

IS STUART DELERY THE ONE WHO FLUBBED DOJ'S FOIA RESPONSE?

In a piece describing how badly the Administration has botched its treatment of the Anwar al-Awlaki killing, Daniel Klaidman elaborates on his past reporting on why the Administration responded the way it did. Of



particular note, he reveals the white paper was written not by anyone in DOJ's Office of Legal Counsel, but by the then Senior Counselor to Eric Holder, Stuart Delery.

A Justice Department lawyer named Stuart Delery set out to produce a stripped down version of the memo. But the White House had still not decided what form the disclosure would take. One proposal was an op-ed piece that would run under Holder's byline, but Delery's document ended up being so long that option was scrapped. Another possibility was releasing a white paper to the public. In the end, the White House settled on letting Holder deliver a so-called "top-wave" speech, an address that would deal with a host of pressing national security issues and would include a section on the legal rationale behind killing American citizens. But, critically, the administration did not give anything separately to Congress.

Soon thereafter, a draft of the speech was sent over to the White House for approval. For reasons that remain unclear, it languished on National Security Adviser Tom Donilon's desk for months. Then, in January 2012, it was circulated by the National Security

Council for final approval.

So the white paper was written not by the department that wrote the actual legal memo authorizing killing Awlaki (remember, both Marty Lederman and David Barron were long gone by this point), but in the Office of Attorney General.

With that in mind, consider how grossly unresponsive the Office of Information Policy (which handles FOIA requests involving the OAG) was to the ACLU FOIA for information on the authority for killing Awlaki, which I laid out here and here.

They started by imposing an arbitrary deadline to cut off the FOIA response, November 3, 2011. Though now that we know the white paper was drafted on November 8, 2011 in the office OIP set the deadline for, the date doesn't seem arbitrary at all: OIP basically designed the search not to find the white paper that must exist in multiple drafts in OAG.

OIP also simply ignored entire parts of ACLU's FOIAs, which basically asked for the intelligence underlying the decision to kill Awlaki and (it now looks like) Samir Khan. OIP defined its searches to ensure it wouldn't find any of the underlying discussions about Awlaki and Khan, just those specifically discussing whether to kill them. And even for the searches it did conduct, OIP somehow managed to miss 30 email chains involving OAG or ODAG that OLC was able to find their own copy of.

In short, OIP made a transparently bogus response to ACLU's FOIA.

When called on it, OIP emphasized how much it relied on the personnel in the offices in question.

In devising and conducting searches, the IR Staff relies on its knowledge of what is in the relevant files, as well as consultations with identified custodians of potentially responsive records, and

continually refines search parameters to ensure a search reasonably calculated to locate responsive records.

[snip]

In light of the direct participation in the searches by OAG, ODAG, and OASG personnel with familiarity with the subject matter, as detailed in ¶ 9 of my June 20, 2012 declaration, coupled with OIP's own extensive experience in conducting records searches, I have confidence that the searches conducted for this request were reasonably calculated to locate the records that had been requested.

In other words, OIP says that the involvement of people at OAG (and other offices) ensured its compliant response. Or, read more cynically, OIP made sure the court knew that if there are problems with the response, those in OAG are to blame.

Surely Delery was one of the people involved in that response.

But Delery's role in writing the white paper – and therefore, almost certainly, responding to ACLU's FOIA – is all the more interesting given his career at DOJ.

From January 2009 to August 2010, he worked as Chief of Staff and Counselor to the Deputy Attorney General and then Associate Deputy Attorney General. He moved over to serve as Senior Counselor to Holder in August 2010. In March 2012, Delery became Principal Deputy Assistant Attorney General in the Civil Division. Since the then AAG for Civil Division, Tony West, had just been moved over to serve as Acting Associate Attorney General, the move into the PDAAG role made Delery the Acting Assistant Attorney General.

Which is to say Delery is now the boss in the department that defends the government in FOIA

suits (as well as wrongful death cases). That is, Delery now manages the people in charge of the ACLU FOIA.

Two more details.

First, among the documents OIP couldn't manage to find but OLC could is a February 9, 2010 email chain between ODAG and OLC (document 4 in this Vaughn Index).

Two e-mails from the Office of the Deputy Attorney General to the Office of Legal Counsel concerning language contained within [a Holder briefing for the President]

In February 2010, Delery was still in ODAG. Given that Delery would go on to make the Administration's public case for killing Awlaki, what are the chances he was involved in that email discussion about what the AG could say to the President that OIP mysteriously couldn't find on its own?

In addition, I'm particularly interested in the way OIP described the people at OAG who were records custodians. Back in December 2011 (when Delery was still at OAG), it found five people who were records custodians.

By memorandum dated December 6, 2011, OAG identified five officials (which included one former OAG official still with the Department) who might have responsive records. Specifically, OAG advised that all five officials (including one former OAG official) may have responsive e-mails, one of them may also have responsive unclassified paper files, and one of them may also have responsive unclassified computer files and classified paper files. [my emphasis]

Now, it's not clear whether there are two people who once were at OAG who are no longer, the one

who moved within DOJ and another, described just as a former OAG official. Equally unclear is whether that "former OAG official still with the Department" was a former employee at the time, in December 2011, or only at the time of this filing, June 2012. But the passage certainly would allow the interpretation that the "former OAG official still with the Department" is Delery, who was there in December 2011 but moved 4 months later, before this filing.

Which is all the more interesting given that the former OAG official still with DOJ not only was the principal records custodian on killing Awlaki, but somehow forgot he might have classified emails and whatnot until "subsequently."

Subsequently, OAG advised that the former OAG official still with the Department, who was the principal OAG records custodian on this matter, may have responsive classified e-mails and classified paper files. That official conducted a search of his classified e-mails and a search was conducted of his classified records for material responsive to the request. OIP cannot further identify or describe on the public record if responsive material was located.

For fucks sake, people! You declared state secrets over Awlaki's killing! Of course the chief document custodian within OAG (where, among other things, the AG would have had to approve the state secrets invocation) would have classified information!

All this is really sketchy, I admit. At a minimum, all this suggests that OIP's difficulties responding to the FOIA served to hide clearly responsive information.

But the details mapped out by OIP certainly suggests the possibility that the guy in charge of the Civil Division (and therefore the FOIA

responses and wrongful death suit on Awlaki) used to be the principal record keeper on that topic in OAG, and somehow forgot that among those records might be some classified documents until he remembered again.

Update: I didn't realize this, but Delery argued the government's case in the Targeted Killing FOIA in the DC Circuit. Well that case is not as directly on point as the Awlaki FOIA (the one I describe above), it still puts someone solidly involved in making policy decisions arguing to keep those decisions secret.