

RON WYDEN: THERE IS MORE THAN ONE TARGETED KILLING MEMO

I've been comparing Ron Wyden's February 2012 letter demanding the authorization the Administration uses to kill American citizens with the one he sent John Brennan last week.

It's striking how similar the letters are, particularly given the Administration's drone publicity tour last year, between the time Wyden wrote the two letters. Wyden dismisses the value of the publicity tour in his latest letter.

Both you and the Attorney General gave public speeches on this topic early last year, and these speeches were a welcome step in the direction of more transparency and openness, but as I noted at the time, these speeches left a larger number of important questions unanswered. A federal judge recently noted in a Freedom of Information Act case that "no lawyer worth his salt would equate Mr. Holder's statements with the sort of robust analysis that one finds in a properly constructed legal opinion," and I assume that Attorney General Holder would agree that this was not his intent.

And in fact, what's most striking is how similar some key features of the letters are.

For example, the list of questions Wyden appends to his later letter largely repeats and expands on questions Wyden poses in his earlier letter; the only new questions are (these are my summaries):

- 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*?

And given my contention that Judge Colleen McMahon, in her opinion denying ACLU and NYT's request for the drone killing opinion, suggested there were multiple opinions, some of them pertaining solely to CIA, and potentially invoked the Gloves Come Off Memorandum of Notification, I'm especially interested in these two details that remained consistent over the two Wyden letters.

First, in both letters Wyden refers to legal opinions—in the plural. Here's the first letter.

Senior intelligence officials have said publicly that they have the authority to knowingly use lethal force against Americans in the course of counterterrorism operations, and have indicated that there are secret legal opinions that explain the basis for this authority.

[snip]

The Director indicated that he would have liked to be responsive to my

request, but he told me that he did not have the authority to provide formal written opinions of the Department of Justice's Office of Legal Counsel to Congress.

So, as you will remember, I called you in April 2011 and asked you to ensure that the secret Justice Department opinions that apparently outline the official interpretation of this lethal authority were provided to Congress.

[snip]

For the executive branch to claim that intelligence agencies have the authority to knowingly kill American citizens (subject to publicly unspecified limitations) while at the same time refusing to provide Congress with any and all legal opinions that delineate the executive branch's understanding of this authority represents an indefensible assertion of executive prerogative, and I expected better from the Obama Administration.

[snip]

So I request, again, that you provide me with any and all legal opinions regarding the authority of the President, or individual intelligence agencies, to kill Americans in the course of counterterrorism operations.
[my emphasis]

And here's the Brennan letter.

I have asked repeatedly over the past two years to see the secret legal opinions that contain the executive branch's understanding of the President's authority to kill American citizens in the course of counterterrorism operations.

Senior intelligence officials have said publicly that they have authority to knowingly use lethal force against Americans in the course of counterterrorism operations, and have indicated that there are secret legal opinions issued by the Justice Department's Office of Legal Counsel that explain the basis for this authority. I have asked repeatedly to see these opinions, and I have been provided with some relevant information on the topic, but I have yet to see the opinions themselves.

[snip]

As I have said before, this situation is unacceptable. For the executive branch to claim that intelligence agencies have the authority to knowingly kill American citizens but refuse to provide Congress with any and all legal opinions that explain the executive branch's understanding of this authority represents an alarming and indefensible assertion of executive prerogative. [my emphasis]

I'm especially intrigued by Wyden's repetition of "any and all," as if he suspects the Administration might hide the existence of one by revealing the existence of only one more respectable one—a suggestion I myself have made.

And given that Wyden seems certain there are more than one opinions authorizing the President to kill American citizens, I find this question—raised in both letters—very provocative.

Is the legal basis for the intelligence community's lethal counterterrorism operations the 2001 Congressional Authorization for the Use of Military Force, or the President's Commander-in-Chief authority?

I assume "President's Commander-in-Chief authority"—which is the formulation Stephen Preston used in his speech on targeted killing, in contradistinction to the formulation Holder and everyone else used—is shorthand for "authorized under the National Security Act." That is, I assume "President's Commander-in-Chief authority" is a polite way to invoke covert operations.

Here you have a member of the Senate Intelligence Committee—the members of which according to the same law that permits the President to unilaterally authorize covert operations must be briefed on those covert operations—revealing complete ignorance as to whether the President's execution of US citizens was done as a covert op or a legally military one.

Along with a bunch of other troubling things, these details from Wyden's letters reveal something else. The Obama Administration is playing the same shell game with the authorization to kill American citizens that the Bush Administration played with the illegal wiretap program: waving the AUMF around as purported Congressional sanction all the while insisting that the President could—and appears to have, in this case, given the strong hints in McMahon's opinion—unilaterally approve such actions without Congressional sanction.

The evidence is building that the Administration believes it can—and did, in the case of Anwar al-Awlaki—simply kill an American based solely on the President's say-so, under the National Security Act.