

THE CIA'S FOUR-BOX OF DEATH

Just to finish up with my continuing obsession with CIA General Counsel Stephen Preston's speech at Harvard (don't miss Josh Gerstein getting into the act with his fact check on the shooting of Osama bin Laden's wife), I wanted to look at Preston's "hypothetical case," which I contend is meant to offer an explanation for how the CIA decided the Anwar al-Awlaki killing was legal.

I say this "hypothetical" is really about Awlaki because Preston focuses closely on Executive Order 12333's prohibition on assassinations (never mind that OLC holds that this very EO can be pixie dusted without notice). Particularly given that Preston willingly talks about OBL's killing—about the only other one that might be deemed an assassination—Preston's attempts to rebut the claims that Awlaki was assassinated seem to arise from the same anxiousness Eric Holder exhibited on the same topic.

In other words, this is the CIA version of the speech Holder made.

Preston describes framing his analysis in terms of a four-box matrix.

I conceive of the task in terms of a very simple matrix. First is the issue of whether there is legal authority to act in the first place. Second, there is the issue of compliance with the law in carrying out the action. For each of these issues, we would look first, and foremost, to U.S. law. But we would also look to international law principles. So envision a four-box matrix with "U.S. Law" and "International Law" across the top, and "Authority to Act" and "Compliance in Execution" down the side. With a thorough legal review directed at each of the four boxes, we would make

certain that all potentially relevant law is properly considered in a systematic and comprehensive fashion.

Curiously, Preston checks off the first box—authorization under US law before the op-by looking to Article II, not the AUMF Congress passed.

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.

A specific congressional authorization might also provide an independent basis for the use of force under U.S. law. [my emphasis]

That's interesting for several reasons. First, it situates the authority to use lethal force not in the stated basis OLC is using—the one SCOTUS has affirmed (sort of), but in Article II. Just where John Yoo would look to situate it.

This also means that CIA maintains it has this authority—presuming a Presidential Finding—outside the context of a declared war.

Finally, note Preston's emphasis on imminent threat. I've already noted that Holder's own speech was weakest precisely when suggesting Awlaki was an imminent threat because he was a top leader of AQAP.

In checking off compliance with the National Security Act, Preston emphasizes the Presidential Finding.

In addition, we would make sure that the contemplated activity is authorized by the President in accordance with the covert action procedures of the National Security Act of 1947, such that Congress is properly notified by means of a Presidential Finding.

I'm wondering whether Preston does this to avoid any compliance problems arising from CIA and DOJ's refusal to answer Ron Wyden's questions about the legal justification for killing Awlaki. Which would mean this check is very cursory, fulfilling only the bare minimum requirement but not ensuring that Congress has full understanding of the program.

In checking off his second box—compliance with international law—Preston does two interesting things.

Here we need look no further than the inherent right of national self-defense, which is recognized by customary international law and, specifically, in Article 51 of the United Nations Charter. Where, for example, the United States has already been attacked, and its adversary has repeatedly sought to attack since then and is actively plotting to attack again, then the United States is entitled as a matter of national self-defense to use force to disrupt and prevent future attacks.

The existence of an armed conflict might also provide an additional justification for the use of force under international law.

He situates self-defense in having already been attacked (another reason this seems to address Awlaki—and a case that doesn't justify CIA's

covert ops against Iran). But he treats “the existence of an armed conflict”—and Congress’ declaration of war—as an optional plus again.

With regards to Preston’s third box, he wasn’t in charge when CIA exceeded the terms of OLC approval for torture. So I’ll forgive him for claiming that CIA strictly adheres to the limits included in authorization.

First, we would make sure all actions taken comply with the terms dictated by the President in the applicable Finding, which would likely contain specific limitations and conditions governing the use of force. We would also make sure all actions taken comply with any applicable Executive Order provisions, such as the prohibition against assassination in Twelve-Triple-Three. Beyond Presidential directives, the National Security Act of 1947 provides, quote, “[a] Finding may not authorize any action that would violate the Constitution or any statute of the United States.” This crucial provision would be strictly applied in carrying out our hypothetical program.

In addition, the Agency would have to discharge its obligation under the congressional notification provisions of the National Security Act to keep the intelligence oversight committees of Congress “fully and currently informed” of its activities. Picture a system of notifications and briefings – some verbal, others written; some periodic, others event-specific; some at a staff level, others for members.

I find this passage particularly interesting given what we know about the Finding that was pointed to as the authorization for torture (it’s likely the same one that authorized Awlaki’s killing). According to reports it authorizes the capture and detention of senior

al Qaeda figures. It was very vague. And Preston's predecessor has asserted the written finding did not authorize torture. Instead, CIA briefed—verbally, like Preston says sometimes occurs—the Gang of Eight (though in truth, according to the CIA's own records, just the Gang of Four, after the fact) about the torture part. Preston seems to suggest the same kind of legal paper trail free briefing still goes on and (if I'm right this is all about Awlaki) went on in that case.

Also, if it all goes back to this Finding and verbal briefings after the fact, then it would explain why Preston situates his analysis in Article II authority: because the Finding in question—dated September 17, 2001—was issued before the AUMF—which was signed on September 18.

The rest of this—about not violating the Constitution of the United States—may well invoke the Scott v. Harris precedent that Charlie Savage says the government used to authorize the use of force against a US citizen (except that's a difficult precedent to apply to CIA, given that, as Preston notes, the CIA can't play a law enforcement role).

Which brings us, finally, to Preston's reiteration that CIA abides by the principles of armed conflict.

Here, the Agency would implement its authorities in a manner consistent with the four basic principles in the law of armed conflict governing the use of force: Necessity, Distinction, Proportionality, and Humanity. Great care would be taken in the planning and execution of actions to satisfy these four principles and, in the process, to minimize civilian casualties.

But wait! I thought Congressional authorization was just gravy? To say nothing of the problems with the CIA performing these tasks rather than

the military. But never you mind, the CIA will make sure to minimize civilian casualties. Except for maybe the 16 year old American son of the last guy they killed.