THE NSC'S MAY 2011 "DRAFT" LEGAL ANALYSIS AND THE CONTINUED STONEWALLING OF RON WYDEN

I'm ultimately going to get around to arguing that the reason the government response to the ACLU targeted killing FOIA is so funky is because (mind you, this is a wildarsed guess) the CIA didn't rely on the OLC memo authorizing Anwar al-Awlaki's killing.

But for the moment I want to point out a far tinier but nevertheless related point.

On March 30 of this year, just before the government started scrambling for extensions on this FOIA, AUSA Sarah Normand called ACLU Attorney Eric Ruzicka to ask if ACLU would "limit the first prong of its FOIA requests" to DOJ and DOD. The first prong asked for,

> All records created after September 11, 2001, pertaining to the legal basis in domestic, foreign and international law upon which U.S. citizens can be subjected to targeted killings, whether using unmanned aerial vehicles ("UAVs" or "drones") or by other means.

Normand asked Ruzicka to agree to exclude any draft legal analyses, emails, and internal communication. Ruzicka agreed to waive draft analyses, but not emails and internal communications.

Most of the internal communications from the DOD and DOJ that would have been excluded which are described in the Vaughn indices aren't all that interesting—almost all pertain to discussions leading up to the Situation Room debate over how

transparent to be on these killings or to Jeh Johnson and Eric Holder's speeches on targeted killing.

But there is a series of three email chains I find particularly interesting.

On May 18-19, 2011 attorneys at OLC and the National Security Council deliberated discussing "draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens." Then, on May 19, lawyers at OLC, DOJ's Civil and National Security Divisions, and at the Offices of the Associate and Deputy Attorney General discussed the same thing. Finally, on May 20, the DOJ lawyers and the National Security Council lawyers continued the discussion, this time including DOJ's Office of Legislative Affairs.

This says, at a minimum, two things. First, the White House and DOJ were discussing what they called "draft" legal analysis as late as May 2011, 11 months after OLC finalized an opinion supposedly authorizing Anwar al-Awlaki's killing but 4 months before the US killed him. And, that the discussion of that "draft" legal analysis pertained, in part, to some issue raised by Congress.

That, by itself, is interesting. Why was this legal analysis still considered draft analysis in May 2011? (And for what it's worth, they were having similar deliberations in November 2011, after they had already killed Awlaki.)

But then there's the likelihood that this discussion relates to persistent requests from Ron Wyden to get basic questions about targeted killing answered.

In a letter to Eric Holder on February 8, 2012 (so before DOJ tried to get ACLU to waive precisely this information) complaining about continued stonewalling of his questions about targeted killing, Wyden made it clear he called Holder in April 2011 to get these questions answered. And DOJ answered in limited form in

May 2011—the same month, at least, that DOJ and the White House were discussing "draft" legal analysis.

> In February 2011, after making similar requests to other officials, I asked the Director of National Intelligence to provide the legal analysis that explains the intelligence community's understanding of its authority to kill American citizens. The Director indicated that he would have liked to be responsive to my request, but he told me that he did not have the authority to provide formal written opinions of the Department of Justice's Office of Legal Counsel to Congress.
>
> So, as you will remember, I called you in April 2011 and asked you to ensure that the secret Justice Department opinions that apparently outline the official interpretation of this lethal authority were provided to Congress. The Justice Department provided me with some relevant information in May 2011, and I mistakenly believed that this meant that you had agreed to my request. Nine months later, however, the Justice Department still has not fully complied with my original request, and it is increasingly clear that it has no intention of doing so.

Wyden's letter continued by describing some of the questions he had asked Holder in April 2011 but had not had answered as of February 2012 (and as far as I know, to this day).

> And it is critically important for the public's elected representatives to ensure that these questions are asked and answered in a manner consistent with American laws and American values.
>
> Some of these questions include: 'how much evidence does the President need to

> decide that a particular American is part of a terrorist group?', 'does the President have to provide individual Americans with an opportunity to surrender before using lethal force against them?', 'is the President's authority to kill Americans based on authorization from Congress or his own authority as Commander-in-Chief?', 'can the President order intelligence agencies to kill an American who is inside the United States?', and 'what other limitations or boundaries apply to this authority?'. [my emphasis]

I'm particularly interested in that question regarding whether the President relied on the AUMF (or some other Congressional grant of authority) or Article II power. Because it says whether or not these email discussions pertained to Wyden's questions, the full Senate Intelligence Committee had still not been briefed on the basis of authority for the President's authority to kill an American citizen. Hell, as far as we know, the Committee still hasn't received that information.

According to Charlie Savage's reporting, the OLC memo finalized 10 months before these discussions of "draft" legal analysis situated the authority to kill Awlaki in the AUMF.

> Based on those premises, the Justice Department concluded that Mr. Awlaki was covered by the authorization to use military force against Al Qaeda that Congress enacted shortly after the terrorist attacks of Sept. 11, 2001 — meaning that he was a lawful target in the armed conflict unless some other legal prohibition trumped that authority.

But in his bizarrely unmentioned April 2012 speech discussing how the CIA decides whether its use of lethal force is legal, CIA General

Counsel Stephen Preston emphasized Article II power, with an AUMF being secondary.

> First, we would confirm that the contemplated activity is authorized by the President in the exercise of his powers under Article II of the U.S. Constitution, for example, the President's responsibility as Chief Executive and Commander-in-Chief to protect the country from an imminent threat of violent attack. This would not be just a one-time check for legal authority at the outset. Our hypothetical program would be engineered so as to ensure that, through careful review and senior-level decision-making, each individual action is linked to the imminent threat justification.
>
> A specific congressional authorization might also provide an independent basis for the use of force under U.S. law.
>
> In addition, we would make sure that the contemplated activity is authorized by the President in accordance with the covert action procedures of the National Security Act of 1947, such that Congress is properly notified by means of a Presidential Finding. [my emphasis]

Now maybe the government still hasn't figured out whether the President killed Awlaki based solely on his own authority or whether they nodded to Congress before they took out a US citizen with a drone.

Or maybe this issue is the precise question that they're trying to obscure with their silence about Preston's speech and their sustenance of the CIA Glomar.