

WHITE PAPER CITES JOHN BRENNAN SPEECH DEFENDING IMPORT OF TRANSPARENCY, FOIA, DECLASSIFIED OLC MEMOS

I've been out addressing an imminent toner cartridge emergency and taping Al Jazeera English (it'll be on tonight at 7:30). So I haven't yet done my timeline of the varying authorizations to kill Anwar al-Awlaki.

But I wanted to look at one citation in the white paper which I find particularly amusing.

In addition, the United States retains its authority to use force against al-Qa'ida and associated forces outside the area of active hostilities when it targets a senior operational leader of the enemy forces who is actively engaged in planning operations to kill Americans. The United States is currently in a non-international armed conflict with al-Qa'ida and its associated forces. See *Hamdan v. Rumsfeld*, 548 US 557 628-31 (2006) (holding that a conflict between a nation and a transnational non-state actor, occurring outside the nation's territory, is an armed conflict "not of an international character" (quoting Common Article 3 of the Geneva Conventions) because it is not a "clash between nations"). Any US operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities. See John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks

at the Program on Law and Security, Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept . 16, 2011) (“The United States does not view our authority to use military force against al-Qa’ida as being restricted solely to ‘hot’ battlefields like Afghanistan.”

There are a number of things that noted legal scholar John Brennan said in this speech DOJ claims authorizes John Brennan (who presumably is the “informed, high-level official” described as judge and jury in this white paper) to kill Americans.

There’s this:

Now, I am not a lawyer, despite Dan’s best efforts.

There’s his argument that only by adhering to the rule of law will we beat the terrorists, because it provides an alternative to the twisted world view of Al Qaeda.

Fourth—and the principle that guides all our actions, foreign and domestic—we will uphold the core values that define us as Americans, and that includes adhering to the rule of law. And when I say “all our actions,” that includes covert actions, which we undertake under the authorities provided to us by Congress. President Obama has directed that all our actions—even when conducted out of public view—remain consistent with our laws and values.

For when we uphold the rule of law, governments around the globe are more likely to provide us with intelligence we need to disrupt ongoing plots, they’re more likely to join us in taking swift and decisive action against terrorists, and they’re more likely to turn over suspected terrorists who are

plotting to attack us, along with the evidence needed to prosecute them.

When we uphold the rule of law, our counterterrorism tools are more likely to withstand the scrutiny of our courts, our allies, and the American people. And when we uphold the rule of law it provides a powerful alternative to the twisted worldview offered by al-Qa'ida. Where terrorists offer injustice, disorder and destruction, the United States and its allies stand for freedom, fairness, equality, hope, and opportunity.

In short, we must not cut corners by setting aside our values and flouting our laws, treating them like luxuries we cannot afford. Indeed, President Obama has made it clear—we must reject the false choice between our values and our security.

There's his suggestion that rule of law depends on transparency.

Our democratic values also include—and our national security demands—open and transparent government. Some information obviously needs to be protected. And since his first days in office, President Obama has worked to strike the proper balance between the security the American people deserve and the openness our democratic society expects.

In one of his first acts, the President issued a new Executive Order on classified information that, among other things, reestablished the principle that all classified information will ultimately be declassified. The President also issued a Freedom of Information Act Directive mandating that agencies adopt a presumption of disclosure when processing requests for

information.

The President signed into law the first intelligence authorization act in over five years to ensure better oversight of intelligence activities. Among other things, the legislation revised the process for reporting sensitive intelligence activities to Congress and created an Inspector General for the Intelligence Community.

For the first time, President Obama released the combined budget of the intelligence community, and reconstituted the Intelligence Oversight Board, an important check on the government's intelligence activities. The President declassified and released legal memos that authorized the use, in early times, of enhanced interrogation techniques. Understanding that the reasons to keep those memos secret had evaporated, the President felt it was important for the American people to understand how those methods came to be authorized and used. [my emphasis]

So to beat the terrorists, we have to uphold rule of law by briefing Congress, releasing classified information, including the legal memos that authorize our most secret counterterrorism, and presume that unclassified information – like this white paper!!! – should be presumptively released via FOIA.

This memo, of course, breaks every single one of those principles. It is designed to serve as substitute for properly briefing Congress. It is not even classified, yet has been withheld even from the ACLU FOIA that should have returned it. And when Jason Leopold and Scott Shane FOIAed this white paper specifically last August, by name, DOJ didn't turn it over (in spite of granting Leopold, at least, expedited processing).

Nevertheless, the fact that Brennan's speech suggests the very treatment of this white paper means we will lose the war on terror didn't prevent them from using it to support the argument that any armed conflict – any! it doesn't even say an armed conflict with al Qaeda! – would still be part of the war on terror.

While the AUMF unwisely allowed the President – and therefore this particular “informed, high-level official” – to define who are and who are not part of al Qaeda (and so therefore relying on John Brennan to make this case isn't as dodgy as it should be), the white paper still goes beyond what appeared in the Brennan speech.

But my favorite part of it is the date. September 16, 2011. Just two weeks before the Administration killed Awlaki with a drone.

The following citation comes from this letter from June 15, 2010, which doesn't mention Yemen, though does say we're engaging al Qaeda pretty much everywhere but Northcom

Since October 7, 2001, the United States has conducted combat operations in Afghanistan against al Qa'ida terrorists and their Taliban supporters. It has also deployed combat equipped forces to a number of locations in the U.S. Central, Pacific, European, Southern, and Africa Command areas of operation in support of those and other overseas operations.

I guess Awlaki should have followed the White House website more closely, because that's where the “informed, high-level official” who serve as judge and jury publish their two week notice they're going to kill us.