

LAWFARE USES INCOMPLETE FACTS ABOUT ABDULMUTALLAB TRIAL TO ATTACK DIRTY WARS

I'm going to take a break from noting how Lawfare ignores the public record on NSA spying – both of past failures to inform Congress, and of Intelligence Community lies about having done so – to note how Lawfare ignores the public record on drone killing.

On Sunday, Lawfare posted a long review of Jeremy Scahill's book *Dirty Wars*. While it is not entirely negative, it stakes a claim on what the public record shows to argue that Scahill glossed over what a dangerous man Anwar al-Awlaki was. Yet the review itself ignores key details in the public record.

First, full disclosure. I'm friends with Scahill, and he acknowledged me in the book. But given that I'm not quoted, I suspect he acknowledged me because I've followed certain aspects of the narrative he covered – especially the evidence in the Umar Farouk Abdulmutallab case and the shoddy OLC case to support Awlaki's killing – in more detail than most other reporters.

It's for that reason that I find the review to be so problematic.

After spending two paragraphs praising the on-the-ground reporting Scahill did, Lawfare reviewer Nick Basciano complains,

Scahill simply skips over facts that don't promote his narrative of Awlaki. One such example comes in Awlaki's relationship with Umar Farouk Abdulmutallab, the "Christmas Day Bomber" who attempted to detonate almost

three ounces of PETN aboard Northwest flight 253 on its descent to Detroit. A publically-available and widely-cited sentencing memorandum for Abdulmutallab describes how Awlaki housed Abdulmutallab in Yemen and took him to AQAP's primary bomb-maker, Ibrahim Al Asiri. There, they "discussed a plan for martyrdom mission" and Awlaki himself gave the bombing plot "final approval and instructed Defendant Abdulmutallab on it." Awlaki's "last instructions," the memorandum continues, "were to wait until the airplane was over the United States and then to take the plane down." Without dealing with this evidence from the Abdulmutallab trial, Scahill admits that Awlaki was only "in touch" with Abdulmutallab, insisting that "no conclusive evidence [was] presented, at least not publicly, that Awlaki had played an operational role in any attacks." Why such a relevant piece of evidence isn't included in Scahill's retelling of the Abdulmutallab plot is unclear, but it isn't the only instance of turning a blind eye to evidence linking Awlaki's directly to terrorism.

~~The trial, of course, took place several weeks after the final event of Scahill's narrative, the killing of Abdulrahman al-Awlaki~~

[Correction: The trial took place on October 11 and 12, 2009, before Abdulrahman's death. But as I note, the narrative presented there differs in key ways from the one Basciano adopts]. The sentencing took place several months later. That doesn't mean Scahill couldn't have included the evidence from "the trial." But it was not part of the narrative arc Scahill told in the book.

Moreover, Basciano's description ignores the reporting Scahill did do on Awlaki's role in Abdulmutallab's attempted attack, reporting based on talking to people who knew of Abdulmutallab's movements in Yemen.

A local tribal leader from Shabwah, Mullah Zabara, later told me he had seen the young Nigerian at the farm of Fahd al-Quso, the alleged USS Cole bombing conspirator. "He was watering trees," Zabara told me. "When I saw [Abdulmutallab], I asked Fahd, 'Who is he?'" Quso told Zabara the young man was from a different part of Yemen, which Zabara knew was a lie. "When I saw him on TV, then Fahd told me the truth."

Awlaki's role in the "underwear plot" was unclear. Awlaki later claimed that Abdulmutallab was one of his "students." Tribal sources in Shabwah told me that al Qaeda operatives reached out to Awlaki to give religious counseling to Abdulmutallab, but that Awlaki was not involved in the plot. While praising the plot, Awlaki said he had not been involved with its conception or planning. (318)

After having complimented Scahill's efforts to speak to people on the ground, Basciano did not mention that he had done so, too, in regards to the Abdulmutallab attack.

Moreover, if Scahill had used the material released in relation to the trial, the evidence would be much muddier than Basciano lays out. After all, the narrative Basciano finds centrally important is just one of three confessions Abdulmutallab made:

- On December 25, 2009, Abdulmutallab claimed "Abu Tarak" prepared all aspects of the attack. A DOJ source has since said that Abu Tarak "was" Awlaki, but that claim conflicts with DOJ's own sentencing memo, which attributes at least one

activity Abdulmutallab attributed to Abu Tarak to Ibrahim al-Asiri.

- Sometime after Dana Priest reported, on January 27, 2010, that Awlaki had already been placed on JSOC's kill list, and April 15, 2010 Abdulmutallab said Awlaki had a central role, both in directing him to target the US specifically, but also in making his martyrdom video. This confession was made during an interrogation directed in part by the High Value Interrogation Group, after some time in solitary confinement, and was offered in conjunction with a plea negotiations that never reached agreement. This narrative is the one Basciano presents as "fact."
- At his guilty plea, Abdulmutallab said Awlaki had inspired his attack, but he did not say Awlaki had prepared it (he did not name his co-conspirators, and he also insisted that Awlaki was still alive).

