DC CIRCUIT SENDS CIA'S GLOMAR CLAIMS BACK TO THE DRAWING BOARD

The DC Circuit just remanded the ACLU's drone targeted killing lawsuit (the one I talked about here) to the District Court.

The decision is based on a theory Merrick Garland used in the hearing (which Wells Bennett analyzed here). Whether or not the CIA had admitted to the agency being involved in drones, it had admitted to having an interest in them. Which makes any claim that it cannot reveal it has documents ridiculous.

> And there is still more. In 2009, then-Director of the CIA Leon Panetta delivered remarks at the Pacific Council on International Policy. In answer to a question about "remote drone strikes" in the tribal regions of Pakistan, Director Panetta stated:
>
> > [O]bviously because these are covert and secret operations I can't go into particulars. I think it does suffice to say that these operations have been very effective because they have been very precise in terms of the targeting and it involved a minimum of collateral damage. . . . I can assure you that in terms of that particular area, it is very precise and it is very limited in terms of collateral damage and, very frankly, it's the only game in town in terms of confronting and trying to disrupt the al-Qaeda leadership.8
>
> It is hard to see how the CIA Director could have made his Agency's knowledge of — and therefore "interest" in — drone strikes any clearer. And given these

> statements by the Director, the President, and the President's counterterrorism advisor, the Agency's declaration that "no authorized CIA or Executive Branch official has disclosed whether or not the CIA . . . has an interest in drone strikes," Cole Decl. ¶ 43; see CIA Br. 43, is at this point neither logical nor plausible.
>
> It is true, of course, that neither the President nor any other official has specifically stated that the CIA has documents relating to drone strikes, as compared to an interest in such strikes. At this stage of this case, however, those are not distinct issues. The only reason the Agency has given for refusing to disclose whether it has documents is that such disclosure would reveal whether it has an interest in drone strikes; it does not contend that it has a reason for refusing to confirm or deny the existence of documents that is independent from its reason for refusing to confirm or deny its interest in that subject. And more to the point, as it is now clear that the Agency does have an interest in drone strikes, it beggars belief that it does not also have documents relating to the subject.
>
> But again, there is more. In the above-quoted excerpt from the CIA Director's Pacific Council remarks, the Director spoke directly about the precision of targeted drone strikes, the level of collateral damage they cause, and their usefulness in comparison to other weapons and tactics. Given those statements, it is implausible that the CIA does not possess a single document on the subject of drone strikes. Unless we are to believe that the Director was able to "assure" his audience that drone strikes are "very precise and . . . very limited in terms of collateral damage"

> without having examined a single document in his agency's possession, those statements are tantamount to an acknowledgment that the CIA has documents on the subject.

This is where things might get interesting. Garland sent the case back to the District for CIA to produce a Vaughn Index or something similar, but left open the possibility Judge Rosemary Collyer could accept something other than a detailed Vaughn Index.

> With the failure of the CIA's broad Glomar response, the case must now proceed to the filing of a Vaughn index or other description of the kind of documents the Agency possesses, followed by litigation regarding whether the exemptions apply to those documents.
>
> [snip]
>
> Just how detailed a disclosure must be made, even in an index, is another matter. A Vaughn index indicates in some descriptive way which documents the agency is withholding and which FOIA exemptions it believes apply. As the plaintiffs acknowledge, there is no fixed rule establishing what a Vaughn index must look like, and a district court has considerable latitude to determine its requisite form and detail in a particular case.

It even entertained accepting a No Number No List response, just like the one recently accepted in the Awlaki FOIA.

> A Glomar response requires the agency to argue, and the court to accept, that the very fact of the existence or nonexistence of responsive records is protected from disclosure. That is conceptually different from conceding (or being compelled by the court to

> concede) that the agency has some documents, but nonetheless arguing that any description of those documents would effectively disclose validly exempt information. There may be cases where the agency cannot plausibly make the former (Glomar) argument with a straight face, but where it can legitimately make the latter.

Collyer has actually been more open to CIA's outrageous claims than Colleen McMahon in SDNY. So it's likely she'll take this opportunity to permit a No Number No List response.

Still, I keep wondering how long the CIA will be able to sustain a Glomar (or limited Glomar) when they've got a document pertaining to its role in targeted killing sitting out there in plain sight — the Stephen Preston speech talking about the legal process CIA uses before it engages in lethal force operations. CIA effectively Glomared that speech in SDNY.

The DC Circuit seems most concerned about the absurdity of the government's public position.

> In this case, the CIA asked the courts to stretch that doctrine too far — to give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible. "There comes a point where . . . Court[s] should not be ignorant as judges of what [they] know as men" and women.

Maybe it's just me. But I find the Glomaring of a speech given as part of a whole series of speeches on drone killing to reach that same level of absurdity.

So we shall see just how much absurdity the courts continue to allow.