

THE COMMERCIAL FOR ~~JOHN BRENNAN'S~~ ~~SIGNATURE STRIKE~~ ~~DRONE SHOP TADS~~

Between them, the NYT and the Daily Beast published over 10,000 words on Obama's drone assassination program yesterday. Both stories rolled out the new acronym the Administration wants us to use: terrorist-attack-disruption strikes, or TADS. Neither of them, in those over 10,000 words, once mentioned Abdulrahman al-Awlaki, Anwar al-Awlaki's 16 year old American citizen son also killed in a drone strike last year.

And while both stories break important new ground and challenge the Administration's narrative in key ways, the prioritization of TADS over Abdulrahman in them is a pretty clear indication of the success with which the Administration pushed a certain agenda in these stories.

As I suggested at the end of this post, I think John Brennan hoped to use them to reframe recent changes to the drone program to make them more palatable.

Drone Strikes before They Got Worse

Before I lay out the new spin these stories offer on the signature strikes and vetting process rolled out last month, let's recall what was included in the drone program **before** these recent changes, in addition to the killing of a 16-year old American citizen.

According to the NYT, the Administration assumed that, "people in an area of known terrorist activity, or found with a top Qaeda operative, are probably up to no good" and therefore all military age males in a strike zone could be targeted. A former senior counterterrorism official calls earlier drone targeting, "guilt

by association.” Of signature strikes in Pakistan, a senior (apparently still-serving) official joked “that when the C.I.A. sees ‘three guys doing jumping jacks,’ the agency thinks it is a terrorist training camp.” And one of Obama’s top political advisors, David Axelrod, was attending targeting meetings, injecting a political taint on the program.

Even with all of that, these stories don’t explain how the intense vetting process they describe resulted in the al-Majala strike that made Jeh Johnson think about going to Catholic confession and “shook” John Brennan and President Obama. Or, of course, how we came to kill a 16 year old American citizen.

So all of that was in place before the recent changes to the drone assassination program made it worse. Don’t worry, though, it’s TADS now.

With all that in mind—Abdulrahman and the guilt by association and the three guys doing jumping jacks—let’s look at how these stories reframe signature strikes in Yemen and White House consolidation of the vetting.

Assassination Czar John Brennan’s Drone Shop

Consider the way the articles describe the targeting process. The NYT—relying on a single source, “an administration official who has watched [Obama] closely”—describes a very aggressive vetting process led by the DOD, then nods to a “parallel” process at CIA in countries where it leads the vetting.

The video conferences are run by the Pentagon, which oversees strikes in those countries, and participants do not hesitate to call out a challenge, pressing for the evidence behind accusations of ties to Al Qaeda.

“What’s a Qaeda facilitator?” asked one participant, illustrating the spirit of the exchanges. “If I open a gate and you drive through it, am I a facilitator?” Given the contentious discussions, it

can take five or six sessions for a name to be approved, and names go off the list if a suspect no longer appears to pose an imminent threat, the official said. A parallel, more cloistered selection process at the C.I.A. focuses largely on Pakistan, where that agency conducts strikes.

The nominations go to the White House, where by his own insistence and guided by Mr. Brennan, Mr. Obama must approve any name. He signs off on every strike in Yemen and Somalia and also on the more complex and risky strikes in Pakistan – about a third of the total.

Since for the most part, DOD has managed the Yemen and Somalia strikes, while CIA managed the Pakistan ones, this conflates the vetting for personality strikes targeted at known people and the signature strikes the CIA has targeted against men doing jumping jacks in Pakistan. Somehow, al-Majala and Abdulrahman still got through that vetting process, but the exhaustive DOD one was, for the most part, far more rigorous than the CIA one.

Now compare that description of the DOD vetting process with the one the AP gave on May 21, which it says is “mostly defunct.”

The previous process for vetting them, **now mostly defunct**, was established by Mullen early in the Obama administration, with a major revamp in the spring of 2011, two officials said.

[snip]

Under the old Pentagon-run review, the first step was to gather evidence on a potential target. That person’s case would be discussed over an interagency secure video teleconference, involving the National Counterterrorism Center and the State Department, among other agencies. Among the data taken into

consideration: Is the target a member of al-Qaida or its affiliates; is he engaged in activities aimed at the U.S. overseas or at home?

If a target isn't captured or killed within 30 days after he is chosen, his case must be reviewed to see if he's still a threat. [my emphasis]

That is, that free-ranging discussion, the process by which targets could come off the list as well as get put on it? At least according to the AP, it is now defunct—or at least “less relevant.” And there's little chance the AP is wrong about the change, given that after it initially reported Brennan's seizure of the process, a senior Administration official responded to it, acknowledging the change.

One senior administration official argues that Brennan's move adds another layer of review that augments rather than detracts from the Pentagon's role.

In other words, the description the NYT offers appears to be outdated, describing a process that recently became less deliberative.

Daniel Klaidman's description, which focuses closely on the important role James Cartwright played in the deliberative process, must also be outdated, given that Cartwright retired in August. Indeed, one (not entirely convincing) explanation the AP offers for the change in vetting is the retirement of Mike Mullen, who left in September, and the comparative disinterest of Mullen's replacement, Martin Dempsey.

As detailed as these stories are, then, it appears **they don't portray the vetting process as it currently exists**, in which Brennan's staffers get recommendations from other agencies rather than letting this larger group debate targets.

So understand what appears to have happened. In April, Brennan became the Assassination Czar, taking over the targeting process. Several weeks later, someone (I'm assuming in JSOC) leaked that fact to the AP, and as the story evolved the White House tried to put a good spin on it. And yet neither the exhaustive, sanctioned profile in the NYT nor Daniel Klaidman's book (which presumably was already substantially completed) included a description of the updated vetting process.

Which makes this line, from the AP, purportedly explaining the reason for the change in vetting process, all the more telling.

With Dempsey less involved, **Brennan believed there was an even greater need to draw together different agencies' viewpoints, showing the American public that al-Qaida targets are chosen only after painstaking and exhaustive debate,** the senior administration official said.
[my emphasis]

The sentence doesn't make any sense (or didn't, until these other two stories came out). It consists of three apparent non sequiturs. Moreover, by moving targeting deeper into the White House, Brennan made the process less transparent, not more. Yet even as he was grasping control of the process (and other entities, presumably, were leaking that fact), he was claiming this was all about "showing the American public that al-Qaida targets are chosen only after painstaking and exhaustive debate." He hid the process even as he expressed an interest in telling the public a pretty tale about it.

And then two long profiles of the drone program came out.

The Assassination Czar's Signature Strikes

With that in mind, consider how these two stories treat signature strikes in Yemen, the other change rolled out as Brennan moved

targeting into the White House.

As I mentioned, the NYT actually conflates the CIA's signature strikes in Pakistan with other strikes in Yemen and Somalia (even while showing some sources mocking the signature strikes). That is, not only does it apparently present an outdated version of the vetting story, but it also ignores the other big change in the drone program.

Not so Klaidman, who ends his piece with a discussion of the change (after having, earlier, shown Obama's reluctant embrace of signature strikes in Pakistan, along with Obama's—rather, Brennan's, as portrayed—refusal to get involved in a Yemen “campaign”). Following a description showing how Obama's obsession with Anwar al-Awlaki ended in his death (but of course with no mention of Awlaki's son), Klaidman shows that that personality strike did not do a damn thing to bring stability to Yemen.

And the shadow wars continued. Throughout 2011, Obama's basic strategy held: he approved missions that were surgical, often lethal, and **narrowly tailored to fit clearly defined U.S. interests**. But even as Awlaki and others were taken out, **Yemen fell further into chaos, and AQAP gained more and more territory**—even threatening the strategic port city of Aden. It looked like the military's dire warnings were becoming a reality.

By 2012 Obama was getting regular updates on a Saudi double agent who'd managed to penetrate AQAP. He had volunteered to be a suicide operative for al-Asiri, AQAP's master bomb maker, and instead delivered the latest underwear-style explosive device to his handlers. By then the military and CIA were pushing again for signature-style strikes, but **they'd given them a new name: terrorist-attack-disruption strikes**, or TADS. And this time, after

resisting for the first three years of his presidency, Obama gave his approval.

