

WHITHER THE ASSASSINATION CONSIDERATION?

As I noted earlier, I'm doing a fairly detailed comparison of what parts of the white paper don't show up in the drone memo released Monday. But that's going to take a while.

Far easier is to compare what Charlie Savage's sources said the memo included but doesn't.

I've noted before that they told him there was one memo when there were really two. Given these discrepancies, it's possible they merged the two memos in their descriptions:

- Savage's sources said the memo was "roughly 50 pages;" it is 41
- Savage's sources said the memo was "completed around June 2010;" it was completed on July 16 (remember, too, that Scott Shane FOIAed the memo in June 2010)

Other than those details, Savage's story maps the actual memo very closely, down to the caveat that,

The memorandum, which was written more than a year before Mr. Awlaki was killed, does not independently analyze the quality of the evidence against him

Similar caveats appear repeatedly in the memo (most OLC memos start that way, and a redacted footnote in this apparently lays that out, but this one repeated it several times later in the analysis).

Savage's report of the content of the memo starts – as the memo itself does (though this is

redacted; see page 41 for a description of what appears in the redacted sections) – with a description of the claims the Intelligence Community used to claim Awlaki qualified as a target under the AUMF. Significantly, this includes the claim that “a pattern of activities [] counterterrorism officials have said show[] that he had evolved from merely being a propagandist ... to playing an operational role.” Later the memo refers to Awlaki recruiting, which I suspect may be an artifact of the argument they made in February 2010, based on what Dennis Blair said publicly at the time. So I find this claim of a progression of particular interest (not least because it’s another reason why this memo simply could not cover the attempt to kill Awlaki on December 24, 2009).

Before Savage’s report turns to the consideration of 18 USC 1119 – which is where the memo starts its analysis – it describes a section considering whether the “ban” (in an unenforceable Executive Order that gets changed from time to time without notice in the actual text) on assassinations would prohibit such a killing.

It then considered possible obstacles and rejected each in turn.

Among them was an executive order that bans assassinations. That order, the lawyers found, blocked unlawful killings of political leaders outside of war, but not the killing of a lawful target in an armed conflict.

No discussion of assassination appears in the memo (unless it appears in a classified section and is not noted by the court opinion, but that seems unlikely as there’s no logical place for it). That said, the “ban” on assassinations did appear prominently in Harold Koh’s justification for drones given in March 2010.

Fourth and finally, some have argued that our targeting practices

violate *domestic law*, in particular, the long-standing *domestic ban on assassinations*. But under domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute “assassination.”

This leads me to suspect the structure of the first memo may parallel the structure of Koh’s speech, with the assassination “ban” figuring prominently in that memo. That is, it seems likely Savage’s sources, in conflating the two memos (if that’s what they did), included that language because it appeared in the first memo.

From that deviation, however, the report in Savage’s story returns to its close match of the actual drone content, with one exception and one area where Savage’s report probably reflects something redacted in our version of the memo.

- Consideration of 18 USC 1119 (though Savage doesn’t talk about the heightened importance of this analysis for CIA)
- Consideration of War Crimes Act
- Consideration of the Fifth and Fourth Amendments

The part that Savage includes but doesn’t appear in the declassified memo is this bit:

But that raised another pressing question: would it comply with the laws of war if the drone operator who fired the missile was a [Central Intelligence Agency](#) official, who, unlike a soldier, wore no uniform? The memorandum

concluded that *such a case* would not be a war crime, *although the operator might be in theoretical jeopardy of being prosecuted in a Yemeni court for violating Yemen's domestic laws against murder, a highly unlikely possibility.*
[my emphasis]

That italicized bit doesn't appear in what we got Monday (though the acknowledgment that CIA officers would not have immunity in footnote 44 addresses precisely the same legal issue), but there is a redacted section on page 38 that may well acknowledge that point.

Finally, there's the one section of the memo that neither Savage's sources nor DOJ, in summarizing the memo in the white paper, included: section IV, which considers whether killing Awlaki would violate 18 USC 956(a)'s prohibition on conspiring within the US to carry out kidnapping or murder overseas. I find that curious and, because they appear to be suppressing it, worthy of more examination. Does the apparently consistent effort not to acknowledge that this might apply reflect some insecurity about the strength of this argument?