

# ON THE GROWING FIGHT AGAINST AMERICA'S SECRET ENEMIES

Cora Carrier describes the absurd response she got when she asked for a list of our enemies.

At a hearing in May, Sen. Carl Levin, D-Mich., asked the Defense Department to provide him with a current list of Al Qaeda affiliates.

The Pentagon responded – but Levin's office told ProPublica they aren't allowed to share it. Kathleen Long, a spokeswoman for Levin, would say only that the department's "answer included the information requested."

A Pentagon spokesman told ProPublica that revealing such a list could cause "serious damage to national security."

"Because elements that might be considered 'associated forces' can build credibility by being listed as such by the United States, we have classified the list," said the spokesman, Lt. Col. Jim Gregory. "We cannot afford to inflate these organizations that rely on violent extremist ideology to strengthen their ranks."

Thing is, this is not entirely new. At least until February, the government had been refusing to give Ron Wyden a list of every country in which we've used lethal force. And he's on the Intelligence Committee!

Indeed, Carrier suggests one reason this might be classified would be if Obama was fighting these enemies under Inherent Authority.

The AUMF isn't the only thing the government relies on to take military action. In speeches and interviews Obama

administration officials also bring up the president's constitutional power to defend the country, even without congressional authorization.

But, as Jack Goldsmith notes, something else seems to be going on here, because the response Currier got suggests the list is classified Secret, not whatever Top Secret compartment the government maintained for a year Wyden couldn't access.

The language of the DOD release suggests that at least a few more groups (or elements of groups), and maybe many more groups (or elements), are on the AUMF "list." The existence of a "list" (which was unclear in the May 2013 AUMF hearing), and the fact that there may be at least a few groups (or elements of groups) on it, is itself news in the AUMF-watcher world. It is also consistent with suggestions and implications in reports, such as in Mark Mazzetti's book, that the AUMF is being invoked in various ways by DOD Special Operations Forces for non-covert military activities in many countries around the globe.

Third, it is entirely unclear why the USG can acknowledge some groups without unduly "inflating" them, and not others. And this in turn makes me skeptical of the notion of "inflation." To be sure, some groups that are AUMF-able (such as, perhaps, the Haqqani network, a known but not acknowledged U.S. target) perhaps cannot be named because the operations are covert actions and involve deals of non-acknowledgment with foreign governments (or elements of foreign governments). But that cannot be a comprehensive explanation for DOD's secrecy. By stating that disclosure of groups on the list would "reasonably be expected to

cause serious damage to the national security," DOD has tipped off that the list is classified only at the secret (as opposed to top secret) level. (See Section 1.2 of E.O. 13,256.) Covert actions are typically classified at the top secret level. This implies (but does not prove) that some if not all of the AUMF-groups in question are not subjects of covert actions.

But remember: There are two other instances where the government has refused to clarify who is, and is not, an enemy.

When a bunch of people who have talked to, but not assisted, terrorists sued to stop the NSAA's provisions allowing indefinite detention, the government refused (until it became convenient) to say whether they could be detained or not.

Then, as part of the Bradley Manning charges, the government kept one of the enemies it was going to prove he had aided classified (but ultimately didn't argue he had aided that enemy in court).

Prosecutors accuse him of "aiding the enemy," and three in particular: al-Qaida, al-Qaida in the Arabian Peninsula and a "classified enemy" referred to by a Bates number, which is a form of legal document identification.

Three professors of military law – Yale Law School's Eugene Fidell, Duke University School of Law's Scott Silliman and Texas Tech University School of Law's Richard Rosen – told Courthouse News they had never heard of a case involving a "classified enemy." After being informed that the phrase stumped the professors, a military spokeswoman insisted that the confusion stemmed from a misunderstanding, because "who the enemy 'is' is not classified." "What 'is' classified is that our government has confirmed that this enemy

is in receipt of certain compromised classified information, and that the means and methods of collection that the government has employed to make that determination are classified," the spokeswoman said in an email.

One thing about all these instances – refusing to share a list of lethal force targeted countries with Ron Wyden, sharing a classified list with Carl Levin only on request, refusing to tell Americans (and one member of parliament from Iceland) whether they are counted as enemies, and refusing to tell Manning which enemy he supposed aided – is that they provide the executive maximum flexibility. That may not be the only thing this extreme secrecy about enemies does. But it is one thing it does do, along with hiding how broad the unilaterally declared war under Inherent Authority is.

It sure does make things confusing, though!