The White House was worried that Yemeni forces were collapsing under the brutal AQAP assault. The more territory AQAP controlled, the more training camps they could set up, and the easier it would be to plot and plan attacks against the United States and its interests. **Obama concluded that he had no choice but to defend the Yemeni Army against a common enemy.** “They are decapitating Yemeni soldiers and crucifying them,” one senior administration official said in justifying the American escalation. “These are murderous thugs, and we are not going to stand idly by and allow these massacres to take place.”

In the spring of 2012, the United States carried out more drone attacks in Yemen than in the previous nine years combined—dating all the way back to when the CIA conducted its first such operation.

While Klaidman intersperses the UndieBomb sting in his discussion, the “more training camps they could set up, and the easier it would be to plot and plan attacks against the United States and” is secondary to the more immediate reason Brennan embraced signature strikes in Yemen: because the Yemeni military was getting badly beaten by AQAP.

These signature strikes, then, are not primarily about protecting the US. Rather, they’re about fighting a common enemy (and implicitly, then, also fighting insurgents who have allied with AQAP but are not part of it).

That detail is important not just because it reveals how deeply we might get sucked into this war. It also explains the conflicting reporting about whether just the CIA or both the CIA and DOD wanted these signature strikes, as well as

why Brennan would have to de-emphasize the previously rigorous DOD vetting. The AP describes how the CIA dodges restrictions in international law on civilians doing the killing this way.

By law, the CIA can target only al-Qaida operatives or affiliates who directly threaten the U.S. JSOC has a little more leeway, allowed by statute to target members of the larger al-Qaida network.

In Yemen, the CIA doesn't have the excuse it uses in Pakistan, that insurgents might cross the border into Afghanistan and target our troops there, and because of that constitute an imminent threat. As Klaidman almost lays out, hitting low-level AQAP fighters, much less insurgents with no formal tie to AQAP, is not about protecting America from an imminent threat, but fighting an enemy we share with the Yemeni government.

And so you need to find a way to get DOD to target three men doing jumping jacks, these insurgents fighting the Yemeni government. One part of that is embracing signature strikes in Yemen. The other part is making sure DOD doesn't do the same kind of vetting of targets they used to do.

The Saudi Order-a-Plot

Which brings me to the element that Klaidman, alone among traditional journalists, put into the proper chronological context. The Saudis dial up a sting with an agent of theirs they've had embedded for months if not years. And only then—almost immediately thereafter—does Brennan fully adopt the Assassination Czar role so as to fight our common enemy, AQAP. The Saudi sting provides the cover—the “imminent threat” to the US—that we need legally to start targeting insurgents.

Which brings me to this acronym the NYT and Klaidman unquestioningly repeat. “Terrorist-attack-disruption strikes.”

The propagandist goal of the name is clear: to rename the process by which we target patterns of behavior—three men doing jumping jacks, a guy opening a gate, all the military-aged men in the vicinity of extremists—and with that name pretend not just that everyone we're hitting is an actual terrorist rather than an insurgent or a military-aged baker in the vicinity or even a terrorist's wife and kids, but also that everyone we're hitting is actively involved in conducting terrorist plots.

Not even our personality strikes—strikes targeted at named individuals vetted by DOD's mostly defunct process—consisted exclusively of disrupting active terrorist attacks. And the signature strikes in Yemen—pretty obviously targeted at insurgents whose animus against the US has everything to do with us propping up a dictator and little to do with an ambition to directly target the US—are even less about disrupting terrorist attacks.

Ah well, thanks to that conveniently timed Saudi-managed plot, the Administration seems to have gotten journalists to adopt an obviously propagandistic name with no question.

According to the AP, John Brennan set out to show—or rather claim to—the American public that al-Qaida—or rather Yemeni AQAP and insurgent and men in the vicinity—targets are chosen only after painstaking and exhaustive debate, even while he had just minimized this debate.

This new, patently false acronym, is part of that.

ANGLER 2.0: BRENNAN WIELDS HIS PUPPET

STRINGS DIFFERENTLY

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/Scott Shane Angler 2.0 story and the earlier series by Becker and Barton Gellman is hard to miss.

But I'm very interested in how the stories are structured differently. With Angler 1.0, the story was very clearly about Dick Cheney and the methods he used to manipulate Bush into following his advice. Here, the story is really about John Brennan, Obama's Cheney, portrayed deep in thought and foregrounding Obama in the article's picture. Indeed, halfway through, the story even gives biographical background on Brennan, the classic "son of Irish immigrants" story, along with Harold Koh's dubious endorsement of Brennan's "moral rectitude."

But instead of telling the story of John Brennan, Obama's Cheney, the story pitches Obama as the key decision-maker—a storyline Brennan has always been one of the most aggressive pitchmen for, including when he confirmed information on the Anwar al-Awlaki strike he shouldn't have. In a sense, then, Brennan has done Cheney one better: seed a story of his own power, but sell it as a sign of the President's steeliness.

The Silent Sources for the Story

I already pointed out how, after presenting unambiguous evidence of Brennan's past on-the-record lies, the story backed off calling him on it.

But there are other ways in which this story

shifts the focus away from Brennan.

A remarkable number of the sources for the story spoke on the record: Tom Donilon, Cameron Munter, Dennis Blair, Bill Daley, Jeh Johnson, Michael Hayden, Jim Jones, Harold Koh, Eric Holder, Michael Leiter, John Rizzo, and John Bellinger. But it's not until roughly the 3,450th word of a 6,000 word article that Brennan is first quoted—and that's to largely repeat the pre-emptive lies of his drone speech from last month.

"The purpose of these actions is to mitigate threats to U.S. persons' lives," Mr. Brennan said in an interview. "It is the option of last recourse. So the president, and I think all of us here, don't like the fact that people have to die. And so he wants to make sure that we go through a rigorous checklist: The infeasibility of capture, the certainty of the intelligence base, the imminence of the threat, all of these things."

That is the only on-the-record direct quote from Brennan in the entire article, in spite of the centrality of Brennan to the story.

And I would bet several of the sources quoted anonymously in the section describing Obama's method of counting the dead (which still ignores the women and children) are Brennan: "a top White House adviser" describing how sharp Obama was in the face of the first civilian casualties; "a senior administration official" claiming, in the face of credible evidence to the contrary, that the number of civilians killed in drone strikes in Pakistan were in "single digits."

Note, too, the reference to a memo his campaign national security advisors wrote him.

"Pragmatism over ideology," his campaign national security team had advised in a memo in March 2008. It was counsel that

only reinforced the president's instincts.

The memo was written not long after Brennan started playing a more central role among Obama's campaign advisors. But the story makes no mention of his presumed role in it. Further, in describing Jeh Johnson to introduce a quote, the piece notes that he was "a campaign adviser" (it doesn't say Johnson was also focused on voter protection). But it does not note that Brennan, too, was a key campaign advisor, one with an exclusively national security focus.

Nor does the story note, when it describes how Obama "deployed his legal skills ... to preserve trials in civilian courts" it was John Brennan making that case, not the Attorney General.

In other words, in several places in this story, Brennan plays a key role that is downplayed.

The Pro-Drone Narrator

Given that fact, I'm really interested in the several places where the story adopts a pro-drone viewpoint (it does adopt a more critical stance in the narrative voice at the end).

For example, the story claims, in the first part of the story, that the drone strikes "have eviscerated Al Qaeda" without presenting any basis for that claim. This, in spite of the fact that al Qaeda has expanded in Yemen since we've started hitting it with drones.

Later, the article uncritically accepts the claim that the drone—regardless of the targeting that goes into using it—is a "precision weapon" that constitutes a rejection of a "false choice between our safety and our ideals."

The care that Mr. Obama and his counterterrorism chief take in choosing targets, and their reliance on a precision weapon, the drone, reflect his pledge at the outset of his presidency to reject what he called the Bush administration's "false choice between

our safety and our ideals.”

For fucks sake! This article describes how the White House has adopted a “guilt by association” approach to drone targeting. It describes renamed signature strikes (though presents what is almost certainly an outdated picture of the targeting review process). Yet it uncritically accepts this “precision” claim—which clearly reflects a source’s judgment—as true.

