

THE ADMINISTRATION'S MANY EXCUSES FOR HIDING ITS TARGETED KILLING MEMO

Remember this article? It describes the debate within the Administration over how readily and extensively to acknowledge the US killing of Anwar al-Awlaki. As it describes, the debate was at least preliminarily resolved at a Situation Room meeting in November.

The issue came to a head at a Situation Room meeting in November. At lower-level interagency meetings, Obama officials had already begun moving toward a compromise. David Petraeus, the new CIA director whose agency had been wary of too much disclosure, came out in support of revealing the legal reasoning behind the Awlaki killing so long as the case was not explicitly discussed. Petraeus, according to administration officials, was backed up by James Clapper, the director of national intelligence. (The CIA declined to comment.) The State Department, meanwhile, continued to push for fuller disclosure. One senior Obama official who continued to raise questions about the wisdom of coming out publicly at all was Janet Napolitano, the Homeland Security director. She argued that the calls for transparency had quieted down, as one participant characterized her view, so why poke the hornet's nest? Another senior official expressing caution about the plan was Kathryn Ruemmler, the White House counsel. She cautioned that the disclosures could weaken the government's stance in pending litigation. *The New York Times* has filed a lawsuit against the Obama administration under the Freedom of

Information Act seeking the release of the Justice Department legal opinion in the Awlaki case. (The department has declined to provide the documents requested.)

It came down to what Denis McDonough, the deputy national-security adviser, cheekily called the “half Monty” versus the “full Monty,” after the British movie about a male striptease act. In the end, the principals settled on the half Monty. As the State Department’s Koh continued to push for the maximum amount of disclosure, McDonough began referring to that position as “the full Harold.”

Note especially the stance of Kathryn Ruemmler, the White House Counsel, who argued that any disclosures on the Awlaki killing “could weaken the government’s stance in pending litigation.”

That is, Ruemmler argued the Administration couldn’t voluntarily provide information about Awlaki’s killing, because it might mean it would have to involuntarily give that information up pursuant to a lawsuit over that information. Huh?

Since November, both the NYT (on December 20, 2011) and the ACLU (yesterday) have sued to get the Awlaki memo under FOIA (the ACLU is also suing to get the underlying evidence, including that relating to Samir Khan and Awlaki’s son Abdulrahman).

So I wanted to compare the different responses different agencies gave the NYT and ACLU around the same time that many top Administration officials were advocating for some kind of transparency even while the White House Counsel was arguing that doing so might lead to transparency. Here’s how the government responded to these FOIAs when (I’ve not noted the ACLU appeals, but all were appealed before the subsequent follow-up):

Around June 2010: OLC completes Awlaki memo

June 11, 2010: NYT's Scott Shane FOIAs DOJ OLC for memos on targeted killings

October 7, 2011: NYT's Charlie Savage FOIAs OLC for memos on targeting killings

October 19, 2011: ACLU FOIAs Anwar al-Awlaki OLC memo, underlying evidence supporting it, and information relating to Samir Khan and Abdullah al-Awalaki

October 27, 2011: OLC denies both NYT requests under FOIA exemptions (b)(1), (b)(3), and (b)(5), and, in response to Shane's request, also notes that with regards to other agencies, "neither confirms nor denies the existence of the documents" in the request

October 27, 2011: DOJ Office of Information Policy grants ACLU's request for expedited processing but determines the request fell within "unusual circumstances" so it could not meet the statutory deadline

October 31, 2011: DOD denies ACLU's request for expedited processing and also claimed "unusual circumstances"

November 2011, unknown date: Situation Room meeting at which Principals decide to pursue a "half monty" strategy of limited release of information on Awlaki

November 4, 2011: NYT appeals its denial

November 7, 2011: USSOCOM denies ACLU's request for expedited processing and determined the request fell within "unusual circumstances"

November 14, 2011: OLC denies ACLU's request under FOIA exemptions (b)(1), (b)(3), and (b)(5)

November 17, 2011: CIA denies ACLU's

FOIA “pursuant to FOIA exemptions (b)(1) and (b)(3)” and claims that the “fact of the existence or nonexistence of requested records is currently and properly classified”

December 27, 2011: DOD informs ACLU it could not process the request within statutory timeframe

January 18, 2012: CIA informs ACLU it would be unable to respond to ACLU’s administrative appeal within statutory timeframe

So we’ve got three different responses, though together they may all make sense:

- An “unusual circumstances” response—which may indicate the need to search many records and/or consult another agency—response from DOD and and DOJ OIP
- A denial under exemptions (b)(1) (national defense information and (b)(3) (classified by statute) from CIA, and under those same exemptions plus (b)(5) (deliberative or executive privilege) from OLC
- A Glomar (“neither confirm nor deny”) response from CIA and OLC

The “unusual circumstances” seems to reflect the inter-agency nature of this memo and the evidence (and, perhaps, that CIA has primary ownership over it), though in the case of the ACLU’s request for the evidence on Awlaki, it may also suggest there’s a whole bunch of materials on Awlaki.

The FOIA exemptions are utterly predictable. They basically say, "sorry, that's classified." And the addition of the (b)(5) from OLC is their standard nod to a deliberative privilege claim based on the pretense that the Executive may not rely on the memo.

And the Glomar response, which seems related to the CIA, would reflect the purportedly covert nature of the drone strike on Awlaki.

What I find interesting, though, is that on the same day when one office at DOJ was giving NYT a final exemption and Glomar-based decision—which suggests both that it had determined the memo to be classified but had also determined that CIA considered it covert—another DOJ office was giving ACLU the "unusual circumstances" answer, as if it had not yet determined the memo pertained to a covert program that could be withheld under FOIA exemptions.

Then there's the fact that most agencies responded a second time to ACLU, but did not, at least according to their suit, to the NYT.

And finally, note that CIA gives ACLU a Glomar response in November, around the same time CIA Director David Petraeus and Director of National Intelligence James Clapper were supporting limited acknowledgement of the CIA's role in Awlaki's killing. Note, too, that NYT appealed in early November, which may be the litigation risk that Rummel was worried about.

And one more issue of timing. CIA finally tells ACLU that it can't respond in timely fashion on January 18. But then within two weeks of that time, former CIA Director Leon Panetta was on TV answering questions about the Awlaki killing. Panetta's the guy who once asserted to a court that,

I am invoking the [state secrets] privilege over any information, if it exists, that would tend to confirm or deny any allegations in the Complaint [about CIA targeting Awlaki for assassination] pertaining to the CIA.

And presumably, given Klaidman's report that Petraeus was more open to releasing information on the Awlaki killing than CIA had previously been, Panetta had also refused to entertain releasing this information. So within two weeks of telling the ACLU it would take forever to get a response, Leon Panetta was on TV violating all the rules of secrecy he had insisted on for years.