

ANWAR AL-AWLAKI FOIA: THE CIA SPEECH THE CIA DID NOT MENTION

John Brennan and Eric Holder gave speeches—the government says—and therefore the CIA admits it has documents pertaining to targeted killing, but cannot say any more about those documents.

As I noted yesterday, the government explained its changed stance toward the NYT and ACLU FOIAs for the Anwar al-Awlaki OLC memo and related documents by pointing to a bunch of speeches. The motion mentioned speeches by four Administration officials officially—those of Harold Koh, Jeh Johnson, Eric Holder, and John Brennan.

One result of that analysis has been a series of speeches by the State Department Legal Adviser, by the Department of Defense General Counsel, by the Attorney General, and by the Assistant to the President for Homeland Security and Counterterrorism that have set forth for the American people the legal analysis and process involved in the determination whether to use lethal force.

It focuses on two in particular: those by Eric Holder and John Brennan.

Since the filing of these cases, senior U.S. officials have publicly addressed significant legal and policy issues pertaining to U.S. counterterrorism operations and the potential use of lethal force against U.S. citizens who are senior operational leaders of al-Qaida or associated forces. Bennett Decl. ¶ 17. These include speeches by Attorney General Eric Holder on March 5,

2012, and by Assistant to the President for Homeland Security and Counterterrorism John Brennan on April 30, 2012, addressing the circumstances in which it would be lawful to use lethal force against such U.S. citizens, and the process employed by the government in making decisions to employ targeted lethal force, respectively.

As noted by the citation to the Bennett declaration above, this focus comes from the declaration the Director of Clandestine Services, John Bennett, submitted in this suit.

However, the CIA has since determined that it can acknowledge the existence of responsive records reflecting a general interest in these broad topics without harming national security. These records include, for example, the speech that the Attorney General gave at Northwestern University Law School on 5 March 2012 in which he discussed a wide variety of issues pertaining to U.S. counterterrorism operations, including legal issues pertaining to the potential use of lethal force against senior operational leaders of al-Qa'ida or associated forces who have U.S. citizenship. The Attorney General explained that under certain circumstances, the use of lethal force against such persons in a foreign country would be lawful when, among other things, "the U.S. government . . . determined, after a thorough and careful review, that the individual pose[d] an imminent threat of violent attack against the United States." These records also include the speech that the Assistant to the President for Homeland Security and Counterterrorism gave on 30 April 2012, in which he addressed similar legal and policy issues related to the U.S. Government's

counterterrorism operations.

There's one speech that never gets mentioned in all of this discussion, however: the one CIA General Counsel Stephen Preston made on April 10. While Preston engaged in a liberal use of hypothetical, his speech clearly addressed targeted killing.

Suppose that the CIA is directed to engage in activities to influence conditions abroad, in which the hand of the U.S. Government is to remain hidden, – in other words covert action – and suppose that those activities may include the use of force, including lethal force.

As I noted, Preston blathered on at length about the Osama bin Laden "triumph," but the underlying context seemed to relate to Anwar al-Awlaki, as well.

And yet, neither the CIA nor DOJ wants to mention it now.

I'm not sure what to make of that, mind you. Perhaps the CIA speech is irrelevant because this FOIA response really is kabuki intended to distract from a DOD document search conducted before the government had acknowledged its targeted killing programs. Perhaps the CIA speech goes unmentioned because doing so would constitute further acknowledgment of CIA's involvement, meaning it would have to turn over more. Perhaps the CIA speech goes unmentioned because it appeals to inherent Presidential authority rather than the AUMF usually used to justify the Awlaki killing.

In short, I don't know what to make of the CIA's silence about the CIA's own speech on targeting killings. But the silence sure seems notable.