Finally, a potentially even bigger bias is in the presentation of the al-Majala strike on December 17, 2009.

It killed not only its intended target, but also two neighboring families, and left behind a trail of cluster bombs that subsequently killed more innocents. It was hardly the kind of precise operation that Mr. Obama favored. Videos of children’s bodies and angry tribesmen holding up American missile parts flooded You Tube, fueling a ferocious backlash that Yemeni officials said bolstered Al Qaeda.

The sloppy strike shook Mr. Obama and Mr. Brennan, officials said, and once again they tried to impose some discipline.

The story doesn’t name who the target was; it says only that the strike killed him, and the NYT repeats the claim without asking for such details.

As I have noted, though, sources speaking immediately after the strike explained the target struck where “an imminent attack against a U.S. asset was being planned.” (The quotes here are from the source, not the ABC report.) There was, of course, an imminent attack being planned at the time, one about which we had at least some advance intelligence. That was Umar Farouk Abdulmutallab’s attack. I’m pretty sure the strike on a Yemeni site 10 days after he

left the country missed him, though.

These last two quotes—perhaps all three—look like comments a White House figure (and it'll surprise no one that I suspect it's Brennan) gave on deep background, such that his exact words are used, but without quotation marks or any indication of the source. Credible journalists would have no other reason to make such unsubstantiated claims, particularly the "precision" claim that they disprove elsewhere in the same article.

Who Okayed Killing Mehsud's Wife?

Ultimately, the depiction of John Brennan as Obama's puppetmaster is most interesting in the telling of Baitullah Mehsud's killing. This version conflicts in key ways from the story that Joby Warrick told in his book, starting with the uranium claim that provided the excuse for targeting him. And while I'm working from memory, I believe Warrick portrayed the approval of that killing—which might kill Mehsud's wife in addition to Mehsud—as involving Panetta alone. This version says Panetta consulted Obama—through Brennan.

Then, in August 2009, the C.I.A. director, Leon E. Panetta, told Mr. Brennan that the agency had Mr. Mehsud in its sights. But taking out the Pakistani Taliban leader, Mr. Panetta warned, did not meet Mr. Obama's standard of "near certainty" of no innocents being killed. In fact, a strike would certainly result in such deaths: he was with his wife at his in-laws' home.

"Many times," General Jones said, in similar circumstances, "at the 11th hour we waved off a mission simply because the target had people around them and we were able to loiter on station until they didn't."

But not this time. Mr. Obama, through Mr. Brennan, told the C.I.A. to take the

shot, and Mr. Mehsud was killed, along with his wife and, by some reports, other family members as well, said a senior intelligence official.

I'm not surprised by (or critical of) the conflict in the stories. It seems like Warrick relied primarily on CIA sources telling a packaged version of the strike, while this story tells another packaged version of it. (Note, curiously, Panetta is only named in this passage and never quoted.)

But I am struck by how obviously this story—whether filtered through Brennan as a direct source for this story, or filtered through Brennan for Panetta's consumption at the time—depends on John Brennan to narrate Obama's role. If he weren't involved somehow, the NYT wouldn't have included the "through Mr. Brennan." And while the detail doesn't matter in the grand scheme of things—Mehsud's wife's death will weigh no more or less against Obama's and Brennan's record than Abdulrahman al-Awlaki or the Bedouin women and children at al-Majala—it is a testament to the degree to which this story, and so many of those cited in this article, depend on Brennan narrating Obama's role.

As I'll show in a later post, I think this story is an attempt to combat the picture of John Brennan's private signature strike shop that has developed over the last month. Perhaps it's even a way to protect himself by implicating the President, as Brennan's old boss George Tenet did with torture. Perhaps, too, this article (which given the number of on-the-record quotes, must be sanctioned) is meant to add to the campaign's portrayal of Obama as a fearless counterterrorism warrior.

But I'm just as fascinated by the way that Angler 2.0 managed to wield puppet strings for the story about himself, too.

THE ASSASSINATION CZAR'S WAR CRIMES DODGE: REVISITING JOHN BRENNAN'S TARGETED KILLING SPEECH

Now that John Brennan is in charge of selecting which patterns of behavior we should target with drones, it ought to be easy to charge him with war crimes. The at least eight civilians we killed in Jaar a number of weeks after Brennan seized control of targeting? John Brennan killed them, presumably based not on intelligence about who they were and what ties to AQAP they had, but because they ran out of a house after an earlier strike.

John Brennan is choosing to target people in Yemen without making adequate efforts to avoid civilian casualties. Given that we know he's making these choices, you'd expect someone to try to hold him accountable.

Of course, such an effort would present all kinds of difficulties. You can't really make a legal case against Brennan based on anonymous sources in an AP story. Furthermore, moving the drone program into the National Security Council makes it inaccessible to FOIA and, probably, to full Congressional oversight.

Most of all, though, Brennan appears to be preemptively crafting his defense.

When Brennan gave his drone speech on April 30, I—and a few other people—noted that the speech was already outdated. Brennan did admit, unequivocally, that we use drones to kill people.

So let me say it as simply as I can.
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-Qaida terrorists,
sometimes using remotely piloted
aircraft, often referred to publicly as
drones.

Yet he spoke repeatedly of targeting specific
individuals.

Without question, the ability to target
a specific individual, from hundreds or
thousands of miles away, raises profound
questions.

[snip]

In this armed conflict, **individuals who
are part of al-Qaida** or its associated
forces are legitimate military targets.
[my emphasis]

Thus, he wasn't talking about the program in
Yemen that—perhaps 10 days earlier—had been
expanded to target patterns rather than
individuals. Rather, he was pretending that the
program remained limited to personality strikes,
strikes against known targets.

The speech always seemed like an attempt to put
the best spin on the program. But the approach
makes even more sense now that we know Brennan
is the one who has legal liability for making
these targeting decisions.

When and if anyone were to charge Brennan for
war crimes for targeting civilians, for example,
he will point back to these paragraphs as
“proof” of his “belief” that we were not
targeting civilians.

Targeted strikes conform to the
principles of distinction, the idea that
only military objectives may be

intentionally targeted and that civilians are protected from being intentionally targeted. With the unprecedented ability of remotely piloted aircraft to precisely target a military objective while minimizing collateral damage, one could argue that never before has there been a weapon that allows us to distinguish more effectively between an al-Qaida terrorist and innocent civilians.

Targeted strikes conform to the principle of proportionality, the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated military advantage. By targeting an individual terrorist or small numbers of terrorists with ordnance that can be adapted to avoid harming others in the immediate vicinity, it is hard to imagine a tool that can better minimize the risk to civilians than remotely piloted aircraft.

He will also point to these paragraphs—which we now know are also outdated—describing a targeting process that existed before Brennan seized control of the process.

This leads me to the final point I want to discuss today, the rigorous standards and process of review to which we hold ourselves today when considering and authorizing strikes against a specific member of al-Qaida outside the hot battlefield of Afghanistan.

[snip]

If our counterterrorism professionals assess, for example, that a suspected member of al-Qaida poses such a threat to the United States to warrant lethal action, they may raise that individual's name for consideration. The proposal

will go through a careful review and, as appropriate, will be evaluated by the very most senior officials in our government for a decision. First and foremost, the individual must be a legitimate target under the law.

[snip]

Even if it is lawful to pursue a specific member of al-Qaida, we ask ourselves whether that individual's activities rise to a certain threshold for action, and whether taking action will, in fact, enhance our security. For example, when considering lethal force we ask ourselves whether the individual poses a significant threat to U.S. interests. This is absolutely critical, and it goes to the very essence of why we take this kind of exceptional action.

[snip]

I am not referring to some hypothetical threat, the mere possibility that a member of al-Qaida might try to attack us at some point in the future. A significant threat might be posed by an individual who is an operational leader of al-Qaida or one of its associated forces. Or perhaps the individual is himself an operative, in the midst of actually training for or planning to carry out attacks against U.S. persons and interests.

[snip]

In addition, our unqualified preference is to only undertake lethal force when we believe that capturing the individual is not feasible.

