

IM-MI-NENT: (ADJ, DOJ) 20 MONTHS

Michael Isikoff has obtained and posted the white paper DOJ gave to the Senate Intelligence and Judiciary Committees to stave off giving them the OLC memos that actually authorized Anwar al-Awlaki's killing. I noted its mention in an SJC markup last year.

While the memos they are hiding are almost certainly far more damning (as I'll lay out tomorrow), this is utterly damning in itself.

It effectively defines imminence so as to have no meaning.

First, the condition that an operational leader present an "imminent" threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future. Given the nature of, for example, the terrorist attacks on September 11, in which civilian airliners were hijacked to strike the World Trade Center and the Pentagon, this definition of imminence, which would require the United States to refrain from action until preparations for an attack are concluded, would not allow the United States sufficient time to defend itself. The defensive options available to the United States may be reduced or eliminated if al-Qa'ida operatives disappear and cannot be found when the time of their attack approaches. Consequently, with respect to al-Qa'ida leaders who are continually planning attacks, the United States is likely to have only a limited window of opportunity within which to defend Americans in a manner that has both a high likelihood of success and sufficiently reduces the probabilities

of civilian casualties.

[snip]

By its nature, therefore, the threat posed by al-Qa'ida and its associated forces demands a broader concept of imminence in judging when a person continually planning terror attacks presents an imminent threat, making the use of force appropriate. In this context, imminence must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans.

[snip]

With this understanding, a high-level official could conclude, for example, that an individual poses an "imminent threat" of violent attack against the United States where he is an operational leader of al-Qa'ida or an associated force and is personally and continually involved in planning terrorist attacks against the United States. Moreover, where the al-Qa'ida member in question has recently been involved in activities posing an imminent threat of violent attack against the United States, and there is no evidence suggesting that he has renounced or abandoned such activities, that member's involvement in al-Qa'ida's continuing terrorist campaign against the United States would support the conclusion that the members is an imminent threat.

Even assuming this is the justification they used to kill Anwar al-Awlaki, they killed him about 20 months after the alleged attacks (the UndieBomber and plotting against British Airways) in which they sort of have evidence against him (though DOJ has always managed to

make sure that evidence was not challenged in an antagonistic setting).

If you measure from the toner cartridge plot – in which other AQAP members seem to have been the operational leaders – it was a year between the plot and the killing.

Anwar al-Awlaki may have been dangerous and surely was a hateful man. But it appears clear that DOJ had no evidence he was an imminent threat – at least as traditionally defined.

So they just redefined it.

Update: See Opino Juris for an assessment of this definition from an IHL and IHRL perspective.

Update: I've corrected my transcription of the imminent passage above (I had had "Second" instead of "Moreover").