WHITE PAPER WHITE WASH

Partly because I want to test my kludge with some quick content while I put out 100 other fires, and partly because I want to raise some issues I've been mulling, I want to point to Steve Vladeck's take on the Awlaki memo decision the other day. My piece (which I've reproduced below because the site is buggered) made a lot of the same points as Vladeck did about how selective disclosure brought us to this point. It's the last paragraph of Vladeck's post I've got questions about. He argues — and the government has argued in their filings in this case — that this decision will lead to less transparency.

> II. The Second Circuit's Decision Might Therefore be Counterproductive for Transparency This leads to the most worrisome reaction I have to yesterday's decision—that, in the long term, it will disincentivize *any* disclosure of secret legal rationales, lest even fairly limited disclosures empower FOIA-based arguments such as those upon which the Court of Appeals seized yesterday. In its editorial today, the *New York Times* suggests that the President should react to this decision by "allowing the conversation the country needs to have." I fear it will have the opposite effect—and, when combined with the D.C. Circuit's decision earlier this year with respect to Exemption 5, make it that much less likely that this or any future President will proactively support *any* disclosure of secret OLC memoranda, or even sanitized white-paper versions thereof. That's not to say that I would have preferred the opposite result; only that the real solution, at the end of the day, will likely have to come from Congress—and not the courts.

I'm not sure disincenting this kind of false transparency is a bad thing. Think back to the days after Awlaki got killed. There was a lot of pressure, both within and outside of Congress, to release this memo. And then the NYT got a leaked nearly verbatim account of the memo (well, just the second one; it appeared to be months and months before NYT's sources admitted there had been an earlier one!). That diminished the pressure for a time, which set back even the SSCI getting to see a copy of the memo for another year and a half. Then, weeks later, Katrhyn Ruemmler was in the White House arguing that releasing it would put the White House at a disadvantage in ACLU's suits against it, which at that point primarily
concerned this FOIA. This false transparency serves as a release valve that allows the Executive to dodge any accountability, particularly in courts. So losing it — losing the release valve that permits President after President to string out any inquiry into these gross expansions of power — would be a good thing. *Note: we continue to have technical issues, so for the moment, comments have been turned off.*

Correction: The original version of this post screwed up the chronology of the release of the NYT article and Ruemmler.

Here's my post on the subject. The 2nd Circuit has just ruled that the government must release a redacted version of the targeted killing memo to the NYT and ACLU, as well as Vaughn documents listing the documents pertaining to the Anwar al-Awlaki killing. The central jist of the argument, written by Jon Newman, is that the White Paper first leaked selectively to Michael Isikoff and then released, under FOIA, to Jason Leopold (Leopold FOIAed after reading about it in this post I wrote), amounts to official disclosure of the information in the OLC memo which, in conjunction with all the other public statements, amounts to a waiver of the

government's claim that the OLC memo amounted to pre-decisional deliberations. This argument starts on page 23, in footnote 10, where the opinion notes that the White Paper leaked to Mike Isikoff was not marked draft, while the one officially released to Leopold was.

> The document disclosed to [Leopold] is marked "draft"; the document leaked to Isikoff is not marked "draft" and is dated November 8, 2011. The texts of the two documents are identical, except that the document leaked to Isikoff is not dated and not marked "draft."

The opinion strongly suggests the government should have released the Mike Isikoff — that is, the one not pretending to be a draft — version to ACLU.

> The Government offers no explanation as to why the identical text of the DOJ White Paper, not marked "draft," obtained by Isikoff, was not disclosed to ACLU, nor explain the discrepancy between the description of document number 60 and the title of the DOJ White Paper.

Then, having established that the document leaked to Isikoff is the same as the document released to Leopold, which was officially released, the opinion describes the DOD opinion at issue, a 41 page classified document dated July 16, 2010 signed by David Barron. An almost entirely redacted paragraph describes the content of the memo.