[snip]

Given the stakes involved and the consequences of our decision, we consider all the information available

to us, carefully and responsibly.

We review the most up-to-date intelligence, drawing on the full range of our intelligence capabilities. And we do what sound intelligence demands, we challenge it, we question it, including any assumptions on which it might be based. If we want to know more, we may ask the intelligence community to go back and collect additional intelligence or refine its analysis so that a more informed decision can be made.

We listen to departments and agencies across our national security team. We don't just hear out differing views, we ask for them and encourage them. We discuss. We debate.

What appears to have happened is the Saudis delivered up a sting presenting a threat, and following that, we—or rather, John Brennan—proceeded to target more generally, using that Saudi-delivered threat as the rationale.

But Brennan will be able to point to these outdated paragraphs and claim they represent his understanding of the legal review of the targeting for the killings he oversaw.

John Brennan has always lied publicly about the drone program, particularly the civilian deaths associated with it. But knowing what has transpired in the last month—the Saudi sting presenting a threat, followed by the decision to use signature strikes overseen by John Brennan—it seems like something far more cynical: a pre-emptive statement of his purported understanding about the drone program, just in case anyone ever tries to hold him accountable for strikes that don't show the appropriate concern for civilian life.

“Oh, those 8 civilians I killed in Jaar?” John Brennan effectively said 15 days before he

killed them, “I didn’t intend to or know I was killing civilians. I was conducting strikes against known targets found to present a direct threat to the United States.”

John Brennan gave this speech in the name of transparency. But given that it involved deliberate and obvious obfuscation, it appears to have little to do with transparency and lots to do with self-preservation.

SCOTUS CERT GRANT IN CLAPPER TAKES KEY 9TH CIRCUIT CASES HOSTAGE

Marcy noted briefly Monday morning, the Supreme Court granted certiorari in *Clapper v. Amnesty International*:

SCOTUS did, however, grant cert to *Clapper v. Amnesty*, which I wrote about [here](#) and [here](#). On its face, *Clapper* is just about the FISA Amendments Act. But it also has implications for wiretap exceptions—and, I’ve argued—data mining exceptions to the Fourth Amendment. In any case, SCOTUS seems interested in reversing the 2nd Circuit opinion, which had granted standing to people whose work had been chilled by the passage of the FAA. Also, as I hope to note further today, SCOTUS’ *Clapper* decision may also impact the *Hedges v. Obama* ruling from last week.

As Marcy indicated, there is nothing good afoot from SCOTUS taking cert in *Clapper*; if they wanted to leave the very nice decision of the 2nd Circuit intact, they simply leave it intact

and don't grant review. Oh, and, yes, Marcy is quite right, it's a very safe bet that Clapper will "impact" the also very nice recent decision in Hedges, which is, itself, headed with a bullet to the 2nd Circuit.

There was, of course, much discussion of the significance of the *Clapper* cert grant yesterday on Twitter; one of the best of which was between Marcy, Lawfare's Steve Vladeck and, to a lesser extent, me. To make a long story a little shorter, I said (here and here):

See, and I HATE saying this, I think Kennedy will do just that+then same 5 will kill al-Haramain once it gets to SCOTUS and then they will have capped the Bush wiretapping well completely and closed off standing significantly for the future.

Yikes, I did not contemplate just how true this statement was; the *Clapper* cert grant has already had a far deeper and more pernicious effect than even I suspected. This morning, in a move I do not believe anybody else has caught on to yet, the 9th Circuit quietly removed both *al-Haramain* and the CCR case encaptioned *In Re: NSA Telecommunications Litigation/CCR v. Obama* from the oral argument calendar that has long been set for June 1 in the old 9th Circuit Pasadena courthouse. The orders for both *al-Haramain* and CCR are identical, here is the language from the *al-Haramain* one:

Argument in this case scheduled for June 1, 2012 in Pasadena, California, is vacated pending the Supreme Court's decision in *Clapper v. Amnesty Int'l*, No. 11- 1025. The court may order supplemental briefing following the Supreme Court's decision. Oral argument will be rescheduled.

Whoa. This is extremely significant, and extremely unfortunate. Also fairly inexplicable.

Entering the order for *CCR* makes some sense, since it involves the same “fear of surveillance” standing issue as is at issue in *Clapper*; but doing it for *al-Haramain* makes no sense whatsoever, because *al-Haramain* is an “actual” surveillance standing case.

There simply is no issue of the claimed, putative, standing concern that permeates *Clapper* and *CCR*. Well, not unless the 9th Circuit panel thinks the Supreme Court might speak more broadly, and expand the parameters wildly, in *Clapper* just as they did in *Citizens United*. That would be a pretty ugly path for the Supreme beings to follow; but, apparently, not just a cynical bet on my part, but also a bet the 9th Circuit immediately placed as well.

To be fair, even positive forward thinking players, like Steve Vladeck, thought the lower courts might be copacetic, or that the Supremes might comply. Maybe not so much. I know, shocking. Here is a glimpse, through Vladeck, of the situation:

But at a more fundamental level, there’s one more point worth making: Readers are likely familiar with Alex Bickel’s *Passive Virtues*, and his thesis that, especially on such sensitive questions where constitutional rights intersect with national security, courts might do best to rely on justiciability doctrines to duck the issue—and to thereby avoid passing upon the merits one way or the other. [Think Joshua at the end of *WarGames*: “The only winning move is not to play.”] And at first blush, this looks like the perfect case for Bickel’s thesis, given the implications in either direction on the merits: recognizing a foreign intelligence surveillance exception and thereby endorsing such sweeping, warrantless interceptions of previously protected communications vs. removing this particular club from the government’s bag...

And yet, the foreign intelligence surveillance exception only exists because it has already been recognized by a circuit-level federal court, to wit, the FISA Court of Review. Whether the passive virtues might otherwise justify judicial sidestepping in such a contentious case, the fact of the matter is that this is a problem largely (albeit not entirely, thanks to the FISA Amendments Act) of the courts' making. To duck at this stage would be to let the FISA Court of Review—the judges of which are selected by the Chief Justice—have the last word on such a momentous question of constitutional law. In my view, at least, that would be unfortunate, and it's certainly not what Bickel meant...

Back to al-Haramain and the effects in the 9th Circuit. Here is the latest, taken from the Motion for Reconsideration filed late yesterday by al-Haramain, Wendell Belew and Asim Ghafoor:

The question presented in Clapper is thus wholly unrelated to the issues presented on the defendants' appeal in the present case. The Supreme Court's decision in Clapper will have no effect on the disposition of the present case. Thus, there is no reason to delay the adjudication of this appeal pending the decision in Clapper, which would only add another year or more to the six-plus years that this case has been in litigation.

It makes sense for the Court to have vacated the oral argument date for Center for Constitutional Rights v. Obama, No. 11-15956, which involves theories of Article III standing similar to those in Clapper. It does not, however, make sense in the present case, where Article III standing is based on proof of actual past surveillance rather

than the fear of future surveillance and expenditures to protect communications asserted in *Clapper*.

Yes, that is exactly correct.

And, therein, resides the problem with Vladeck's interpretation of what is going on with the *Clapper* case. Steve undersold, severely, just how problematic *Clapper* is. Both the discussion herein, and the knee jerk action of the 9th Circuit, the alleged liberal scourge of Democratic Federal Appellate Courts, demonstrate how critical this all is and why *Clapper* is so important.

Clapper has not only consumed its own oxygen, it has consumed that of independent, and important, nee critical, elements of the only reductive cases there are left in the United States judicial system in regards to these ends. That would be, at an irreducible minimum, *al-Haramain* in the 9th Circuit.

If you have forgotten about *al-Haramain*, and the proceedings that took place in the inestimable Vaughn Walker's, court, here it is. Of all the attempts to attack the Bush/Cheney wiretapping crimes, *al-Haramain* is the only court case that, due to its unique circumstances, has been successful. It alone stands for the proposition that mass crimes were, in fact, committed. *al-Haramain* had a tough enough road ahead of it on its own, the road has become all the more treacherous now because of *Clapper*.

