

WHY ASK THE FBI ABOUT CLASSIFICATION ON THE TARGETED KILLING FOIA?

The FBI, as far as we know, never gets to press the buttons on JSOC and CIA's drones. And as I noted last June, FBI information we know exists (some of it in unclassified form) was suspiciously absent from the materials identified in the response to ACLU's request for information on the evidence supporting the targeting of Anwar al-Awlaki and Samir Khan.

Remember, in addition to general information about the legal authorization process, ACLU asked for:

Facts supporting a belief that al-Awlaki posed an imminent threat to the United States or United States interests;

[snip]

Facts supporting the assertion that al-Awlaki was operationally involved in al Qaeda, rather than being involved merely in propaganda activities;

[snip]

All documents and records pertaining to the factual basis for the killing of Samir Khan

DOJ probably has information pertaining to the assessment—for example—that Samir Khan could leave the US and travel to Yemen even though a long line of FBI terror investigation subjects have gotten arrested for doing the same. There's also information submitted in the Mohamed Osman Mohamud prosecution

pertaining to Khan which also probably would have received high level attention.

And we know that DOJ claims to have evidence that proves that Awlaki was operational, much of it pertaining to Umar Farouk Abdulmutallab's attempted attack and subsequent interrogation (indeed, two of the few documents OIP says were responsive date to January and February 2010 and almost certainly pertain to the aftermath of Abdulmutallab's attempted attack).

Yet in spite of FBI's notable absence from the discussion of the targeted killing FOIA, Judge Colleen McMahon asked them—and not ODNI or CIA, both of which submitted declarations in this case—whether anything in her unclassified opinion was classified.

The final draft of this unclassified opinion was provided to the FBI several days ago, in order to give the Government an opportunity to object to the disclosure of any classified information that may have inadvertently found its way into this document.

The FBI?!? Why would the FBI be the entity to review this opinion, in which they have no apparent role?

Meanwhile, one of the assertions for which McMahon provides absolutely no support in her unclassified opinion is this one.

Most of what is sought in the facially overbroad request filed by the American Civil Liberties Union ("ACLU") was properly withheld pursuant to one or more properly invoked exemptions that Congress wrote into the FOIA statute to guard against the disclosure of highly confidential and operational information—if, indeed, the Government

has acknowledged that any such documents exist.

In her unclassified opinion, McMahon discusses at length why the government can withhold the (or one of the) OLC opinion on killing Awlaki we all know exists. But she says nothing about what makes a request for the evidence backing the Awlaki targeting (she says ACLU presented no evidence Khan was targeted) “facially overbroad.”

As I suggested the other day, it is perhaps judicious to assume that any big holes in McMahon’s ruling are dealt with, by necessity, in her classified Appendix. Note too that in addition to providing an overview of the ACLU request in her unclassified opinion, McMahon also includes—but doesn’t discuss at length—the ACLU’s full request as an Appendix itself.

All of which is my way of suggesting that one thing in McMahon’s classified Appendix is almost certainly a discussion of why the American people are not allowed to know what the government knows—or claims to know—about Awlaki’s ties to terrorism. And that, as part of her discussion, McMahon actually got into some of what the government knows (or claims to know) or how it claims to have learned it.

I’m not really interested in that—though I do hope the ACLU points out this big gap in her unclassified opinion in their appeal, because their request doesn’t seem overbroad to me, particularly since the government has made unclassified claims about Awlaki being an operational leader without supporting those claims.

But I want to reflect on what it suggests that the FBI—and not CIA or NSA intelligence—seems to be treated as the crown jewels of the Anwar al-Awlaki intelligence.

As I keep repeating, we know that on the day Umar Farouk Abdulmutallab tried to attack a Detroit bound plane, the day after the

government first targeted Awlaki in a drone strike, the FBI did not believe Awlaki to be operational. And while there are other big claims against Awlaki—the toner cartridge plot that implicated other AQAP members more directly, for example (and yes, I know Fox and Judicial Watch are making new claims, but they've been debunked)—the key claim always comes back to the UndieBomb plot.

And yet the government has avoided—in the suit Awlaki's father took against the government, in the Abdulmutallab trial, and in this FOIA—presenting this information in any antagonistic venue. Only when they had the opportunity to present the information in a venue where their interlocutors could **not** challenge the provenance of their claims—in the Abdulmutallab sentencing hearing—did the government make the legal claim that Awlaki was the operational leader they ultimately killed him for being.

Again, I hope the ACLU pursues a better explanation for why the government doesn't have to present the same level of information they'd have to present in a trial, especially given that they've made unclassified claims about this stuff.

Because I find it damned telling that information they've protected so assiduously from the antagonistic challenges they would have faced in a terror trial appear to be the central secret they're protecting here.