

QUESTION: WHAT DO DAVID BARRON AND JAY BYBEE HAVE IN COMMON?

Answer: They were both nominated for a lifetime appellate court seat even as the Executive continued hiding their controversial OLC opinions.

Several hours ago, Barack Obama nominated David Barron, author of the notorious OLC memos authorizing the assassination of an American citizen with the kind of “due process” the Executive Branch gives, by itself, in secret, to serve on the First Circuit.

Yet even while Obama moved to make Barron a lifetime appointed judge, the FOIA suits to liberate the troubling opinion Barron authored continues at a snail’s pace. CIA filed an intransigent opinion back in August in the more general suit (that would, however, probably return Barron’s opinions). In a response a few weeks ago, the ACLU suggested that such frivolous claims could only serve to forestall the time when it will have to release the assassination-related documents.

The CIA’s blanket “no number no list” response is utterly deficient—indeed, it is so plainly inadequate that it verges on the frivolous. To justify a “no number no list” response, the agency must establish that not even one responsive document can be described, in any way, without revealing information that falls within FOIA’s exemptions. The CIA cannot carry this burden, and its brief barely makes the attempt. The agency’s “no number no list” response is so obviously deficient that one can only assume that the CIA’s goal is not to prevail on this motion but simply to

delay as long as possible the day on which the agency will finally be required to explain what documents it is withholding and why.

While, when Bybee was confirmed to the Ninth Circuit, we had no idea about the Yoo-authored torture memos he rubber-stamped, we do know what one (of two) of Barron's OLC opinions look like from the White Paper leaked to hasten John Brennan's confirmation in February.

And at least from what we see, the authors of such an opinion have no business on a court. For starters, that's because it suggested the Courts have no role in adjudicating the assassination of an American citizen.

Similarly, paragraph 23 (section IIC) refuses any review from Article III courts by invoking military (AUMF) operations to apply to some very spooky language.

Were a court to intervene here, it might be required inappropriately to issue an ex ante command to the President and officials responsible for operations with respect to their specific tactical judgement to mount a potential lethal operation against a senior operational leader of al Qa'ida or its associated forces. And judicial enforcement of such orders would require the Court to supervise inherently predictive judgments by the President and his national security advisors as to when and how to use force against a member of an enemy force against which Congress has authorized the use of force.

I get that Courts shouldn't be making battlefield decisions. But in spite of the fact this passage invokes the AUMF twice, the invocation of "officials responsible for operations" falls far short of limiting the assertions to just the military.

In other words, it's another instance where the white paper asserts a claim that is uncontroversial for the military to apply to the CIA as well.

Perhaps more troubling, it suggests if the President orders the CIA to assassinate an American citizen, it is legal.

[T]he white paper effectively argues (though it doesn't say so) that the President may, under Article II power alone, authorize the CIA to kill a U.S. citizen.

Similarly, under the Constitution and the inherent right to national self-defense recognized in international law, the President may authorize the use of force against a U.S. citizen who is a member [note, they've dropped the senior operational leader modifier here!] of al-Qa'ida or its associated forces who poses an imminent threat of violent attack against the United States.

And just to be sure, the following paragraph again adopts the dual structure, and ends by says killing an American under such circumstances isn't assassination because the President authorized it.

In fact, several of the claims Martha Lutz, the

CIA person designated to lay out why CIA cannot reveal more details, point to covert actions that would be authorized by Presidential authorization.

Similarly, references to “legal memoranda” from either the CIA’s Office of General Counsel or the Department of Justice would reveal the extent to which the CIA’s involvement required formal legal analysis, which would raise the same concerns discussed above.

[snip]

Theoretically, such involvement could be based on not only the CIA’s foreign intelligence gathering functions, but also its ability to conduct covert action and other activities as directed by the President.

[snip]

Hypothetically, if it was officially confirmed that the CIA possesses this extraordinary authority, it would reveal that the CIA had been granted authorities against terrorists that go beyond traditional intelligence-gathering activities.

Which is all consistent with what then CIA and currently DOD General Counsel Stephen Preston said last year.

That is, there’s reason to wonder whether Barron gave legal rubber stamp to the kind of unilateral authority that has no place in a democracy.

And yet, if the Obama Administration has its way, that won’t become public before Barron’s nomination gets considered.