The 9th Circuit should grant the motion for reconsideration and reinstate *al-Haramain* on the oral argument calendar, but that is quite likely a longshot at this point. Expect the DOJ to file a very aggressive response, they are undoubtedly jumping for joy at this stroke of good fortune and will strive to protect it.

JUDGE ENJOINS NDAA SECTION 1021 BECAUSE GOVERNMENT IMPLIES SPEECH MAY EQUAL TERRORISM

The Court then asked: Give me an example. Tell me what it means to substantially support associated forces.

Government: I'm not in a position to give specific examples.

Court: Give me one.

Government: I'm not in a position to give one specific example.

When Judge Katherine Forrest asked the government, repeatedly, for both generalized clarification and descriptions specific to plaintiffs like Chris Hedges and Brigitta Jonsdottir explaining the scope of Section 1021 of the NDAA, the government refused to give it. Not only was the government unwilling to reassure that even a Pulitzer Prize winning journalist like Hedges would not be indefinitely detained as "a person who was part of or substantially supported al-Qaeda, the Taliban, or associated forces" if he reported on any number of terrorist groups, but it also refused to explain the meaning of the section generally.

Which is the core reason why Forrest not only ruled that the plaintiffs have standing and the case should go forward, but also enjoined any enforcement of Section 1021. In explaining this, she noted that she was forced by the government's refusal to give clarification to assume that the government believes First Amendment speech is included in the orbit of "substantially supported" that might be indefinitely held under 1021.

It must be said that it would have been a rather simple matter for the Government to have stated that as to these plaintiffs and the conduct as to which they would testify, that § 1021 did not and would not apply, if indeed it did or would not. That could have eliminated the standing of these plaintiffs and their claims of irreparable harm. **Failure to be able to make such a representation given the prior notice of the activities at issue requires this Court to assume that, in fact, the Government takes the position that a wide swath of expressive and associational conduct is in fact encompassed by § 1021.**

[snip]

This Court is left then, with the following conundrum: plaintiffs have put forward evidence that § 1021 has in fact chilled their expressive and associational activities; the Government will not represent that such activities are not covered by § 1021; plaintiffs' activities are constitutionally protected. Given that record and the protections afforded by the First Amendment, this Court finds that plaintiffs have shown a likelihood of succeeding on the merits of a facial challenge to § 1021.

I spent much of the day explaining to people why Obama's Yemen EO is so troubling. I've had to describe all the things that have transpired that have criminalized speech since Obama issued a similar EO in 2010—the decision in *Holder v. Humanitarian Law Project*, the conviction of Tarek Mehanna, and the charging of Bradley Manning with aiding the enemy.

Now I can point to Forrest's opinion to show that the proposition that journalists might be prosecuted for material support of terrorism for

their First Amendment speech—to the extent it’s an extreme proposition—it is the government’s extreme proposition.

Forrest used the government’s stubbornness against it in one other way, too—to get past the rather high bar on whether to issue a preliminary injunction or not. The decision on whether to issue an injunction or not depends on a lot of things. But ultimately, it requires a balancing test between the hardships imposed on the plaintiff and the defense. And since—Forrest explained—the government repeatedly insisted that Section 1021 does no more or less than what the AUMF already does, then enjoining the enforcement of 1021 would not harm the government at all.

In considering whether to issue a preliminary injunction, the Court must consider, as noted above, “the balance of the hardships between the plaintiff and defendant and issue the injunction only if the balance of the hardships tips in the plaintiff’s favor.”
Salinger, 607 F.3d at 80.

The Government’s primary argument in opposition to this motion is that § 1021 is simply an affirmation of the AUMF; that it goes no further, it does nothing more. As is clear from this Opinion, this Court disagrees that that is the effect of § 1021 as currently drafted. However, if the Government’s argument is to be credited in terms of its belief as to the impact of the legislation—which is nil—then the issuance of an injunction should have absolutely no impact on any Governmental activities at all. The AUMF does not have a “sunset” provision: it is still in force and effect. Thus, to the extent the Government believes that the two provisions are co-extensive, enjoining any action under § 1021 should not have any impact on the Government.

While most of Forrest's ruling involved hoisting the government on its own obstinate petard, she also left a goodie in her ruling for the higher courts that will surely review her decision after the government surely appeals (unless Congress passes a fix to the NDAA tomorrow, as they might). Forrest established the importance of speech by pointing to ... Anthony Kennedy's opinion in *Citizens United*.

In *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), Justice Kennedy wrote that “[s]peech is an essential mechanism of democracy, for it is the means that hold officials accountable to the people The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a pre-condition to enlightened self-government.” *Id.* at 899. Laws that burden political speech are therefore subject to strict scrutiny. *Id.* at 898. “The First Amendment protects speech and speaker, and the ideas that flow from each.” *Id.* at 899.

If corporations can avail themselves of unlimited campaign speech, then mere journalists and activists ought to be able to engage in political speech without being indefinitely detained.

And yet, it took a judge to make that argument to the government.

GOVERNMENT INVOKES VALERIE PLAME TO

ARGUE CIA ACKNOWLEDGMENT THAT BUSH AUTHORIZED TORTURE IS NOT OFFICIAL ACKNOWLEDGMENT

As you'll recall, back in April I went on a week-long rant about the great lengths—including submitting a secret declaration from the National Security Advisor—the Obama Administration had gone to hide a short reference to the September 17, 2001 “Gloves Come Off” Memorandum of Notification. In doing so, it appears the Obama Administration hid George Tenet’s invocation of the Presidential MON that authorized the capture and detention of terrorists but which the Bush Administration used as its authorization to torture those alleged terrorists. (post 1, post 2, post 3, post 4, post 5, post 6, post 7)

In a classified hearing on March 9, the government claimed that releasing the reference in question would “reveal[] for the first time the existence and the scope of” what now clearly appears to be the MON. After I went on my rant, the ACLU informed the Circuit Court that the claim might be false. If the reference was indeed to the MON, ACLU wrote, then the CIA had already revealed that the September 17, 2001 MON authorized torture in this litigation.

If true, it may be relevant to this Court’s consideration that the CIA officially acknowledged the existence of that memorandum in this very litigation.

In response to appellees’ Freedom of Information Act request, the CIA identified as responsive “a 14-page memorandum dated 17 September 2001 from President Bush to the Director of the

CIA pertaining to the CIA's authorization to detain terrorists" and "to set up detention facilities outside the United States." Eighth Declaration of Marilyn A. Dorn

On Friday, the government responded, effectively saying that Marilyn Dorn's declaration doesn't count as official acknowledgement of the MON.

For the reasons set forth in the Government's classified filings, the disclosures identified in plaintiffs' letter, including the information provided in the Dorn declaration, do not constitute an official disclosure of the information redacted from the OLC memoranda.

Notably, in its discussion of the cases which it cited to support its claim that Dorn's description of the MON doesn't count, it also included language that would address John Rizzo's extensive blabbing about the MON as well as Glenn Carle's CIA Publication Review Board-approved reference to CIA having received a Finding covering torture (neither of which the ACLU mentioned in its letter). But look what case they cited to make that argument.

This Court applies "[a] strict test" to claims of official disclosure. **Wilson v. CIA**, 586 F.3d 171, 186 (2d Cir. 2009). "Classified information . . . is . . . officially disclosed only if it (1) is as specific as the information previously released, (2) matches the information previously disclosed, and (3) was made public through an official and documented disclosure." *Id.* (quoting *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007)). With regard to the requirement of "official and documented disclosure," the Court has made clear that "the law will not infer official disclosure . . . from (1) widespread

public discussion of a classified matter; (2) statements made by a person not authorized to speak for the Agency; or (3) release of information by another agency, or even by Congress.” Id. at 186-87 (citations omitted). [my emphasis]

There’s a lot packed in here. If Marilyn Dorn—who was the CIA’s long-time Information Review Officer when she wrote this declaration—doesn’t count as “a person authorized to speak for the Agency,” then it seems likely that the CIA is not the agency at issue in this case (remember, rather unusually, the National Security Council directed that the torture program be made a Special Access Program; the CIA didn’t do so of its own accord). Which would seem to explain why the government also emphasizes that release of information by another agency doesn’t count; that’s only relevant if the CIA is not the agency in question here. Note too that (as I pointed out) Dorn’s declaration included details we know not to be true, such as that the MON authorized clandestine rather than covert activities.

