

DID ADMINISTRATION STALL CONGRESSIONAL OVERSIGHT JUST TO BEAT ACLU IN COURT?

In an interview with WSJ last March, White House Counsel Kathryn Ruemmler said that publicly explaining the drone program would be “self-defeating.”

White House Counsel Kathy Ruemmler acknowledged Mr. Obama has developed a broader view of executive power since he was a senator. In explaining the shift, she cited the nature of the office.

“Many issues that he deals with are just on him, where the Congress doesn’t bear the burden in the same way,” she said. “Until one experiences that first hand, it is difficult to appreciate fully how you need flexibility in a lot of circumstances.”

[snip]

Ms. Ruemmler said Mr. Obama tries to publicly explain his use of executive power, but says certain counterterrorism programs like the drone campaign are exceptions. Opening them to public scrutiny would be “self-defeating,” she said.

At the time, I thought she was treating the NYT and ACLU as “the public.” After all, in a debate over releasing the targeted killing memos in the situation room in November 2011, she had warned that releasing the memo might weaken the government’s position in litigation, presumably the FOIA battle with the two entities.

The CIA and other elements of the intelligence community were opposed to any disclosures that could lift the veil

of secrecy from a covert program. Others, notably the Justice and State departments, argued that the killing of an American citizen without trial, while justified in rare cases, was so extraordinary it demanded a higher level of public explanation. Among the proposals discussed in the fall: releasing a "white paper" based on the Justice memo, publishing an op-ed article in *The New York Times* under Holder's byline, and making no public disclosures at all.

The issue came to a head at a Situation Room meeting in November. At lower-level interagency meetings, Obama officials had already begun moving toward a compromise. David Petraeus, the new CIA director whose agency had been wary of too much disclosure, came out in support of revealing the legal reasoning behind the Awlaki killing so long as the case was not explicitly discussed. Petraeus, according to administration officials, was backed up by James Clapper, the director of national intelligence. (The CIA declined to comment.) The State Department, meanwhile, continued to push for fuller disclosure. One senior Obama official who continued to raise questions about the wisdom of coming out publicly at all was Janet Napolitano, the Homeland Security director. She argued that the calls for transparency had quieted down, as one participant characterized her view, so why poke the hornet's nest? Another senior official expressing caution about the plan was Kathryn Ruemmler, the White House counsel. She cautioned that the disclosures could weaken the government's stance in pending litigation. *The New York Times* has filed a lawsuit against the Obama administration under the Freedom of Information Act seeking the release of

the Justice Department legal opinion in the Awlaki case. [my emphasis]

But having now updated my timeline of the over 14 requests members of Congress have made for the targeted killing memos, she seems to lump Congress with the ACLU and NYT.

More troubling, though: it appears the White House stalled its response to Congress for almost nine months simply to gain an advantage in the ACLU FOIA lawsuits.

Here are the relevant dates:

October 5, 2011: Chuck Grassley requests targeted killing memo.

November, 2011, unknown date: Situation Room meeting regarding targeted killing memo.

November 3, 2011: Arbitrary end date DOJ's Office of Information Policy placed on FOIA request for targeted killing documents.

November 8, 2011: In his opening statement for a DOJ Oversight hearing, Pat Leahy complained the Senate Judiciary Committee had not been given "the legal justification underlying drone strikes against an American citizen overseas."

November 8, 2011: According to House Judiciary Committee letter, the date on the white paper it later received.

February 8, 2012: Ron Wyden follows up on his earlier requests for information on the targeted killing memo with Eric Holder.

June 20, 2012: The government responds to NYT and ACLU lawsuits for memo and other documents related to targeted killing (though several of the declarations supporting that motion,

including the one from DOJ OIP, were not submitted until June 21).

June 22, 2012: According to House Judiciary Committee letter, the date the 7-month old white paper provided to Committee (Dianne Feinstein says both Senate Judiciary and Intelligence Committees received the memo in June 2012 too).

August 10, 2012: Pat Leahy claims SJC received the white paper in response to his (and Grassley's) initial requests from the previous year: "the Senators has been provided with a white paper we received back as an initial part of the request I made of this administration."

Grassley requested the memo(s) just 6 days after Anwar al-Awlaki was killed; over a week before 16-year old American citizen Abdulrahman was killed. By November, the White House determined that releasing a white paper would present a middle ground. At least according to Jerry Nadler and friends, that memo was completed on November 8, 2011.

But then DOJ and the White House waited, ignoring Leahy's renewed call for the memo that same day.

The DOJ and the White House waited, ignoring Ron Wyden's request the following February.

DOJ only finally provided this woefully inadequate white paper to the committees overseeing DOJ and the CIA the day after the Administration had provided the NYT and ACLU with their FOIA request. And not only did they impose an arbitrary date on the ACLU's request to ensure it would not return this white paper – which was an unclassified document clearly responsive to the ACLU request (the NYT request specified OLC memos, so the white paper might not have been included) – but it stamped it draft so when NYT's Scott Shane asked for it specifically, they could deny it on deliberative

grounds.

Note, when DOJ responded to ACLU's allegation that its search was inadequate, the FOIA officer blamed people who worked in Eric Holder and the Deputy Attorney's offices (several of the key people involved have moved on; one of those may be – though I am not certain – Lisa Monaco, who will replace Brennan in the White House after he gets confirmed at CIA).

Consider what this appears to mean. The White House and DOJ appear to have delayed the time when key oversight committees in Congress could begin to exercise oversight over the targeted killing of Americans – including Abdulrahman al-Awlaki, who was still alive when the first request was made – until such time as it had dealt with the ACLU.

They appear to have stalled almost nine months because they didn't want to respond in good faith to the ACLU FOIA lawsuit.

Remember, one of the key John Brennan speeches in this whole process – one the white paper points to as public notice that people like Anwar al-Awlaki might be targeted under the twisted definition of "imminent threat" – also suggests that if the government doesn't respond to FOIA requests with a presumption of disclosure it will help the terrorists win.

Perhaps tellingly, while the speech bragged about Congress' effort to impose new disclosure requirements on the Executive, Brennan said nothing about the value of Congressional oversight; on the contrary, he complained that Congress was reining in the Executive Branch's "flexibility."