

THE ADMINISTRATION'S DRAFTY SECRECY CLAIMS

As I've noted a couple of times, both Jason Leopold and Scott Shane FOIAed the white paper someone strategically leaked to Mike Isikoff this week.

Leopold requested the white paper in August, shortly after Pat Leahy discussed it in a hearing. Just weeks later, DOJ granted him expedited processing. But then his request dropped off the face of the earth – I guess the Administration treated this “expedited” request with the same temporal measure as the Administration treats “imminence.”

Scott Shane requested the white paper in December. In January DOJ rejected his request, citing deliberative process (basically claiming the white paper was a draft).

The disparate treatment of the two requests – and the leaking of it to Isikoff after two different people had been denied it already – is troubling enough.

But I think there's another problem with the claim they made to Shane, that it was a draft.

The letter that Ron Wyden and 10 other Senators sent to President Obama the other day suggests that the reason they're being given for not receiving the OLC memos is because they are drafts.

Specifically, we ask that you direct the Justice Department to provide Congress, specifically the Judiciary and Intelligence Committees, with any and all legal opinions that lay out the executive branch's official understanding of the President's authority to deliberately kill American citizens. We are not asking for any pre-

decisional legal advice and do not believe that providing this information would violate and Constitutional privilege. However, if there is any concern that providing this information to Congress might implicate some sort of privilege, we would encourage you to simply waive whatever privilege might apply, if you would like to make it clear that you are not setting a precedent that applies to other categories of documents.

At one level, this language suggests a consistency from the Administration. Every single document they have on drone strikes, it would seem, is a draft.

Except that the Senators' helpful suggestion – that if these so-called drafts really are drafts, then Obama could just waive the privilege this time around without implicating other drafts it wants to keep secret – **suggests** (I'm going to see if I can confirm it) that what the Committees have (remember, 9 of the 11 Senators are on either the Intelligence or Judiciary Committee, and so have officially received the white paper) **was not considered a draft when it was given to them**. If they already received a draft, after all, it would not be novel for them to get more drafts.

It's just that when a reporter who has an active FOIA on precisely this kind of document asks for it, it suddenly reverts to draft status, until such time as someone finds it convenient for Mike Isikoff to have it.

Ah well, John Brennan has made it clear the terrorists will win if the Administration doesn't presumptively turn over documents under FOIA. So I'm sure the Administration will sort this all out in "expedited" fashion.

Update: Thanks to Charlie Savage for linking to the letter off of which Scott Shane FOIAed the document. It reads:

On June 22, 2012, the Department provided us with a copy of a Department of Justice White Paper titled "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is A Senior Operational Leader of Al-Qa'ida or An Associated Force." That document, which is marked as "Draft November 8, 2011," sets forth the legal framework for considering the circumstances in which a particular, identifiable United States Citizen may be targeted. In transmitting that document to us, the Department acknowledged that this white paper is not classified, but took the position that it is not intended for public dissemination.

So DOJ did represent to HJC, at least, that it was a draft.

Two more interesting details, though. The memo was finalized 5 days after the date – November 3, 2011 – when DOJ's Office of Information Policy arbitrarily enacted as the end date for their FOIA.

And the memo was handed to HJC, at least, the day after DOJ responded to the NYT and ACLU FOIA.

Man, according to John Brennan's own rules, the terrorists are winning.