

IS DOJ STILL HIDING THEIR LOGIC BEHIND USE OF DRONES TO EXECUTE AMERICAN CITIZENS?

Back in June, I compared the content of Charlie Savage's account of the Awlaki drone memo with the content of the July 16, 2010 memo released that month. I noted that Savage reported the memo discussed whether killing Awlaki would violate the "ban" on assassinations in EO 12333, but the July memo did not. I suggested the earlier memo probably included that section.

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.

Voila! The memo released Friday – dated February 19, 2010 – does indeed focus on the assassination “ban,” though much of that discussion, like the entire memo, remains redacted.

[T]he use of lethal force against Aulaqi would not violate the assassination ban in Executive Order 12333.

And if you add the length of the February (7 pages) and July (41 pages) OLC memos and round up, you get the rough page length Savage’s sources provided: 50 pages.

So it does seem that Savage's sources just synthesized the two memos as one.

That said, comparing Koh's March 2010 speech presumably incorporating OLC's assassination discussion with the (overly redacted) memo raises another question.

Several words in the title of the memo remain redacted.

MEMORANDUM FOR THE ATTORNEY GENERAL
Re: *Lethal Operation Against Shaykh Anwar Aulaqi* [REDACTED] (b)(1)
(b)(3)

I wonder – and this is a guess – whether the redacted words pertain to using drones to executive an American citizen?

I ask that because Koh's speech includes this paragraph about drones and other high tech weapons.

Second, some have challenged *the very use of advanced weapons systems*, such as unmanned aerial vehicles, for lethal operations. But the rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict– such as pilotless aircraft or so-called smart bombs– so long as they are employed in conformity with applicable laws of war. Indeed, using such advanced technologies can ensure both that the best intelligence is available for planning operations, and that civilian casualties are minimized in carrying out such operations.

That is, I wonder whether some significant part of the 7 pages David Barron originally dedicated to weighing Awlaki's due process free execution pertained to whether using drones to kill him changed the legal question?

Another possibility for the redacted phrase is a reference to Yemen, though the 2nd Circuit has already deemed that unclassified. Or, perhaps, this memo started the discussion of CIA's involvement in an execution, which would explain the focus on E.O. 12333, which governs their covert operations.

In any case, it does seem that the Administration self-justification evolved over the first half of 2010, and only later in the year did the Department of Justice consider whether there were laws that might prohibit CIA from executing a US citizen with no due process.