

THE TIMING OF THE WHITE PAPER

I'm going to do a longer timeline on targeted killing authorizations, but first I wanted to address a more narrow issue: When did DOJ give the (as received) undated white paper released by NBC to Congress?

Michael Isikoff says Congress got the memo in June, 2012.

It was provided to members of the Senate Intelligence and Judiciary committees in June by administration officials on the condition that it be kept confidential and not discussed publicly.

That actually contradicts the implication made by Pat Leahy in August of last year, who said it was shared as part of his initial request for the DOJ memos.

Leahy: The five minutes is expired, but I would note that each of the Senators has been provided with a white paper we received back as an initial part of the request I made of this administration.

On November 8, 2011, Pat Leahy complained about the Administration's previous refusal to turn over the memos. That would put his initial request some time in 2011. He renewed that request on March 8 and June 12, 2012. So if the memo dates to June 2012, it would date to one of Leahy's subsequent attempts to pry it out of the Administration.

But I think Isikoff's reporting is likely correct here (and not just because Leahy has wavered between covering for the Administration and trying to get the memos from the start).

If DOJ gave Congress the memo in June 2012, then Ron Wyden would have gotten it between the time he wrote his February 2012 letter demanding the

memos and the time he wrote his January 2013 letter. As I laid out in this post, the questions Wyden posed in those two letters are remarkably similar.

These are the three questions that appear in the second letter but in the first. Both ask some version of these questions (these are from the first letter):

- How much evidence does the President need to decide that a particular American is part of a terrorist group?’
- Does the President have to provide individual Americans with an opportunity to surrender before using lethal force against them?’
- Is the President’s authority to kill Americans based on authorization from Congress or his own authority as Commander-in-Chief?
- Can the President order intelligence agencies to kill an American who is inside the United States?
- What other limitations or boundaries apply to this authority?’

Here are the questions that show up only in the page-long list attached to his second letter.

- What standard is used to determine whether it is feasible to capture a particular American.
- What is the rationale for

applying *Ex Parte Quirin*, *Hamdi v. Rumsfeld*, and *Mathews v. Eldridge* to the question of when the President may legally kill an American?

- What impact does Holder's reference to the use of lethal force "outside the hot battlefield in Afghanistan" have on the applicable legal principles of due process laid out in *Hamdi*?

The capture question, in particular, seems like a likely response to reading the white paper. After all, in spite of the fact that feasibility of capture is one of three main tests in the white paper, here's all it says about feasibility.

Second, regarding the feasibility of capture, capture would not be feasible if it could not be physically effectuated during the relevant window of opportunity or if the relevant country were to decline to consent to a capture operation. Other factors such as undue risk to U.S. personnel conducting a potential capture operation also could be relevant. Feasibility would be a highly fact-specific and potentially time-sensitive inquiry.

Note, too, Wyden uses the same word "feasible" as the white paper uses, when you'd think the true standard would be higher, whether capture was possible at all, not the much weaker "feasible."

And while Wyden refers to Holder's speech (he seems to have done so here and elsewhere to

avoid relying on the white paper), his questions about case law seem to come directly from weaknesses in the white paper itself (the inapt use of *Matthews v. Eldridge*, for example, is one of the problems Jameel Jaffer points out).

Now, all that is speculative support for the timeline laid out by Isikoff.

But if it's correct, consider what it means. After asking for the targeted killing justification starting in February 2011 (actually he says he had already made inquiries by that point), followed by a written request posing very specific questions –such as whether they were relying on Article II or AUMF authority – in February 2012, all DOJ gave Wyden was this crappy white paper (which, I increasingly suspect, may be an amalgam of the memos they wrote, not just a summary of the June 2010 memo).

To give the Intelligence Committees this white paper – which was presumably written for that purpose specifically – without even answering one of the most basic questions in there (the Article II/AUMF question) should only have served to raise more questions.

Which is what it appears to have done.