

THE SECRETS THEY'RE KEEPING SELECTIVELY LEAKING ABOUT ANWAR AL-AWLAKI

As I noted yesterday (and Glenn has examined at more length), in addition to asserting that the government can target Anwar al-Awlaki ... because they said so, the Obama Administration also invoked state secrets in its motion to dismiss the ACLU/CCR suit challenging targeted killings.

The Obama Administration has officially positioned itself to the right of hack lawyer David Rivkin.

But the state secrets invocation is interesting not just because it shows a Democratic Administration out-hacking a noted hack.

For example, I think the invocation shows just how weak they recognize their own argument to be. Consider what Robert Gates (who invoked something newfangled called the "military and state secrets privilege") and James Clapper described as falling under their invocation of state secrets (Leon Panetta basically said only that CIA could neither confirm nor deny its involvement, which sort of makes me wonder whether CIA really has targeted al-Awlaki or not).

Robert Gates:

A. Intelligence information DoD possesses concerning AQAP and Anwar al-Aulaqi, including intelligence concerning the threat AQAP or Anwar al-Aulaqi pose to national security, and the sources, methods, and analytic processes on which any such intelligence information is based;

B. Information concerning possibly military operations in Yemen, if any, and including criteria or procedures DoD

may utilize in connection with such military operations; and

C. Information concerning relations between the United States and the Government of Yemen, including with respect to security, military, or intelligence cooperation, and that government's counterterrorism efforts.

James Clapper:

A. (U) Intelligence information concerning al-Qaeda and the sources and methods for acquiring that information.

B. (U) Intelligence information concerning AQAP and the sources and methods for acquiring that information.

C. (U) Intelligence information concerning Anwar al-Aulaqi and the sources and methods for acquiring that information.

The Administration is sort of kind of relying on the President's authority under the AUMF (unless the judge doesn't buy that argument, in which case the Administration promises to try something else), which states:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

In other words, the Administration is relying on some tie between AQAP and the al Qaeda organization that hit us on 9/11 for its authority to kill an American citizen with no

due process. Mind you, it can't say precisely what that tie is—whether AQAP **is** al Qaeda or whether it is just **closely connected enough** to be included under the AUMF. But that's precisely what it has called a state secret: the evidence of ties between the group against which Congress declared war in 2001 and the group we're targeting in Yemen.

Effectively, the Executive Branch—with no known support from Congress—is saying we're at war against AQAP. But it's also saying no one outside of select people within the Executive Branch (and, presumably, a group of four or maybe eight members of Congress who serve in leadership or on the Intelligence Committees) can see the evidence that proves we're at war against AQAP.

The President has unilaterally declared war against a group but then said no one can see why he has done so.

And then both Gates and Clapper invoke state secrets over the evidence the government has against al-Awlaki.

Rather than prove to a judge that they even have reasonable suspicion to believe al-Awlaki is part of AQAP, much less enough evidence to execute him, the government has instead asserted that all of that is a state secret. They've declared everything al-Awlaki would need to challenge his execution a state secret. Even KSM will be able to see the evidence against him; and he has admitted to killing 3,000 Americans. But American citizen al-Awlaki, whom no one has accused of actually killing anyone, can't see the same kind of information.

Finally, there's the tired old sources and methods catch all. We can't know how the government has collected the evidence it has against al-Awlaki.

Except we already do.

Thanks largely to the efforts of Crazy Pete Hoekstra, we know that the government had

wiretaps on al-Awlaki going back at least since December 2008. Al-Awlaki himself has challenged the government to release the intercepts they have on him (which public reports say include correspondence with tens of thousands of people). Al-Awlaki has even made some of that correspondence available himself. But the government says all that is a state secret.

Furthermore, some of the evidence against al-Awlaki appears in court documents, from the public testimony of Umar Farouk Abdulmutallab. The alleged recruitment of Abdulmutallab is one of the key issues the government describes al-Awlaki to have been involved in. That information is public. Yet the government also says it is a state secret.

And if all this really is a state secret, then why isn't Crazy Pete Hoekstra in jail? If letting others know that al-Awlaki has been wiretapped for years—as Hoekstra did—causes grave damage to the national security of the United States, then why hasn't the government prosecuted Crazy Pete, or at least stripped him of his security clearance?

More importantly, if the information surrounding al-Awlaki's targeting is a state secret, then why not prosecute the steady stream of national security officials who have leaked details of his targeting to the press going back to January?

The government has deliberately leaked details of al-Awlaki's targeting to the press when it served its political purpose. No investigation of which officials made those leaks has ever been launched—not even against Crazy Pete. And yet now that al-Awlaki's family is asking for the information that has been leaked to the press for the last nine months, the government is choosing to declare it all a state secret.

The release of it **can't** be causing grave danger to the US—because national security officials have leaked tons of it with no consequences. Which suggests the government invoked state

secrets for just two reasons. First, to give plausible deniability to Yemen, which (as officials leaked to David Ignatius months ago, apparently with no consequences to themselves) apparently came to us and asked us to ~~gather intelligence on capture~~ kill al-Awlaki on their behalf back in October.

But more importantly, to hide what is evidenced by the shoddiness of their motion to dismiss itself. The government isn't really sure whether any of its arguments about al-Awlaki make sense (and that's reading their filing generously). It's not even willing to commit to one or another of those arguments to a judge. So using the best way to hide the obvious legal insufficiency of its argument, it has simply declared all the evidence that (doesn't) support its argument off limits.

Not only has the President declared the authority to target American citizens with no stronger argument than "because I say so." But it has also declared any of the evidence that would prove the sufficiency or insufficiency of his argument for doing so off limits.