DRONE WAR SECRECY AND KILL OR CAPTURE



As we stand on the doorstep of President Obama signing into law the new NDAA and its dreaded controversial provisions, there are two new articles out of interest this morning. The first is an incredibly useful, and pretty thorough, synopsis at Lawfare of the new NDAA entitled "NDAA FAQ: A Guide for the Perplexed". It is co-written by Ben Wittes and Bobby Chesney and, though I may differ slightly in a couple of areas, it is not by much and their primer is extremely useful. I suggest it highly, and it has condensed a lot of material into an easily digestible blog length post.

The second is a long read from the Washington Post on how secrecy defines Obama's drone wars:

> The administration has said that its covert, targeted killings with remote-controlled aircraft in Pakistan, Yemen, Somalia and potentially beyond are proper under both domestic and international law. It has said that the targets are chosen under strict criteria, with rigorous internal oversight.
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> ….
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> "They've based it on the personal legitimacy of [President] Obama – the 'trust me' concept," Anderson said. "That's not a viable concept for a president going forward."

The article goes on to state how the CIA, and the majority of voices in the White House, are fighting tooth and nail for continued utmost secrecy lest any of our enemies somehow discover we are blowing them to bits with our drones. This is, of course, entirely predictable, especially now that the former head of the CIA leads the military and the former military chief for the greater Af/Pak theater which has long been ground zero for the drone kill program, Petraeus, is the head of the CIA.

But then the Post piece brings up our old friend, the OLC:

> The Justice Department's Office of Legal Counsel has opposed the declassification of any portion of its opinion justifying the targeted killing of U.S. citizen Anwar al-Awlaki in Yemen this year. Awlaki, a propagandist for the Yemen-based al-Qaeda affiliate whom Obama identified as its "external operations" chief, was the first American known to have been the main target of a drone strike. While officials say they did not require special permission to kill him, the administration apparently felt it would be prudent to spell out its legal rationale.
> ….
> Under domestic law, the administration considers all three to be covered by the Authorization for Use of Military Force that Congress passed days after the Sept. 11, 2001, attacks. In two key sentences that have no expiration date, the AUMF gives the president sole power to use "all necessary and appropriate force" against nations, groups or persons who committed or aided the attacks, and to prevent future attacks.
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> The CIA has separate legal authority to conduct counterterrorism operations under a secret presidential order, or finding, first signed by President

> Ronald Reagan more than two decades ago. In 1998, President Bill Clinton signed an amendment, called a Memorandum of Notification, overriding a long-standing ban on CIA assassinations overseas and allowing “lethal” counterterrorism actions against a short list of named targets, including Osama bin Laden and his top lieutenants. Killing was approved only if capture was not deemed “feasible.”
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> A week after the Sept. 11 attacks, the Bush administration amended the finding again, dropping the list of named targets and the caveat on “feasible” capture.
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> “All of that conditional language was not included,” said a former Bush administration official involved in those decisions. “This was straight-out legal authority. . . . By design, it was written as broadly as possible.”

This brings us back to the notable October 8, 2011 article by the New York Times’ Charlie Savage on his viewing of the Awlaki targeting memo relied on by the Obama White House for the extrajudicial execution of Anwar al-Awlaki. Marcy, at the time discussed the incongruity of the collateral damage issue and the fact Samir Khan was also a kill in the targeted Awlaki strike.

I would like to delve into a second, and equally misleading, meme that has been created by the self serving and inconsistent secret law Obama has geometrically expanded from the already deplorable Bush/Cheney policy set: the false dichotomy in the kill or capture element of the Awlaki kill targeting.

It has become an article of faith that Awlaki could neither have been brought to justice in Yemen nor, more importantly, captured in Yemen and brought to justice in an appropriate forum

by the United States. It has been a central point made in the press; here is the New York Time's Scott Shane in early October:

> The administration's legal argument in the case of Mr. Awlaki appeared to have three elements. First, he posed an imminent threat to the lives of Americans, having participated in plots to blow up a Detroit-bound airliner in 2009 and to bomb two cargo planes last year. Second, he was fighting alongside the enemy in the armed conflict with Al Qaeda. **And finally, in the chaos of Yemen, there was no feasible way to arrest him.** (emphasis added)

Shane was relying on Bobby Chesney, a University of Texas law professor, and granted an expert in the field who also is a principal at Lawfare Blog. It is the same meme propounded by not only other reporters, but by other leading experts. Here is Ben Wittes in Lawfare stating the assumption as a given fact. Here is Jack Goldsmith (also of Lawfare) espousing the same in a widely read Times Editorial. Here is Peter Finn and the venerable Washington Post doing the same.

Just how does this meme set in and become the common wisdom and fact of such wise men (and I mean that term literally; these are smart people)? Because, of course, that is what the US government tells them, as well as us. With nothing but the self-serving, selective dribble leaking by the Administration of supposedly classified information, there is no specific factual basis from which to dissect the truth. And that is the way the Administration likes it; it always gets messy when citizens actually *know* what their government is doing in their name.

