluate this?

A: Only if the President decides he wants to stop this shell game.

Q7: Should CIA be a paramilitary agency?

A: See answer to question 6.1.

Q9: We missed the Arab Spring. Shouldn't we expect better?

A: The liaison relationships with Egypt, Israel, and Saudi Arabia that failed us before won't fail us again.

Q10: Rather than asking whether you set up the CIA-on-the-Hudson, can you just answer whether you knew about this attempt to bypass restrictions on CIA operating in the US?

A: Yes, I did. CIA likes providing "key support" to local entities under the guise of Joint Terrorism Task Forces.

Q12: How would you manage CIA?

A: Moral rectitude.

Q13: You have lied about things like the Osama bin Laden raid to boost President Obama's political fortunes. How will you ensure

independence from the White House?

A: I will provide him with objective intelligence but I won't necessarily provide such objective intelligence to anyone else.

Q15: How will you work with your buddies in the Saudi and similar intelligence agencies?

A: I will be the gatekeeper to all US intelligence community elements, but I promise to keep the Chief of Mission informed. At least about what the US side of that relationship is doing.

Q16: How will you staff the agency?

A: Moral rectitude.

Q17: How will you ensure accountability?

A: As CIA did when it was torturing, we'll refer allegations of criminal wrongdoing to DOJ.

Q20: What is the proper relationship between Director of CIA and Director of National Intelligence?

A: James Clapper and I are buds, so it doesn't really matter what the proper relationship is supposed to be.

Q22 Bullet 1: How's our information sharing going?

A: Great! We're sharing with DOD, DHS, state, local, tribal, private sector, and international partners! But don't worry about Americans' privacy because I think we shared this much information with these many counter-parties responsibly.

Q22 Bullet 4: What information won't you share with the Intelligence Communities?

A: Instead of answering that let me cite statute and say I'll inform you of "significant" developments.

Q23: We haven't been getting information from the secretive Directorate of Strategic Operational Planning. Are you responsible for

that?

A: You're only allowed to get that information after we've made up our mind.

Q24: Did you write Susan Rice's talking points?

A: No.

Q25: Will you give us information? Will you let the President refuse to give us information?

A: Let me cite statute again. Flexibility! Gang of Four! 12 year old Memoranda of Notification as transparency!

You see, the Executive Branch decides how much oversight the Executive Branch needs.

Q26: Will you give us OLC memos?

A: Probably not.

Q27: Does the CIA have to admit when it has lied to Congressional intelligence committees?

A: Yes. But only to the committees.

Q28: What will you do to cut down on leaks?

A: In January 2012, CIA Inspector General audited "CIA's Process for Investigating Leaks of Classified Information." I commit to read that report and its recommendations and might even consider some of the recommendations.

Q29: Can people with security clearance – including contractors – share classified information with the media and Hollywood?

A: When high level executive branch officials leak, it is considered, "acknowledg[ing] classified information to a member of the media or [] declassify[ing] information for the very purpose of limiting damage to national security by protecting sources and methods or stemming the flow of additional classified information." But only senior Agency officials have the power to save the classified info by leaking it.

Q30: The Public Interest Declassification Board says the classification system is outdated. Do

you agree?

A: Let me answer after I’m confirmed.

Q31: Is the CIA transparent enough?

A: Sensitive intelligence sources and methods should not be sacrificed in an effort to increase transparency.

Q32: Tell us how much you have leaked.

A: Yes.

Q34 Bullet 1: You claim you opposed torture. Prove it.

A: That’s a sensitive intelligence source and method.

Q34 Bullet 2: What role should the CIA play in detention, interrogation, and rendition?

A: The CIA’s subject matter expertise should be leveraged in interrogation.

Q35: Have you read the torture report?

A: If confirmed I promise to read it.

Q36: Where should terrorists be indefinitely detained?

A: I don’t get to decide but if needed we would find some place.

Q37 Bullet 1: Define imminent as used before you decide to kill someone.

A: I know it when I see it.

Q37 Bullet 3: Is the US at war with terrorist organizations besides al Qaeda?

A: No, but we’re using intelligence and military resources against them anyway.

Q38: Do you support legislation to use drone strikes outside of “hot” battlefields?

A: Jeh Johnson has already said the world is the battlefield.

Q39: Is there a drone rulebook?

A: Not so much a rulebook as little scraps of paper strewn around I sometimes lose.

Q40: Did you lie about civilian casualties?

A: Harness Tragedy Myriad Regrettably Dialogue … Sorry, what was the question again?

