

# THE DOD TARGETED KILLING MEMO NOT ADDRESSED TO DOD

I'm still deep in the weeds of Judge Colleen McMahon's opinion rejecting the NYT and ACLU's efforts to get the legal basis for killing Anwar al-Awlaki, The Child (as McMahon calls Anwar's son Abdulrahman), and Samir Khan.

I observed yesterday that McMahon strongly hinted that the DOD OLC memo identified by the government in response to the FOIA may not be the legal authority under which Awlaki was ultimately killed. She seems to suggest the DOD memo may not have been relied on, and there may be some other document that authorizes the government—possibly the CIA—to kill Awlaki.

And from that I wondered whether the June 2010 memo that both Scott Shane and Charlie Savage had tips on, and which Savage described in detail, was the DOD memo, not the memo used.

There's another detail of all this that was apparent before but which McMahon emphasizes.

The DOD memo was not addressed to the DOD.

DoD also excepts to disclosure of this document [the OLC memo] (though it was apparently not prepared for or directed to the Defense Department),

[snip]

That may be so, but it is sheer speculation that this particular OLC memorandum—addressed to the Attorney General “pertaining to the Department of Defense” and “regarding a potential military operation in a foreign country”—contains the legal analysis that justifies the Executive Branch's conclusion that it is legal in certain circumstances to target suspected terrorists, including United States

citizens, for killing away from a “hot” field of battle. [my emphasis]

She’s right. Here’s how OLC’s John Bies described the document.

OLC identified one OLC opinion pertaining to the Department of Defense marked classified as responsive to the Shane and Savage requests. That OLC opinion contains confidential legal advice to the Attorney General, for his use in interagency deliberations, regarding a potential military operation in a foreign country.

This is interesting for several reasons.

As I said, the memo Savage described was written in June 2010. Six months before, on December 24, 2009, JSOC—that is, DOD—tried to kill Awlaki. They did so the day before (according to the William Webster report and subsequent Intelligence Community testimony) the IC came to believe Awlaki was operational. And while sources subsequently told Dana Priest that Awlaki wasn’t the primary target of that drone strike and only afterwards got added to the JSOC target list (though he was still added six months before the one memo we know about), a cable released by WikiLeaks makes it fairly clear that then Yemeni President Ali Abdullah Saleh believed Awlaki was a direct target of that strike.

Whether the June 2010 memo is the disclosed OLC memo or not, it’s clear it was written after the government had already tried to kill Awlaki, and had done so at a time when he was understood to be a really obnoxious propagandist, but not—as the OLC memo laid out would be required to justify targeting—an operational leader of al Qaeda. And yet it is being protected (this is true whether or not it is the DOD memo, because the CIA documents were exempted for this reason as well) as a predecisional document.

That suggests that JSOC—whose actions were controlled by CentCom, which was then headed by David Petraeus, who would be in charge of CIA when Awlaki was killed by a strike understood to be a CIA one—may have tried to kill Awlaki without having OLC legal guidance in hand authorizing it.

Though note there is an entirely different possibility, which is that the DOD memo is much older, written before the time the US killed Kamal Derwish much as they did Samir Khan and as they claim to have tried to kill Awlaki the first time, by treating him as collateral damage to a strike on someone else.

They may not have had legal guidance, but they had the President's personal sign-off (remember, too, that the cables discussing the first attempted strike on Awlaki were copied to the White House).

As part of the operations, Obama approved a Dec. 24 strike against a compound where a U.S. citizen, Anwar al-Aulaqi, was thought to be meeting with other regional al-Qaeda leaders. Although he was not the focus of the strike and was not killed, he has since been added to a shortlist of U.S. citizens specifically targeted for killing or capture by the JSOC, military officials said.

And if the revealed memo is the DOD one, when OLC finally wrote legal guidance covering DOD that would have authorized the December 24, 2009 strike on Awlaki (except that the intelligence clearly did not, at that point, support it), they may have addressed that opinion not to DOD, but to the Attorney General.

There are two more interesting details of this.

First, the only document revealed in the FOIA response that claimed a Presidential privilege—revealed in the OIP Vaughn Index and also discussed by the OLC—is a January 18, 2010

set of draft talking points for an Eric Holder briefing of the President. In the days after DOD first tried to kill Awlaki and around the same time, according to Priest's not entirely credible sources, that Awlaki was added to the JSOC kill list, Eric Holder briefed the President about legal issues relating to killing Awlaki. And (if the June 2010 memo is the disclosed one) six months later OLC wrote Holder a memo authorizing a DOD strike.

Note, too, that OLC was fully forthcoming with the documents it had pertaining to the Awlaki targeting. DOJ's Office of Information Policy, which is in charge of responding to FOIAs including the Attorney General and Deputy Attorney General, was not.

All of this is really inconclusive. Though unless the DOD memo is a much older one, it seems to indicate JSOC targeted Awlaki on Presidential authority, not OLC guidance.

This is, to be clear, inconclusive, since we don't know whether the DOD memo really is the memo Savage described.

But it appears more and more like what happened with torture: which is that the spooks were executing the program under Presidential authority—that is, under the Gloves Come Off Memorandum—and only after someone complained internally about the legal sketchiness of it all, did they go about getting an OLC opinion sanctioning the actions that had already happened.