So the content of the government’s claim is interesting enough.

But then consider that the government is invoking Valerie Plame Wilson here!

In her suit, *Wilson v. CIA*, she unsuccessfully tried to win the right to publish details on her CIA career after Dick Cheney and friends exposed her identity. The Circuit didn’t actually argue that Dick Cheney’s insta-declassification of Plame’s identity wasn’t official acknowledgment, complete with required official record of acknowledgment, which would have been true, but political dynamite. Rather, it said that Plame herself exposed her pre-2002 CIA employment when she let Jay Inslee publish details of her CIA employ in the Congressional Record; the CIA had given her the details but had inadvertently,

they claimed, not marked the letter with proper classification marks. So the government, in citing *Wilson v. CIA*, is not quite equating Dick Cheney's improper insta-declassification of Plame's identity as justification for hiding George Bush's personal authorization of torture. But they're coming awfully close.

In other words, the Obama Administration is so desperate to hide this minimal reference to Bush's authorization of torture, they're citing the most cynical instance of politicized treatment of classified information as legal precedent.

Which I guess is about right.

BIG BOY PANTS AND THE PRESIDENCY

Frankly, I think Jose Rodriguez was being naive when he claimed that having Jay Bybee's signature on a memo authorizing some, but not all, of the torture the torturers had already done by August 1, 2002 constituted full authority for what they had done.

But before moving forward, Jose Rodriguez got his superiors, right up to the president – to sign off on a set of those techniques, including waterboarding.

Jose Rodriguez: We needed to get everybody in government to put their big boy pants on and provide the authorities that we needed.

Lesley Stahl: Their big boy pants on–

Jose Rodriguez: Big boy pants. Let me tell you, I had had a lot of experience in the agency where we had been left to hold the bag. And I was not about to let

that happen for the people that work for me.

Lesley Stahl: There wasn't gonna be any deniability on this one?

Jose Rodriguez: There was not gonna be any deniability. And I tell you something. In August of 2002, I felt I had all the authorities that I needed, all the approvals that I needed. The atmosphere in the country was different. Everybody wanted us to save American lives.

After all, to this day, these counterterrorism programs are being run on a Memorandum of Notification that not only doesn't comply with the terms of the National Security Act, but shields the President (Obama even more so than Bush) from any direct accountability, a carefully crafted deniability that the CIA has worked to preserve.

Lesley Stahl was apparently not up to the task of asking Rodriguez about the torture the torturers actually used which exceeded the terms of the authorization. She describes waterboarding as laid out in the Bybee Memo, without acknowledging that the torturers didn't follow those guidelines. Stahl asserts as fact that the CIA kept Abu Zubaydah up for 3 straight days, when evidence suggests his sleep deprivation lasted longer, perhaps as long as 11 days. Had Stahl laid out the degree to which the torturers were known to have exceeded guidelines (both before and after those guidelines were codified in the Bybee Memo), she might have noted the underlying problem with this exchange.

Lesley Stahl: Oh, you had rules for each thing?

Jose Rodriguez: Yes, we had rules. And not only that, but every time we did any of this, we had to ask permission. The field had to ask permission of headquarters.

Lesley Stahl: Each time.

Jose Rodriguez: Each time.

As she herself pointed out, Rodriguez was not doing the torture. He wasn't in the field. He was at HQ. In fact, he was one of the guys sitting in Langley giving the oral permissions for individual torture techniques both before and after Bybee signed his memo, the techniques that exceeded the rules laid out in Bybee. You'd think Stahl might have pointed that out.

There's something similar going on in this passage.

Lesley Stahl: Mock executions. People threatened with power drills.

Jose Rodriguez: Yes.

Lesley Stahl: People told that, that you were gonna go and hurt their children, rape their wives.

Jose Rodriguez: Stupid things that were done by people who had no authority to do that.

Lesley Stahl: And they just took it on themselves.

Jose Rodriguez: Correct. And we found out about it and we self-reported, and actually called in the I.G. and said, "You better take a look at what these people did and do what you need to do."

A big reason the CIA sought OLC sanction after the fact is that the torturers brought out a coffin-shaped box and prepared to use it with Abu Zubaydah. In response, Ali Soufan left the black site, citing the CIA's use of borderline torture. When CIA attempted to get everything they had done and planned to do authorized by DOJ, they included mock burial among the techniques in question. As I've noted, the failure to get OLC buyoff for mock

burial—regardless of what they called the small box confinement they used with Abu Zubaydah—made all the later mock executions legally suspect in a way even waterboarding beyond the scope of Bybee’s approval did.

Though no one seems to have gotten in trouble not just for rape threats of prisoners’ family members, of prisoners themselves, or even imprisonment of prisoners’ children, so I’m not sure why Rodriguez is claiming to be squeamish about that too.

And since Stahl was not in the business of journalism with this interview, it’s unsurprising all she missed in this exchange on the actual torture tapes.

Lesley Stahl: Well, that’s ironic. You wanted to have a video record that he was being well treated, but in the end they became— a video record that he had been subjected to these harsh techniques.

Jose Rodriguez: Yeah, we weren’t hiding anything.

Lesley Stahl: But you then ordered these tapes destroyed.

Jose Rodriguez: Correct. Ninety-two tapes.

Lesley Stahl: Ninety-two tapes. Why did you order that they be destroyed?

Jose Rodriguez: To protect the people who worked for me and who were at those black sites and whose faces were shown on the tape.

Lesley Stahl: Protect them from what?

Jose Rodriguez: Protect them from al Qaeda ever getting their hands on these tapes and using them to go after them and their families.

[snip]

Jose Rodriguez: Everything that was on those tapes were authorized activities by the U.S. government. So there was nothing to cover up.

Not that Stahl was going to note that much of the tapes Rodriguez had destroyed—perhaps as many as half—were blank, tampered, and mangled. By no means were all these 92 tapes depicting the torture, and we have every reason to assume the tapes did not depict the worst torture (they may have depicted only 3/5 of the waterboarding sessions at all).

Furthermore, the guards, at least (though not Abu Zubaydah's torturers) wore masks.

But I'm particularly interested in Rodriguez' last claim: "everything that was on the tapes were authorized activities by the US government."

Yes, and many of the tapes that taped interrogation sessions were blank by the time Rodriguez destroyed them.

Those are not incompatible claims in the least. Indeed, Rodriguez' claimed certainty that what was on the tapes when he destroyed them had been authorized may well stem from an awareness that the stuff that had already been destroyed was not authorized.

Over and over again, Rodriguez dodges the degree to which the CIA program exceeded even the oral authorizations given for torture and the evidence that Rodriguez—right at the nexus of accountability for the times CIA exceeded what guidelines they had been given—was protecting himself when he destroyed these tapes.

Which brings us to this wail.

Lesley Stahl: President Obama has said that what we did was torture.

Jose Rodriguez: Well, President Obama is entitled to his opinion. When President Obama condemns the covert action

activities of a previous government, he is breaking the covenant that exists between intelligence officers who are at the pointy end of the spear, hanging way out there, and the government that authorized them and directed them to go there.

Let's review what's going on here.

Rodriguez—whose torturers broke the law with no written cover from the President, went to “everybody in government” and demanded they don their “big boy pants.” He claims they did, to his satisfaction. But somehow, all the ways his torturers either didn't have authorization or Rodriguez had insufficiently submitted Bush and Cheney to big boy pants has left them exposed for crimes (though not really, because Rodriguez knows Obama isn't going to prosecute).

And so now that Rodriguez' big boy pants have failed, he invokes, instead, a “covenant,” which says Presidents have to pretend their predecessors wore precisely the big boy pants CIA's torturers hoped they had, after the fact.

Don't get me wrong—to some degree Rodriguez is fucked because while he was boasting of his big boy pants the rest of the national security establishment was building in protections for the guy Rodriguez insinuates was forced to wear them.

Jose Rodriguez looks awfully tough boasting of having made our Cowboy President wear big boy pants, of invoking a “covenant” that binds all future Presidents to overlook our spooks' past crimes. And maybe Presidents are as responsive to Rodriguez' taunts as he makes out.