JACK GOLDSMITH, OPEN SOURCE OLC LAWYER, TO OBAMA: YOU'RE BREAKING THE LAW

Eleven days ago, Senate Intelligence Committee member Ron Wyden sent a publicly released letter to John Brennan making two things clear:

- The Administration has refused to tell grunt (that is, non-Gang of Four) members of the Senate Intelligence Committee whether its targeted killing program—extending even to the killing of US citizens—is authorized under Article II or AUMF power.
- The Administration has refused to tell grunt members of the Senate Intelligence Committee which countries it uses "lethal counterterrorism authorities" in.

Nine days later, Jack Goldsmith, a man best known for going to some length to force a

President to have credible legal justifications for his counterterrorism programs, wrote this column, offering his advice about "What to do about growing extra-AUMF threats?"

Mind you, Goldsmith is addressing the legal problem presented by (and explaining his column by pointing to) our fight against AQIM in North Africa and al-Nusra in Syria. He is not pointing—at least not explicitly—to the troubling revelations of Wyden's letter.

But Goldsmith's advice is directly relevant to the topics on which the Administration refuses to brief the grunt Senate Intelligence Committee members. Goldsmith warns that Article II power—on which it increasingly appears the Administration is relying—doesn't extend as far as AUMF authority would.

> One possibility is to rely on the president's independent Article II power, which authorizes the president to use force, in the absence of congressional authorization, in defense of the nation. This approach faces at least three problems. First, it is a fraught basis for action because the president must act without the overt support of Congress, which can later snipe at his decisions, or worse. Relatedly, courts are more inclined to uphold presidential action supported by Congress. Second, the scope of Article II targeting authorities is less certain than the scope of AUMF targeting authorities, and might be narrower. [my emphasis]

And Goldsmith describes the importance of telling Congress—and he's talking about telling all of Congress, not just grunt Senate Intelligence Committee members—what groups are actually included among legal counterterrorism targets.

> Congress could authorize the President

> to use force against specified terrorist groups in specified countries (or perhaps just against particular groups without specifying nations). The *Wall Street Journal* recently reported that some in the administration are considering asking Congress for just such a statute to address Islamist terrorist threats in some North African countries. This retail approach is in theory the best option because Congress defines the enemy, and because Congress stays in the loop politically and legally and must debate and approve any expansions of the conflict. The problem with the retail approach is that it is unclear whether Congress can or will, on a continuing basis, authorize force quickly or robustly enough to meet the ever-morphing threat.
>
> Third, Congress could set forth general statutory criteria for presidential uses of force against new terrorist threats but require the executive branch, through an administrative process, to identify particular groups that are targetable. One model here is the State Department's "Foreign Terrorist Organization" designation process. There are at least two problems with this approach. First, it is unclear whether Congress may constitutionally delegate the war power in this fashion. And second, it lessens congressional involvement and accountability as compared to the second approach. [my emphasis]

Now, let me be clear: Goldsmith never comes out and directly says that the Obama Administration is, currently, breaking the law (and he makes no comment on whether the Administration is violating National Security Act requirements on briefing Congress). And if he did, he'd probably couch it in language about needing the cover of

Congressional sanction—more language about Congress "sniping, or worse." Nevertheless, the clear implication if you take Wyden's letter in conjunction with Goldsmith's Office of Legal Counsel-type advice is that the Obama Administration is conducting counterterrorism ops without legal sanction.

But consider what it means that this solidly conservative lawyer is telling the Obama Administration the same thing he had to tell George Bush when the latter relied on John Yoo's crappy legal advice.

> This suggests that the administration will continue to rely as much as possible on an expansive interpretation of the AUMF and on Article II. We will see if these authorities suffice to meet the threat.

When Jim Comey, in response Goldsmith's advice, dramatically stood up to Andy Card and Alberto Gonzales' bullying in a DC Intensive Care Unit, he did so to convey to them that an "expansive interpretation" of Article II power was not good enough (though according to Tom Daschle's read of the AUMF discussions, Goldsmith replaced John Yoo's expansive interpretation of Article II authority with an expansive interpretation of the AUMF).

Goldsmith's advice, writing without the authority he once had as the confirmed OLC head, and lacking the leverage of an expiring wiretapping authorization or the imposing figure of a 6'8″ Acting Attorney General to deliver his message, may not carry the weight it once did.

But he is offering fundamentally the same warning he did 9 years ago.

Update: This post has been updated for clarity.