

DID DOJ INTERVENE IN YEMEN'S EFFORTS TO TRY THE GUY WE SAID THEY WOULDN'T TRY?

In my last post, I asked whether State's effort to lure Anwar al-Awlaki into the Embassy in Sanaa was an effort to check the box on DOJ's targeting rules asserting that the US could not capture Awlaki.

Did not come to Embassy in response to obviously bogus letter sent to known address in Sanaa from State? Impossible to capture then!

In this post, I want to look at some interesting chatter in the Awlaki documents from the previous year.

The two documents pertaining to revoking Awlaki's passport—the cable itself and the email referring to the high side request for it—have document numbers ending in 3993 and 3992, respectively. Presumably, that means they were in Elizabeth Perry Bender's (from whose hard copies these Consular Affair documents come) file together.

The next document in the series—ending in 3994—is a string of emails regarding Yemen's decision to charge Awlaki in absentia the previous December (see pages 76 to 83).

The thread starts with Peter Leary, the trial attorney in DOJ's Civil Division in charge of the ACLU/CCR suit on Awlaki, who sends a November 2, 2010 AP article and a link to a CNN article on Yemen charging Awlaki to other members of that team; he sends it the day the article comes out. It's not clear how the article got forwarded to State (as no one from State is listed on the non-blind copies), but two days later the legal staff of Consular

Affairs sends the article to the Yemen desk officer with a question for the Embassy. The exchange continues for a while; after 19 days the emails start getting appended with a Sensitive but Unclassified marker and start to include FBI personnel stationed in Yemen, including FBI's Legal Attaché there, Rod Swanson, who seems to resolve the thread on December 4, a month after it started, at which point the thread was forwarded to the State employee whose hard copies show up in this FOIA request.

A note about the timing: Yemen's charges against Awlaki were filed on November 2, 2010. Thus, they came just days after the alleged toner cartridge bomb plot revealed (like the one earlier this year) by a Saudi infiltrator. But the charges had nothing to do with that plot. Instead, they pertained to the October 6 shooting of the French employee of an Austrian oil company working in Yemen. The witness implicating Awlaki said he had been tortured.

The prosecutor in Tuesday's trial said Assem, a guard at the French engineering firm SPIE, had acknowledged that he received Internet messages from al-Awlaki inciting him to kill foreigners with whom he was working.

Assem, who appeared at Tuesday's hearing wearing a blue prison overall, told interrogators that al-Awlaki convinced him that foreigners are "occupiers," and sent him audiotapes with sermons justifying the killing of foreigners when he hesitated, according to the prosecutor.

On the date of the attack at SPIE, Assem followed a French manager and shot him dead in his office, then looked for other foreigners to kill, al-Saneaa said. Assem also shot at a British man, wounding him in the foot, the prosecutor added.

Assem denied all the charges and said he was tortured and forced to give false confessions

So the email thread appears to have gone from DOJ's team hiding the government's targeting of Awlaki, to Consular Affairs, to the FBI guys presumably actively investigating the toner cartridge plot.

But the email thread also comes days before the November 8 hearing on the ACLU Awlaki suit (though when the Yemeni desk officer noted that the non-coincidental weekend timing meant she couldn't get an answer until the day of the hearing, the Consular Legal person had no problem with it).

Now why would the team dealing with the ACLU suit on why Awlaki could or could not be targeted, people in the Civil Division, not the charging terrorists division, set off a chain of emails that ended up with the FBI guys in Yemen who were presumably investigating the toner cartridge plot (and remember, Victoria Nuland claimed the government was ready to charge Awlaki four months later)? Why would DOJ get Consular Affairs involved in Yemen's attempt to at least pretend to be holding Awlaki accountable?

I'm particularly interested, given that a key part of Judge John Bates' decision (which came days after this email thread petered out) to dismiss had to do with a naive belief that Awlaki could waltz up to the Embassy in Sanaa and ask why he was targeted. From my post on Bates' decision:

Key to Bates' ruling is the government's claim that al-Awlaki can just waltz up to an Embassy and make a legal request that they stop their illegal targeting of him.

In his complaint, plaintiff maintains that his son cannot bring suit on his own behalf

because he is “in hiding under threat of death” and any attempt to access counsel or the courts would “expos[e] him[] to possible attack by Defendants.” Compl. ¶ 9; see also id. ¶ 26; Al-Aulaqi Decl. ¶ 10. But while Anwar Al-Aulaqi may have chosen to “hide” from U.S. law enforcement authorities, there is nothing preventing him from peacefully presenting himself at the U.S. Embassy in Yemen and expressing a desire to vindicate his constitutional rights in U.S. courts. Defendants have made clear – and indeed, both international and domestic law would require – that if Anwar Al-Aulaqi were to present himself in that manner, the United States would be “prohibit[ed] [from] using lethal force or other violence against him in such circumstances.”

Bates makes the very helpful suggestion that if al-Awlaki wants to access the justice system, he should just email some lawyers—not admitting, of course, that the government now routinely wiretaps attorney-client correspondence.

There is no reason why – if Anwar Al-Aulaqi wanted to seek judicial relief but feared the consequences of emerging from hiding – he could not communicate with attorneys via the Internet from his current place of hiding.

But there’s a problem with this (aside from the whole abuse of attorney-client privilege). Bates has said that he would

support the government's state secrets claim, if it came to that. Which means even if al-Awlaki waltzed up the American Embassy in Yemen, he would have no way to challenging his targeting, because his suit—like that of Binyam Mohamed or Maher Arar—would be dismissed on state secrets grounds. Which gets to the whole underlying problem here. The government has refused to indict al-Awlaki, to even place their accusations into a legal form. Absent that and in light of Bates' advance assault on state secrets, al-Awlaki would still have no legal means to challenge his targeting.

There was another problem: Yemen had just charged Awlaki based on what the key witness claimed was a tortured confession, all in an effort to convince the US it was serious about pursuing Awlaki if not pursuing the culprit of the toner cartridge plot. Given that Yemen had just charged Awlaki on perhaps dubious charges under pressure from the US, it would add another wrinkle to the whole waltzing into the US Embassy thing.

I don't know what to make of all this (obviously, it would be easier to suss out if the emails weren't redacted)—though I am amused that Bates' decision offered, via Awlaki's father Nasser, assurances the US couldn't target him if he did waltz up to the Embassy, that Victoria Nuland refused to confirm in her comments the other day.

But DOJ's intervention into Yemen's effort to charge Awlaki—whatever it was—raises some questions given subsequent claims about Yemen's ability or willingness to charge Awlaki.