On the Awlaki targeted execution, it was not only desirable for people to believe the government's stated basis, it was critical. Because the house of cards falls otherwise without the necessity element, and it becomes no

more than a convenience kill wherein Mr. Obama was too lazy and hamstrung by his own political considerations to do otherwise. Here is how Charlie Savage describes the predicate element in the Awlaki OLC memo in his, so far, seminal report:

> The Obama administration's secret legal memorandum that opened the door to the killing of Anwar al-Awlaki, the American-born radical Muslim cleric hiding in Yemen, found that it would be lawful only if it were not feasible to take him alive, according to people who have read the document.
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> …
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> **The [OLC] lawyers were also told that capturing him alive among hostile armed allies might not be feasible if and when he were located**. (emphasis added)

In fairness to Mr. Savage, he more than touches on the import of the issue by including a question from Samir Khan's father:

> "Was this style of execution the only solution?" the Khan family asked in its statement. "Why couldn't there have been a capture and trial?"

And Charlie himself posits the following:

> The memorandum is said to declare that in the case of a citizen, it is legally required to capture the militant if feasible — raising a question: was capturing Mr. Awlaki in fact feasible?
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> It is possible that officials decided last month that it was not feasible to attempt to capture him because of factors like the risk it could pose to American commandos and the diplomatic problems that could arise from putting ground forces on Yemeni soil. Still, the raid on Osama bin Laden's compound in Pakistan demonstrates that officials

> have deemed such operations feasible at times.

So Obama Administration "officials decided last month that it was not feasible to attempt to capture" Awlaki. Most everybody has taken that on faith, but should they? The US had had Awlaki under intense surveillance for quite some time. The US also claims to be strong strategic partners with Pakistan. It is doubtful Yemen really cared all that much about Awlaki, as he was a noisy American. Who says there was no way between the combined capabilities of the US and Yemen Awlaki could not at least be attempted to be captured?

Now, I am not saying it is clear Awlaki could have been captured and brought to trial, just that it is not a given that it was impossible. Who makes those decisions, and on what exact basis and criteria? Anwar Awlaki, for everything you want to say about him, had *never* been charged with a crime, much less convicted of one, and he retained Fourth, Fifth and Sixth Amendment rights as a US citizen. If the precedent for extrajudicial execution of American citizens is being set at the whim of the President, then American citizens should know how and why.

So, hats off to Charlie Savage for having raised the critical question on necessity; problem is, however, it was only a question. There was, and is, no more specific information for him, or us, to go on from the Administration. Which leaves the remainder of the citizenry and chattering classes effectively working off of the glittering generalities and assumptions propounded by the government. And, in case you did not notice, there was effectively no discussion of the kill or capture paradigm in all the hubbub of the recent NDAA discussion. So, we are no further along in this regard than we were when Awlaki was terminated with prejudice. I will likely come back to the kill or capture paradigm at a later date, because it is a fascinating discussion in terms of history

and protocols.

Which brings us back to where we started here. These are life and death matters for those, like Awlaki (and Samir Khan too, as it is quite likely the US had reason to know he was in Awlaki's "collateral damage" radius), that are placed on the President's kill list and, to the rest of us, are of rude foundational importance to the very existence of American rule of law and constitutional governance. For all the sturm and drang surrounding the release of the torture memos, the resulting discussion has been sober, intelligent, and important. The publication of the torture memos has provided a template not only showing how it can be done, but proving that it can and should be done.

The same as was the case with the OLC torture memos holds true in regards to the OLC kill list targeting memo for Anwar al-Alawki and the related memos the Obama Administration is relying on. The documents should be released by the Obama administration with no more than the absolute minimal redaction necessary to truly protect means and methods.

If the Obama administration insists on hiding such critical knowledge and information necessary for the knowing exercise of democracy within the United States, then Mr. Obama and his administration should have the intellectual consistency and honesty to investigate and prosecute those within his administration responsible for the serious leaks to Charlie Savage and the New York Times of classified information that has previously been deemed in court and under oath to be "state secrets". If you can prosecute Bradley Manning, surely there should be some effort to bring Savage's leaker to justice. Except there will be none of that, because it was almost certainly ordered by the White House as a selective propaganda ploy to bolster their extrajudicial killing program.

As hard as it is to believe, I, at the time, contacted the Obama Department of Justice and they oficially stated "no comment" when these

questions were propounded. In light of the fact the leak almost certainly came from extremely high up within the Obama administration, and was done with the express knowledge and consent of Mr. Obama himself to crow and take political advantage of his kill, it is hard to say that this is shocking. And, again, this is exactly the problem when the United States government plays self-serving games with its own classified information – the people, and the democracy they are tasked with guiding, all lose.

[The forever classic Emptywheel “Killer Drone” graphic is, of course by the one and only Darkblack]