

SENATE INTELLIGENCE SWISS CHEESE ON OLC MEMOS

Great news!

After a member of the President's party had to hold up that President's nominee to head the CIA just to get Office of Legal Counsel memos authorizing the killing of an American citizen with no due process, the Senate Intelligence Committee has moved to force the Administration to turn over OLC memos in the future.

Terrible news!

The language is full of ginormous loopholes that would allow the Executive Branch to avoid sharing all the memos they're already withholding.

Here's what it says.

(1) REQUIREMENT TO PROVIDE LIST OF OPINIONS TO CONGRESS.—Except as provided in subsections (b) and (c), not later than 180 days after the date of the enactment of this Act and annually thereafter, the Attorney General, in coordination with the Director of National Intelligence, shall provide to the congressional intelligence committees a listing of every opinion of the Office of Legal Counsel of the Department of Justice that has been provided to an element of the intelligence community.

(2) CONTENT.—Each listing submitted under paragraph (1) shall include—

(A) as much detail as possible about the subject of each opinion;

(B) the date the opinion was issued;

(C) a listing of each recipient agency;

(D) whether the opinion has been made available to Congress or a specific committee of Congress, including the identity of each such committee; and

(E) for any opinion that has not been made available to Congress or a specific committee of Congress, the basis for such withholding.

(b) EXCEPTION FOR COVERT ACTION.—If the President determines that it is essential to limit access to a covert action finding under section 503(c)(2) of the National Security Act of 1947 (50 U.S.C. 3093(c)(2)), the

President may limit access to information concerning such finding that is subject to disclosure under subsection (a) to those members of Congress who have been granted access to the relevant finding under such section 503(c)(2).

(c) EXCEPTION FOR INFORMATION SUBJECT TO EXECUTIVE PRIVILEGE.—If the President determines that a particular listing subject to disclosure under subsection (a) is subject to an executive privilege that protects against such disclosure, the Attorney General shall not be required to disclose such opinion or listing if the Attorney General notifies the congressional intelligence committees, in writing, of the legal justification for such assertion of executive privilege prior to the date by which the opinion or listing is required to be disclosed.

Basically, this language requires the Attorney General to give the Intelligence Committees – not the public, not all of Congress, not even the Judiciary Committees – an annotated list – not the actual opinions! – of all the OLC memos written for an element of the Intelligence

Community (which would presumably exclude the White House) in a given year.

There are two exceptions to this rule.

DOJ doesn't have to include memos on covert operations – like torture, illegal domestic wiretapping, or drone killing – that have only been briefed to a subset of the committee, such as the Gang of Four. This would allow the White House to continue to hide all the OLC memos about which there have been contentious fights in the past, including the roughly seven OLC memos on targeted killing they're still (as far as we know) sitting on.

And DOJ doesn't have to include memos "subject to" executive privilege (it's not clear he has to formally invoke executive privilege, mind you). If the limitation on this language wouldn't already have done so, this would allow the White House to hide memos like the torture memos addressed to the White House rather than CIA or DOD.

Seriously, the annotated list mandated for the Intelligence Committees ought to be the standard mandated for the public, with provision to hide secret stuff. Which is close to the standard earlier Presidents had abided by.

So what this basically does is enshrine the status quo, in which the President doesn't have to tell the American people what his lawyers say the law is.