Still, if I were President reading a torturer try to insulate himself for his past crimes, I might not take too kindly to this taunt about big boy pants.

IS THE GOVERNMENT WORRIED ABOUT REVEALING BROADER TARGETED KILLING AUTHORITY IN THE DRONE FOIAS?

In addition to yesterday's letter's explanation that the government needed an extension in ACLU and NYT's Anwar al-Awlaki drone FOIA because Obama and/or his closest aides—the highest level of the Executive Branch—were getting involved, there was one other interesting phrase I wanted to note: the way in which it portrays the FOIA.

We write respectfully on behalf of the Department of Justice and the Central Intelligence Agency (collectively, the "Government") to seek a further extension until May 21, 2012, of the Government's deadline to file its consolidated motion for summary judgment in these related Freedom of Information Act cases seeking records pertaining to **alleged targeted lethal operations directed at U.S. citizens and others affiliated with al Qaeda or other terrorist groups.** [my emphasis]

That description doesn't precisely match the request in any of the three FOIAs, which ask for:

ACLU: the legal authority and factual basis of the targeted killing of [Anwar] al-Awlaki, Abdulrahman [al-Awlaki], and [Samir] Khan.

NYT Savage: all Office of Legal Counsel

memorandums analyzing the circumstances under which it would be lawful for United States armed forces or intelligence community assets to target for killing a United States citizen who is deemed to be a terrorist.

NYT Shane: all Office of Legal Counsel opinions or memoranda since 2001 that address the legal status of targeted killings, assassination, or killing people suspected of ties to Al-Qaeda or other terrorist groups by employees or contractors of the United States government.

The government seems squeamish, first of all, about repeating the language used in all three of these requests—targeted killing—opting instead for the phrase “targeted lethal operations.” Note, significantly, that these requests, and especially Shane’s, would not be limited to drone strikes, but also would include hit squads.

The government understandably opts not to use the names specified by ACLU, opting instead to use the generic “US citizen” used by Savage.

Equally understandably, it uses Shane’s language to describe the target: “Al-Qaeda or other terrorist groups.” But I find the adoption of Shane’s formulation significant, because it is much broader than the language from the AUMF:

those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons

And somewhat broader than the language from the NDAA:

person who was a part of or substantially supported al-Qaeda, the

Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners

Now, it's not just Shane's language that broadens the scope here. None of the three requests mention AQAP, which would at least give the government the ability to focus on questions about how it decided that Awlaki was a legitimate target under the AUMF (on that topic, note this exchange between Robert Chesney and Bruce Ackerman). Both NYT requests ask for information about targeting terrorists generally. Which might get into some interesting targeting decisions both specific to Pakistan (for example, the original decision to target Beitullah Mehsud—and therefore the Pakistani Taliban—was based on a potentially erroneous information about a dirty bomb) and more generally in places like Gaza or Iran or Latin America.

In other words, if the government maintains it has the authority to assassinate terrorists, generally, perhaps tied to the Iraq AUMF or perhaps tied to the Gloves Come Off MON, then this language might make it hard for the government to provide a tidy response to this FOIA.

Not only that, there's one more issue going on: the government is also working on its DC Circuit response to ACLU's appeal of a more general FOIA suit filed in DC in early 2010 asking for:

All records created after September 11, 2011 pertaining to the legal basis in domestic, foreign and international law upon which unmanned aerial vehicles ("UAWs" or "drones") can be used to execute targeted killings ("drone strikes"), including but not limited to records regarding [among other things] who may be targeted.

The judge in this suit, Rosemary Collyer,

granted the government summary judgment last September. She judged that the CIA generally and Leon Panetta in particular had acknowledged neither the CIA's role in the drone program nor the existence of records about the program, and therefore the Agency's Glomar response was proper.

Plaintiffs submitted ten detailed requests for records, covering the gamut from the "legal basis" for drone strikes; the selection of human targets; civilian casualties; post-strike assessments; limits to the use of drones; the agency of government or branch of the military involved; the supervision, oversight, discipline, or training of drone operators and those involved in targeting decisions, and more. There is nothing in the various statements submitted by Plaintiffs which speaks to any records on these points; only by inference from former Director Panetta's statements might one conclude that the CIA might have some kind(s) of documentation somewhere. Thus, even if former Director Panetta could be understood colloquially to have suggested some sort of CIA involvement in drone strikes, he neither referenced specific records nor referenced records that go to the exact requests posed by Plaintiffs.

[snip]

Plaintiffs fail to demonstrate that the CIA has officially acknowledged either the CIA's involvement in a drone strike program or the existence or nonexistence of pertinent agency records. Plaintiffs' arguments to the contrary, the CIA has not waived its ability to issue a broad Glomar response.

While I haven't reviewed the abundant blabbing Panetta and President Obama have been doing

about the drone program since Collyer's ruling, it's clear that there has been far more official acknowledgment of the program since the time she judged the blabbing to fall below the level of official acknowledgment.

The government's response in this suit—assuming they don't say the dog ate their homework here, too—is due May 7.

Note this FOIA, too, might present the same broadening problems for the government. While it does limit its request to drone strikes, it doesn't even limit the request to terrorists (in its treatment of who might be targeted, for example, it asks whether "individuals involved in the Afghan drug trade" could be included).

Central to the question of Anwar al-Awlaki's targeting is the fairly narrow—but still contentious—question of whether and when AQAP qualified as legitimate targets under the AUMF (or the Gloves Come Off MON). But these FOIAs ask broader questions about targeting generally, which may be one of the reasons the government is not rushing to provide clarity to its targeting killing policy.

CIA GENERAL COUNSEL: THE OSAMA BIN LADEN KILLING WAS LEGAL BECAUSE ... "TRIUMPH!"

In this post, I unpacked how the CIA General Counsel, Stephen Preston, managed to argue that "the CIA is an institution of laws and the rule of law is integral to Agency operations" even while admitting that courts had no review over many of its activities.

In the rest of his speech, Preston examines a

“hypothetical case” that I will eventually argue is the Anwar al-Awlaki killing, and then a concrete example, the Osama bin Laden killing.

While the OBL case doesn’t elucidate much—anything—really about CIA’s legal process, I want to examine what Preston said because it’s so lame.

The OBL section takes up 794 words out of the 3,488 words total in the speech—over a fifth of the speech. Preston starts by claiming (in just over 50 words) he wants to examine the OBL example because it shows “that the rule of law reaches the most sensitive activities in which the Agency is engaged.”

In the next paragraph (68 words) Preston says he won’t dwell on the importance of the OBL op in terms of the larger fight against al Qaeda, because that’s already been covered; instead, he’ll focus on the law. Except,

But if you will indulge me, there are a few other aspects of this historic event that warrant mention up front.

Preston then spends three paragraphs describing what a “triumph” of intelligence (195 words), an example of momentous Presidential decision-making (70 words), and a “triumph” for our military (164 words) the op was. Preston spends well over half the section of the speech purporting to show that the rule of law reached the most sensitive CIA ops talking, instead, about what a triumph nailing OBL is.

That’s the kind of analysis he’s conducting to make sure all this is legal, I guess? Will it be a “triumph”? If so, then it must be legal.

Once Preston has declared “triumph,” here’s the not very interesting 165 words he finally offers about the legal analysis of the OBL raid:

Because of the paramount importance of keeping the possibility that bin Laden had been located a secret and then of maintaining operational security as the

Abbottabad raid was being planned, there were initially very few people in under the tent. So I cannot say the operation was heavily lawyered, but I can tell you it was thoroughly lawyered. From a legal perspective, this was like other counterterrorism operations in some respects. In other respects, of course, it was extraordinary. What counsel concentrated on were the law-related issues that the decision-makers would have to decide, legal issues of which the decision-makers needed to be aware, and lesser issues that needed to be resolved. By the time the force was launched, the U.S. Government had determined with confidence that there was clear and ample authority for the use of force, including lethal force, under U.S. and international law and that the operation would be conducted in complete accordance with applicable U.S. and international legal restrictions and principles.

