

GOVERNMENT'S ASSASSINATION OF ANWAR AL-AWLAKI USED "SIGNIFICANTLY DIFFERENT" EO 12333 ANALYSIS

Jameel Jaffer has a post on the government's latest crazy-talk in the ongoing ACLU and NYT effort to liberate more drone memos. He describes how – in the government's response to their appeal of the latest decisions on the Anwar al-Awlaki FOIA – the government claims the Court's release of an OLC memo does not constitute official release of that memo. (Note, I wouldn't be surprised if the government is making this claim in anticipation of orders to release torture pictures in ACLU's torture FOIA suit that's about to head to the 2nd Circuit.)

But there's another interesting aspect of that brief. It provides heavily redacted discussion of the things Judge Colleen McMahon permitted the government to withhold. But it makes it clear that one of those things is a March 2002 OLC memo that offers different analysis about the assassination ban than the analysis used to kill Anwar al-Awlaki.

The district court also upheld the withholding of a March 2002 OLC Memorandum analyzing the assassination ban in Executive Order 12,333 (the "March 2002 Memorandum"). (CA 468-70; see CA 315-29). Although the district court noted that the OLC-DOD Memorandum released by this Court contained a "brief mention" of Executive Order 12,333, the district court concluded that the analysis in the March 2002 Memorandum is significantly different

from any legal analysis that this Court held has been officially disclosed and for which privilege has been waived.

The statement here is carefully worded, probably for good reason. That's because the February 19, 2010 memo McMahon permitted the government to almost entirely redact clearly explains EO 12333 and its purported ban on assassinations in more depth than the July 16, 2010 one; the first paragraph ends,

Under the conditions and factual predicates as represented by the CIA and in the materials provided to us from the Intelligence Community, we believed that a decisionmaker, on the basis of such information, could reasonably conclude that the use of lethal force against Aulaqi would not violate the assassination ban in Executive Order 12333 or any application constitutional limitations due to Aulaqi's United States citizenship.

I pointed out that there must be more assassination analysis here. It almost certainly resembles what Harold Koh said about a month later, for which activists at NYU are now calling into question his suitability as an international law professor.

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.”

But the government is claiming that because that

didn't get disclosed in the July 2010 memo, it doesn't have to be disclosed in the February 2010 memo, and the earlier "significantly different" analysis from OLC doesn't have to be disclosed either.

At a minimum, ACLU and NYT ought to be able to point to the language in the white paper that addresses assassinations that doesn't appear in the later memo to show that the government has already disclosed it.

But I'm just as interested that OLC had to change its previous stance on assassinations to be able to kill Awlaki.

Of course, the earlier memo was written during a period when John Yoo and others were pixie dusting EO 12333, basically saying the President didn't have to abide by EO 12333, but could instead violate it and call that modifying it. Perhaps that's the difference – that David Barron invented a way to say that killing a high ranking leader (whether or not he's a citizen) didn't constitute assassination because of the weapons systems involved, as distinct from saying the President could blow off his own EOs in secret and not tell anyone.

I suggested Dick Cheney had likely pixie dusted EO 12333's ban on assassinations back in 2009.

But there's also the possibility the government had to reverse the earlier decision in some other fashion. After all, when Kamal Derwish was killed in a drone strike in Yemen on November 9, 2002, the government claimed Abu Ali al-Harithi was the target, a claim the government made about its December 24, 2009 attempt to kill Anwar al-Awlaki, but one they dropped in all subsequent attempts, coincident with the February 2010 memo. That is, while I think it less likely than the alternative, it is possible that the 2010 analysis is "significantly different" because they had to interpret the assassination ban even more permissively. While I do think it less likely, it might explain why Senators Wyden, Udall, and Heinrich keep pushing

for more disclosure on this issue.

One thing is clear, however. The fact that the government can conduct "significantly different" analysis of what E0 12333 means, in secret, anytime it wants to wiretap or kill a US citizen makes clear that it is not a meaningful limit on Executive power.