

HOW CAN SAMIR KHAN BE “COLLATERAL DAMAGE” IF OLC MEMO RESTRICTED CIVILIAN DEATH?

Here's the 32nd of 33 paragraphs in a Charlie Savage story describing the state secrets-protected explanation that justifies the killing of Anwar al-Awlaki.

The memorandum did assert that other limitations on the use of force under the laws of war – like avoiding the use of disproportionate force that would increase the possibility of civilian deaths – would constrain any operation against Mr. Awlaki.

That is, among the other restrictions on the assassination of Anwar al-Awlaki, the memo also said the government had to make efforts to avoid “civilian deaths.”

You know? Civilians? Like Samir Khan, the other American citizen killed in the strike? A propagandist, but not—according to any claim—an operational terrorist?

Yet in spite of the fact they had been following Awlaki for weeks—presumably gathering a good deal of detail in the process—they still killed him in such a way that they didn't avoid killing an American citizen.

As Savage describes, the memo also says they can only kill someone like Awlaki if they can't take him alive. But we've already seen a stream of articles saying the government simply avoids capture now because it's ... well ... inconvenient. Did the David Barron memo prohibit the killing of Americans if capture was inconvenient?

Two more important details of this. First, as

seemingly always happens, OLC simply trusted the Executive Branch agency to give it credible intelligence.

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.

I presume the memo says, "you've given us this information; if it proves to be otherwise, our advice might be different."

And then there's the timing:

December 24, 2009: Administration tries unsuccessfully to kill Awlaki as collateral damage

Before January 26, 2010: Awlaki may or may not be placed on CIA (or JSOC) kill list

April 2010: Awlaki put on kill list

June 2010: OLC opinion authorizing Awlaki assassination

June 2010: David Barron announces his departure

July 2010: Marty Lederman announces his departure

August 2010: ACLU and CCR sue on Awlaki targeting

September 2010: Administration considers charging Awlaki

September 2010: After not charging Awlaki, the government declares the material just leaked to Charlie Savage a state secret

April 2011: The Administration tries, but fails, to kill Awlaki

September 2011: The Administration assassinates Awlaki and Khan

In other words—as Savage suggests—they had Awlaki on the kill list before they had actually done the review whether or not he should be there.

I can see why I'd want to leave the department if that had happened to me in OLC.