

IS THERE A PRE-2001 OLC OPINION AUTHORIZING TARGETED KILLING OF US CITIZEN TERRORISTS?

Update: I realize now this can't be the explanation. I've just referred back to the original request and the ACLU actually did time-limit their general requests to records created after September 11, 2001. So maybe the issue relates to non-al Qaeda terrorists?

I'm still working through all the declarations submitted in the government's response to the drone targeting FOIAs; I will have far, far more to say about what they suggest.

But for now I wanted to point to a detail in OLC Deputy Assistant Attorney General John Bies' declaration that suggests OLC has a pre-2001 memo authorizing the targeted killing of US citizen terrorists.

As Bies' declaration lays out, the three FOIAs at issue in this suit ask for OLC memos relating to the targeted killing of US citizens. To summarize:

- Scott Shane asked for OLC memos since 2001 on the targeted killing of people suspected of ties to Al Qaeda or other terrorist groups
- Charlie Savage asked for OLC memos on the targeted killing of a United States citizen who is deemed to be

a terrorist

- ACLU asked for all records on the legal basis under which US citizens can be subjected for targeted killings

That is, Shane put a start date on his FOIA—post 2001—and limited it to terrorist groups. Savage put no start date on it and didn't specify which terrorist groups he was addressing. ACLU didn't limit it with either a start date or ties to terrorist groups. Note, too, ACLU was looking for info on the killing of Abdulrahman al-Awlaki as well as his father and Samir Khan; Savage used language suggesting an interest in Anwar al-Awlaki, though he did not limit his request to the older Awlaki. Shane used no such limiting language.

As I've analyzed and will show at more length, the government gave inconsistent responses to these three FOIAs, even though on the surface they appeared to ask for the same information.

More interesting still is Bies' claim in his declaration that the responses to Savage and the ACLU were limited to the recent spate of targeted killings of US citizens. Bies wrote,

By letter dated October 27, 2011, [OLC Special Counsel] Colburn responded to the Savage Request on behalf of the OLC. ... Interpreting the request as seeking OLC opinions pertaining to al-Aulaqi, OLC neither confirmed nor denied the existence of such documents, pursuant to FOIA Exemptions One, Three, and Five.

[snip]

By letter dated November 14, 2011, Mr. Colburn responded to [ACLU lawyer Nate] Wessler on behalf of OLC, interpreting the request as seeking OLC opinions pertaining to those three individuals [Anwar al-Awlaki, Samir Khan, and

Abdulrahman al-Awlaki] and informing him that, pursuant to FOIA Exemptions One, Three, and Five, OLC “neither confirms nor denies the existence of the documents in your request” because the very fact of the existence of nonexistence of such documents is itself classified, protected from disclosure by statute, and privileged.” [my emphasis]

Bies’ declaration had no language about Colburn “interpreting” Shane’s FOIA to pertain only to these killings in Yemen. In addition, as you can see from the letters Colburn sent (linked above), Colburn actually didn’t note his interpretation in his response letters to Savage and ACLU. I guess they were just supposed to guess.

And while this is just a wildarsed guess, the totality of these three requests and the caveats Bies made about the responses suggests that Colburn had to make such interpretations because of the open timeframe of the requests. That is, what is common to the Savage and ACLU requests but not the Shane one is the way they set no start point for their request.

Which suggests there may be OLC documents pertaining to the targeted killing of Americans (potentially as terrorists) dating back before the 2001 start point of Shane’s request. Who knows? Maybe there’s an OLC opinion authorizing the assassination of Black Panther Fred Hampton, for example (though the FBI would only fall under Savage’s request if considered “intelligence community assets”). If that’s correct, then is that OLC memo still on the books?

There are, I suspect, a number of other reasons why the government is so squirrely about this FOIA. But one of them may relate to documents lying around OLC’s archives from before the time 9/11 changed everything ... or returned an earlier state of targeted killing.