

DIANNE FEINSTEIN'S LIMITED HANG-OUT

Shorter Dianne Feinstein: "Well, the magical release of that white paper sure eliminates any need to release the Office of Legal Council memos that depict far worse legal theories, even to the grunt members of my committee who have are legally entitled to read it."

I have been calling for the public release of the administration's legal analysis on the use of lethal force—particularly against U.S. citizens—for more than a year. That analysis is now public and the American people can review and judge the legality of these operations. The administration has also described its legal analysis in speeches by the Attorney General and several senior officials during the past two years.

The white paper itself was provided to the Senate Intelligence and Judiciary Committees in June 2012 as a confidential document. The white paper (along with other documents and briefings) has allowed the Intelligence Committee to conduct appropriate and probing oversight into the use of lethal force. That oversight is ongoing, and the committee continues to seek the actual legal opinions by the Department of Justice that provide details not outlined in this particular white paper.

While the analysis in the white paper is not specific to any one individual, there has been significant question over the death of a U.S. citizen and operational leader of al-Qa'ida in the Arabian Peninsula named Anwar al-Aulaqi. As President Obama said at the time of his death, Aulaqi was the external operations leader for AQAP. He directed

the failed attempt to blow up an airplane on Christmas Day in 2009 and was responsible for additional attempts to blow up U.S. cargo planes in 2010. He was actively plotting and recruiting others to kill Americans until the time of his death in Yemen.

The analysis is completely disingenuous for a number of reasons. As I have shown, DiFi utterly rolled John Cornyn when he tried to get the legal analysis released last year. She has done – and appears to be doing – far more to obstruct the release of the actual legal analysis than to facilitate it. And as at least 12 Senators strongly suggest, the white paper probably doesn't reflect the memos (note that DiFi, like Wyden, uses the plural) – or at least one memo – that claims the authority to kill Americans solely on the President's Article II power. At best, the intelligence (not evidence) to support the claims she advances about Anwar al-Awlaki is not a slamdunk; perhaps the CIA is lying to her again, perhaps DiFi is lying herself to prevent Americans from assessing how badly she is fulfilling her role as a member of the Gang of Four who has presumably read the Administration's legal justification and not objected to the President killing another American without due process.

Perhaps unsurprisingly, DiFi's statement accords nicely with what Jay Carney said at the White House.

Like DiFi, the President's flack pointed to all the disingenuous speeches that Judge Colleen McMahon called "a far cry from a legal research memorandum" as proof that the Administration had offered transparency.

As you know, in spite of these stories – or prior to these stories, this administration, through numerous senior administration officials, including Deputy National Security and Counterterrorism Advisor John Brennan,

State Department Legal Advisor Harold Koh, and former Department of Defense General Counsel Jeh Johnson – have spoken publicly and at length about the U.S. commitment to conducting counterterrorism operations in accordance with all applicable domestic and international law, including the laws of war.

In March 2012, the Attorney General gave a speech at Northwestern University Law School in which he outlined the legal framework that would apply if it was necessary to take a strike against one of the “small number of U.S. citizens who have decided to commit violent acts against their own country from abroad.” The Attorney General made clear that in taking such a strike, the government must take into account all relevant constitutional considerations, but that under generations-old legal principles and Supreme Court decisions, U.S. citizenship alone does not make a leader of an enemy force immune from being targeted.

[snip]

I would point you to a speech by John Brennan where he talked about this issue. And again, I want to say from the outset, these are important questions and the President takes them very seriously, just as he takes his responsibility to defend the United States and its citizens very seriously.

Mr. Brennan gave a speech in which he talked about this issue of imminent threat. I think I just talked in general terms about the nature of the conflict we have with the terrorists who have set as their goal the killing of Americans and attacks on the United States. And this President and those who work for him are very mindful of the need to

fulfill our responsibility to protect the United States and its citizens, and to do so in a way that is consistent with the Constitution and consistent with the laws that apply. And that is certainly something of great importance to the President. [my emphasis]

That last reference, by the way, appears to be to the John Brennan speech in which he also said the terrorists win if the Administration doesn't release documents under FOIA and make OLC memos public.

Predictably, Carney was prepared with precisely the spin the memo supported, that the President is conducting assassinations of US persons with the authorization of the Congress they won't even tell where they're conducting those assassinations.

As you know, Congress authorized in an authorization of the use of military force all necessary military force to be used in our fight against al Qaeda. And certainly under that authority, the President acts in the United States' interest to protect the United States and its citizens from al Qaeda.

It's the AUMF, not a claim to unbound Article II power, Carney deceitfully suggests.

Perhaps most tellingly, the guy whose Administration tried to fire people for reading and linking to certain other leaked documents, is encouraging journalists to go read this one.

I would point you to the now-released – it was not meant for public release, but it's not classified – the now-released white paper, which goes into some detail on that very issue.

It actually looks like this moment – this limited hang-out of a partial representation of

the Administration's troubling views – was planned long ago.

After all, the white paper itself dates to almost precisely the moment the Administration responded to the ACLU FOIAs of precisely this kind of information; I presume it was released just late enough so as to not in any conceivable fashion be subject to their FOIA. (I think Josh Gerstein made this observation last night, though I missed the significance of it at the time.)

And in spite of the fact that Carney repeated that the white paper is unclassified seven times in the briefing, for some reason over the last six months DOJ has not managed to respond to either Jason Leopold or Scott Shane's FOIA for this document, in spite of the fact that Leopold, at least, was granted expedited processing (Leopold will have more on what happened with this FOIA in the near future, as I understand it).

Indeed, Carney even resisted committing to releasing this unclassified document that is already available!

Q But we request that you put it out, Jay.

MR. CARNEY: Put what out?

Q The white paper you've referred to dozens of times.

MR. CARNEY: Well, again, I'll take the question. I'm sure the Justice Department can also take this question. It is out there online.

So here you have it: DiFi now claiming, falsely, that Americans can review the legality of these observations (based on her assertion of facts that are nowhere near as certain as she claims). And the uber-secretive White House, now claiming everyone should read a purportedly illicitly released document, even while it reaffirms its intention to withhold the actual analysis and

potentially the unclassified document itselfd.
All in time to confuse the issue and pretend the
Administration has provided anywhere near the
transparency on a key aspect of John Brennan's
work required to confirm him.

According to John Brennan's own standards, the
terrorists are winning.

Update: And one of DiFi's aides says the leak of
the white paper was "helpful."

"If anything, I would argue it's a
helpful thing, in that it removes some
mystery and conspiracy theories," a
senior Democratic aide on the Senate
Intelligence Committee, which is
handling Brennan's nomination, said of
the policy paper.