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.
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> 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**.
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> 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.
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> JUDGE GRIFFITH: Are you aware of any case in which we have been confronted with allegations of such widespread —
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> MR. DELERY: Right.
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> JUDGE GRIFFITH: — and strategic leaking at such a high level? Are you aware of any case that's like this? I'm not.
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> MR. DELERY: I think there certainly are other cases.
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> JUDGE GRIFFITH: Like this.
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> 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.
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> 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.
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> 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 —
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> 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?
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> 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.