

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"!?