> The OLC-DOD Memorandum has several parts. After two introductory paragraphs, Part I(A) reports [redacted]. Parts I(B) and I(C) describe [redacted]. Part II(A) considers [redacted]. Part II(B) explains [redacted]. Part III(A) explains [redacted], and Part

> III(B) explains [redacted]. Part IV explains [redacted]. Part V explains [redacted]. Part VI explains [redacted].

A subsequent passage explains that parts II through VI provide the legal reasoning.

> FOIA provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552b. The Government's waiver applies only to the portions of the OLC-DOD Memorandum that explain legal reasoning. These are Parts II, III, IV, V, and VI of the document, and only these portions will be disclosed.

And a still later passage reveals that the remaining section — part I — discusses intelligence gathering activities, presumably as part of a discussion of the evidence against Anwar al-Awlaki.

> Aware of that possibility, we have redacted, as explained above, the entire section of the OLC-DOD Memorandum that includes any mention of intelligence gathering activities.

So while the paragraph describing the content of the Memo is redacted, we know the first section lays out the evidence against Awlaki, followed by 5 sections of legal reasoning. The redacted paragraph I included above, describing the content of the Memo, is followed immediately by a paragraph addressing the content of the White Paper.

> The 16-page, single-spaced DOJ White Paper [redacted] in its analysis of the lawfulness of targeted killings. [redacted]

The first redaction here probably states that

the White Paper parallels the OLC memo. The second probably describes the key differences (besides length and the absence of the underlying evidence against Awlaki in the White Paper). And that second redaction is followed by a discussion describing the White Paper's extensive passage on 18 US 1119, and lack of any discussion of 18 USC 956, a law prohibiting conspiracies to kill, maim, or kidnap outside the US.

> The DOJ White Paper explains why targeted killings do not violate 18 U.S.C. §§ 1119 or 2441, or the Fourth and Fifth Amendments to the Constitution, and includes an analysis of why section 1119 encompasses the public authority justification. Even though the DOJ White Paper does not discuss 18 U.S.C. § 956(a)[redacted].

In other words, the big difference in the legal reasoning is that the still-secret Memo argues that the US plot against Awlaki was not an illegal conspiracy to kill him, in addition to not being a murder of an American overseas. Conspiracies to conduct extralegal killings of terrorists are not the same as conspiracies by terrorists to kill, apparently. Having laid out that the non-draft Isikoff memo is the same as the officially-released Leopold memo, and the officially-released Leopold memo lays out the same legal reasoning as the OLC Memo, the opinion basically says the government's claims it hasn't already released the memo are implausible.

> As the District of Columbia Circuit has noted, "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" Wolf v. CIA, 473 F.3d 370, 374-75 (D.C. Cir. 2007) (quoting Gardels v. CIA, 689 F.2d 1100, 1105 (D.C. Cir. 1982)). But Gardels made it clear that the justification must be "logical" and

> "plausible" "in protecting our intelligence sources and methods from foreign discovery." [snip] With the redactions and public disclosures discussed above, it is no longer either "logical" or "plausible" to maintain that disclosure of the legal analysis in the OLC-DOD Memorandum risks disclosing any aspect of "military plans, intelligence activities, sources and methods, and foreign relations."
> The release of the DOJ White Paper, discussing why the targeted killing of al-Awlaki would not violate several statutes, makes this clear. [redacted] in the OLC-DOD Memorandum adds nothing to the risk. Whatever protection the legal analysis might once have had has been lost by virtue of public statements of public officials at the highest levels and official disclosure of the DOJ White Paper.

Clearly, throughout its treatment of the Awlaki killing, the Obama Administration has attempted to be able to justify its killing of an American citizen publicly without bearing the risk of defending that justification legally. And they almost got away with it. Until they got a little too loosey goosey with the selective leaks when they (someone) leaked the White Paper to Isikoff. Ultimately, though, their selective leaking was the undoing of their selective leaking plan.