Basciano, in short, commits the same error he accuses Scahill of, ignoring the parts of the case record that don't help his argument.

And there are a whole slew of reasons the sentencing memo narrative should not be accepted as fact unquestioningly. Dr. Simon Perry, who read Abdulmutallab's interrogation reports, treated Abu Tarak and Awlaki as different people, indicating the reports never include a clear claim that Tarak was Awlaki. The sentencing memo narrative claims that AQAP's greatest English language propagandist would make a martyrdom video with someone formally schooled in English and still learning Arabic, but make that video in Arabic, even while other English speaking terrorists made their videos in English for the greater propaganda value. It ignores Fahd al-Quso's role in working with Abdulmutallab, which is especially interesting given his apparent central role in training UndieBomb 2.0. Oddly, Abdulmutallab's interrogators discussed Awlaki's possible death during interrogations.

In addition, prosecutors planned the actual trial, during which Abdulmutallab would have had the opportunity to challenge this statement, so as not to rely on it. (Abdulmutallab objected to its use because it was only a proffer, and the prosecutors readily agreed to that demand.) I would suggest they were not confident the narrative would go unchallenged. Their failure to indict Awlaki, either in Abdulmutallab's conspiracy charge or on his own, further supports that.

So Basciano's claim Scahill should have presented the sentencing memorandum needs far more context than he gives it, because it not a "fact," but just one version of the "facts," which conflicts with other versions. We don't know which version is correct, because the government chose not to present this narrative in the normal venue for assessing conflicting claims, a trial.

But there's a detail in the public record – and important new reporting from Scahill's book – that I find Basciano's silence on just as troubling.

As I have noted, the WikiLeaks cable of the January 2, 2010 meeting between Ali Abdullah Saleh and David Petraeus, in which Saleh blithely notes both Nasir al-Wuhayshi and Awlaki escaped death in a US strike on Christmas Eve 2009, strongly suggests Awlaki was a named target of that attack. Scahill doesn't cite the cable, which would have helped his case. Instead, Scahill relays that, on December 20, Saleh told Awlaki's father his son had been killed in a strike on that day.

He said, 'Nasser, have you heard the news?' I said, 'What news?' He said, 'Four hours ago, your son was killed by an American airplane.' I said, 'What American airplane? Where?'" Saleh told him the location, a mountainous area of Shabwah. Nasser hung up and started calling tribal leaders in the area, desperate for any information. There had been no air strikes reported. "I don't know why the president told me that," Nasser later told me, adding that he believes the Americans had told Saleh they were going to hit Anwar on that day but that the operation had been called off for some reason. Regardless of the reason, it was now clear: "The Americans really wanted to kill Anwar." (314)

Nasser al-Awlaki is obviously not an unbiased observer (though if he had wanted to lie, he might have crafted a less convoluted story). But Nasser's story, the WikiLeaks cable, and a number of contemporary reports all support the case that Anwar al-Awlaki was targeted by name, not just incidentally, the day before the UndieBomb plot.

That's important because – another public record not cited by either Basciano or Scahill – according to the William Webster report, Anwar al-Awlaki was not considered to be operational until the UndieBomb attack, a day after (increasing amounts of evidence suggest) Awlaki may have been targeted based solely on

Presidential authority. Significantly, FBI sources immediately started leaking that Abdulmutallab had implicated Awlaki in his Christmas day confession, which we now know to be false (he implicated "Abu Tarak.") Thus, over a month before Abdulmutallab did implicate Awlaki in a plea proffer at the hands of HIG, FBI was already anonymously claiming he had. All just days after the government had apparently tried to kill Awlaki before they had definitive evidence he was operational.

Mind you, Abdulmutallab's confessions are not the only piece of evidence implicating Awlaki (or not) in his attack. The sentencing memo also refers to electronic communications Abdulmutallab wrote to Awlaki. Though curiously, no one has ever questioned why FBI's two Agents spending several hours a day monitoring Awlaki's wiretap missed that particular dot in advance of the attack.

The public record shows two things. A good deal of conflicting information about Awlaki's role in Abdulmutallab's attack (as well as evidence that he grew even closer to Al Qaeda after that point, which Scahill shows too, though even some of that doesn't support the claim he played a leadership role). And solid – but unconfirmed – evidence that the government tried to kill Awlaki before they had evidence he was operational, the key criterion that would (according to DOJ's white paper) make such killing legal. I would suggest those two details must be presented together to understand both the incentives driving the plea deal DOJ tried to get Abdulmutallab to take and the circumstances under which DOJ decided it could kill an American citizen with no recognizable due process.

Basciano is absolutely entitled to attack Scahill's book if he chooses. But for a guy claiming Scahill ignored key facts, he seems to be claiming a mighty selective set of "facts" himself.

Update: In related news, the 6th Circuit has

scheduled a hearing for Abdulmutallab's appeal of his conviction and sentence on December 5. Here's a post describing the appeal; the most interesting claim is that 15 months in solitary confinement made Abdulmutallab incompetent to represent himself.