

THE COMMON COMMERCIAL SERVICES OLC OPINION AFFECTING CYBER POLICY IS OVER A DECADE OLD

I've been meaning to go back to an exchange that occurred during Caroline Krass' confirmation hearing to be CIA's General Counsel back on December 17. In it, Ron Wyden raised a problematic OLC opinion he has mentioned in unclassified settings at least twice in the last year (he also wrote a letter to Eric Holder about it in summer 2012): once in a letter to John Brennan, where he described it as "an opinion that interprets common commercial service agreements [that] has direct relevance to ongoing congressional debates regarding cybersecurity legislation." And then again in Questions for the Record in September.

Having been ignored by Eric Holder for at least a year and a half (probably closer to 3 years) on this front and apparently concerned about the memo as we continue to discuss legislation that pertains to cybersecurity, he used Krass' confirmation hearing to get more details on why DOJ won't withdraw the memo and what it would take to be withdrawn.

Wyden: The other matter I want to ask you about dealt with this matter of the OLC opinion, and we talked about this in the office as well. This is a particularly opinion in the Office of Legal Counsel I've been concerned about – I think the reasoning is inconsistent with the public's understanding of the law and as I indicated I believe it needs to be withdrawn. As we talked about, you were familiar with it. And my

first question – as I indicated I would ask – as a senior government attorney, would you rely on the legal reasoning contained in this opinion?

Krass: Senator, at your request I did review that opinion from 2003, and based on the age of the opinion and the fact that it addressed at the time what it described as an issue of first impression, as well as the evolving technology that that opinion was discussing, as well as the evolution of case law, I would not rely on that opinion if I were–

Wyden: I appreciate that, and again your candor is helpful, because we talked about this. So that's encouraging. But I want to make sure nobody else ever relies on that particular opinion and I'm concerned that a different attorney could take a different view and argue that the opinion is still legally valid because it's not been withdrawn. Now, we have tried to get Attorney General Holder to withdraw it, and I'm trying to figure out – he has not answered our letters – who at the Justice Department has the authority to withdraw the opinion. Do you currently have the authority to withdraw the opinion?

Krass: No I do not currently have that authority.

Wyden: Okay. Who does, at the Justice Department?

Krass: Well, for an OLC opinion to be withdrawn, on OLC's own initiative or on the initiative of the Attorney General would be extremely unusual. That happens only in extraordinary circumstances. Normally what happens is if there is an opinion which has been given to a particular agency for example, if that agency would like OLC to reconsider the

opinion or if another component of the executive branch who has been affected by the advice would like OLC to reconsider the opinion they will come to OLC and say, look, this is why we think you were wrong and why we believe the opinion should be corrected. And they will be doing that when they have a practical need for the opinion because of particular operational activities that they would like to conduct. I have been thinking about your question because I understand your serious concerns about this opinion, and one approach that seems possible to me is that you could ask for an assurance from the relevant elements of the Intelligence Community that they would not rely on the opinion. I can give you my assurance that if I were confirmed I would not rely on the opinion at the CIA.

Wyden: I appreciate that and you were very straightforward in saying that. What concerns me is unless the opinion is withdrawn, at some point somebody else might be tempted to reach the opposite conclusion. So, again, I appreciate the way you've handled a sensitive matter and I'm going to continue to prosecute the case for getting this opinion withdrawn.

The big piece of news here – from Krass, not Wyden – is that the opinion dates to 2003, which dates it to the transition period bridging Jay Bybee/John Yoo and Jack Goldsmith's tenure at OLC, and also the period when the Bush Administration was running its illegal wiretap program under a series of dodgy OLC opinions. She also notes that it was a memo on first impression – something there was purportedly no law or prior opinion on – on new technology.

Yet for some reason, it was not among the opinions Goldsmith chose to withdraw in 2004

(assuming he didn't write it), nor will Eric Holder even respond to questions about why he won't withdraw it now.

I wonder if Wyden has asked whether some opinion written since that time relies back on that 2003 opinion, just as the illegal wiretap programs relied back on Yoo's Fourth Amendment stripping one?