

IN 2010, DOJ WAS STALLING GANG OF FOUR MEMBER SILVESTRE REYES OVER (PROBABLY) COMMON COMMERCIAL SERVICES MEMO

As far as the public record shows, Ron Wyden first started complaining about the Common Commercial Service OLC Memo in late 2010, in a letter with Russ Feingold written “over two years” before January 14, 2013. As I’ve written, John Yoo wrote the memo on May 30, 2003, as one of the last things he did before he left the Office of Legal Council. It seems to have something to do with both the Stellar Wind program and cybersecurity, and apparently deals with agreements with private sector partners. At least one agency has operated consistently with the memo (indeed, Ron Wyden’s secret memo submitted to the court probably says the memo was implemented) but the government claims that doesn’t mean that agency relied on the memo and so the ACLU can’t have it in its FOIA lawsuit.

According to a letter liberated by Jason Leopold, however, someone in Congress was raising concerns about a memo – which is probably the same one – even before Wyden and Feingold were. On June 30, 2010, then Chair of the House Intelligence Committee Silvestre Reyes wrote Attorney General Holder a letter about a May 30, 2003 memo. On October 5, Ron Weich wrote Reyes,

We have conferred with Committee staff about your letter and your concerns regarding the potential implications of the opinion. We appreciate your concerns and your recognition of the complexities

of the issues involved in our consideration of your request. We will let you know as soon as we are in a position to provide additional information.

In other words, three months after one of the top ranking intelligence overseers in government raised concerns about the memo, DOJ wrote back saying they weren't yet "in a position to provide additional information."

That seems like a problem to me.

It also seems to be another data point suggesting that – whatever the government did back in 2003, after Yoo wrote the memo – it was being discussed more generally in 2010, possibly with an eye to implement it.

Update: On reflection, I may have overstated how sure we can be that this May 30 opinion is the same opinion. I've adjusted the post accordingly.