So:

- Not heavily lawyered but thoroughly lawyered
- Like other counterterrorism operations but not
- Analysis was divided into the law-related issues the decision-makers would have to decide, the legal issues of which decision-makers would have to be aware, and the lesser issues
- The US Government decided it was a legal use of lethal force

Note what Preston didn't discuss: **who** in the USG

decided this was legal, especially if the analysis pertained primarily into what information decision-makers would have to decide and what they'd simply need to be aware of. Nor does he discuss how the legal analysis decided that killing, not capturing, OBL was legal.

I'd also be interested in whether anyone analyzed the legal implications of using an immunization drive as cover for the intelligence gathering part of the operation, since that, too, might lead to casualties, if only indirectly, but then I'm a dirty fucking hippie who cares about the kids who will forgo immunization now because their parents fear that it's a CIA op.

Not only does Preston offer almost no insight into the legal analysis that went into OBL's killing, but consider how inadequate his example is to "show that the rule of law reaches the most sensitive activities in which the Agency is engaged." OBL's killing was a covert op, which Preston has already helpfully explained means, "it is intended that the role of the U.S. Government will not be apparent or acknowledged publicly." Yet here he is, acknowledging publicly what a "triumph" the op was for US intelligence and the US military. So it's rather hard to believe that the OBL killing is a good example of "the most sensitive activities in which the Agency is engaged." Hell! It's a public "triumph"! We might even be able to have courts review it!

The OBL op, then, serves as a thoroughly unenlightening surrogate for the "hypothetical" op this speech is really about—Awlaki's killing, which really is among "the most sensitive activities in which the Agency is engaged." And, along the way, a convenient way to spend a big chunk of the speech talking about "triumph" rather than rule of law.

Now, I'm really not trying to litigate whether the OBL killing was legal or not, though I do think the kill versus capture issue probably is a legitimate question. And I don't want to

diminish the work of the spooks and SEALs who carried out this operation; both deserve kudos.

But if the CIA's idea of proving they abide by rule of law entails,

- Reaffirming the definition of covert ops as those in which US government's role will not be acknowledged publicly
- Asserting the necessity of keeping covert ops secret from courts
- Boasting, in explicit detail, about the "triumph" of what it claims is an example of one of its "most sensitive" covert ops

Then they're not really making a coherent argument. Rather, they're showing that secrecy is not a matter of necessity—indeed, it can be disposed of in case of "triumph,"—but rather just an expedient way of avoiding legal oversight of the truly sensitive ops CIA conducts.

But who needs rule of law when you have "triumph"!?

CIA GENERAL COUNSEL: IF THE PRESIDENT AUTHORIZES IT, IT'S LEGAL

I do hope the Harvard students who listened to this speech from CIA General Counsel Stephen

Preston—in which he purported to explain what a law-abiding agency the CIA is and which appears to be the CIA's effort to prove that the Anwar al-Awlaki killing was legal—are sophisticated enough to realize he, like all spooks, was peddling deceit. I'll get to those details below.

But first I want to focus on how he bookends his claim that CIA's "activities are subject to strict internal and external scrutiny."

He starts by admitting that courts and citizens are not part of this "external scrutiny."

It is true that a lot of what the CIA does is shielded from public view, and for good reason: much of what the CIA does is a secret! Secrecy is absolutely essential to a functioning intelligence service, and a functioning intelligence service is absolutely essential to national security, today no less than in the past. This is not lost on the federal judiciary. The courts have long recognized the state secrets privilege and have consistently upheld its proper invocation to protect intelligence sources and methods from disclosure. Moreover, federal judges have dismissed cases on justiciability or political question grounds, acknowledging that the courts are, at times, institutionally ill-equipped and constitutionally incapable of reviewing national security decisions committed to the President and the political branches.

Let's unpack the logic of this: first, CIA operations are subject to strict "external scrutiny." But because—"national security"—such external scrutiny is not possible.

Next, Preston claims that the courts have been in the business of consistently upholding the "proper invocation" of state secrets "to protect intelligence sources and methods." Of course,

just about every invocation of state secrets has been subsequently or contemporaneously shown to be an effort to protect—at best—misconduct and, in most cases, illegal activities: things like kidnapping, illegal wiretapping, and torture. So when he describes this “proper invocation” of states secrets, he is effectively saying that when lawsuits threatened to expose CIA’s law-breaking, courts have willingly dismissed those cases in the name of sources and methods.

And even before it gets to that stage, courts will bow to the Executive Branch’s claim that only Congress and the Executive can decide what forms of law-breaking by the CIA will be tolerated; courts are “ill-equipped” to judge the legality of illegal actions if those illegal actions are committed by the CIA.

So to prove that CIA’s ops are subject to “external scrutiny,” Preston starts by admitting that two of the most important agents of external scrutiny—citizens and courts—don’t actually exercise any scrutiny, particularly in cases where the government is willing to invoke state secrets to shield illegal activities.

Preston then lists a whole bunch of agents exercising “internal and external scrutiny.” He lists the Intelligence Committees—which in the case of the unspoken subject of this speech, Awlaki’s killing, did not receive key details of the op; in addition, under Bush, CIA lied to these committees about at least five ops. He mentions the FISA Court, which not only rubber stamps most things (and also got lied to under Bush), but doesn’t have any oversight over the unspoken subject of this speech, Awlaki’s killing. Preston mentions the Intelligence Advisory Board and Intelligence Oversight Board, committees which the President appoints (in Obama’s case, after two years of delay) with no oversight, whose members are apparently so secret the Director of National Intelligence doesn’t know to invite them to his holiday party. And he mentions the DNI and CIA Inspectors General, the latter of which had been

a key oversight player in the past until John Helgerson got hounded out for ... exercising oversight.

Which brings us to the second bookend of Preston's list of the not-so-impressive entities exercising scrutiny over the legality of CIA's operations.

Last, but by no means least, there is the U.S. Department of Justice, to which the CIA is required to report all possible violations of federal criminal laws by employees, agents, liaison, or anyone else.

Even ignoring past practice with torture of DOJ allowing the CIA—not FBI—to investigate potential legal violations, remember how Preston began this section: by admitting that when cases do go to any court besides FISA, the Executive Branch can and does invoke state secrets or political question grounds to make sure courts don't review these actions.

"Last but not least," Preston is arguing, DOJ gets to learn about potential criminal violations, which is absolutely meaningless once courts have been rendered incapable of actually reviewing those criminal violations (even assuming DOJ chose to pursue them).

So where does that leave Preston's claim, then, that the "the rule of law is integral to Agency operations"? With a list of Executive Branch entities—some of them not always functioning—exercising "scrutiny," with the Intelligence Committees as the sole external entity on the use of force this speech implicitly discusses, and aside from the mention of FISA that doesn't apply to his example ... no courts.

So with no courts to determine whether the CIA actually is abiding by the rule of law Preston claims is integral to its operations, then who decides?

The President.

First, there is direct supervision by the National Security Council and the President, who, after all, not only is constitutionally responsible for keeping the American people safe, but also, quote, “shall take Care that the Laws be faithfully executed.”

[snip]

I don’t mean to suggest that these judgments are confined to the Agency. To the contrary, as the authority for covert action is ultimately the President’s, and covert action programs are carried out by the Director and the Agency at and subject to the President’s direction, Agency counsel share their responsibilities with respect to any covert action with their counterparts at the National Security Council.

[snip]

First, we would confirm that the contemplated activity is authorized by the President in the exercise of his powers under Article II of the U.S. Constitution, for example, the President’s responsibility as Chief Executive and Commander-in-Chief to protect the country from an imminent threat of violent attack. This would not be just a one-time check for legal authority at the outset. Our hypothetical program would be engineered so as to ensure that, through careful review and senior-level decision-making, each individual action is linked to the imminent threat justification.

Sure, Preston mentions a few other things—Congressional notice, the Constitution and some laws that don’t pertain to targeted killings, and international law (I’ll return to some of these in a later post). But ultimately,

once Preston admits that courts won't ever review these activities—that they're shielded by the President's habit of declaring illegal activities a state secret—then you're really left with one thing.

If the President has authorized a covert action then, from the CIA's standpoint, it's legal.