

BOB LITT TRIED TO STUFF RON WYDEN DOWN ALICE IN WONDERLAND'S RABBIT HOLE

From: robert.litt [mailto:robert.litt] [redacted]
Sent: Thursday, January 17, 2013 1:13 PM
To: [redacted]
Subject: RE: Senator Wyden's letter to John Brennan

Although I am dubious, since there are statements in there that assume as fact things that we have recently succeeded in convincing a judge remain classified, I'll take a look. Thanks.

Man, I must have written about this letter Ron Wyden sent to John Brennan during his confirmation process 15 times (of which just a few are linked below). Which is why I'm so fascinated by the back and forth between Wyden's office (the staffer's name is redacted) and ODNI, largely Bob Litt, both before and after Wyden sent the letter on January 14, 2013. (Many many kudos to Zack Sampson who FOIAed it through MuckRock.)

Wyden's office submitted the letter for a declassification review on January 11, 2013. Wyden's office did not get an answer before he sent it. And on January 15, Bob Litt complained,

I have a concern that there are several references in this letter that are not only classified but compartmented.

So the staffer writes back letting Litt know that he or she had unclassified comments by Executive Branch officials for all the references, and he or she will happily share it. To which Litt responded (on January 17),

Although I am dubious, since there are statements in there that assume as fact things that we have recently succeeded in convincing a judge remain classified, I'll take a look.

It went on for a while (the email thread is from

page 21 to 24), with Litt complaining some more, promising Brennan wouldn't answer questions about it, and the staffer ultimately pointing out that the reason they keep asking publicly is because ODNI won't provide answers even in classified form (this exchange precedes Clapper's lies about the dragnet – about which most of the other documents released under this FOIA pertain – by two months).

What Litt was talking about, clearly, was the Administration's killing of Anwar al-Awlaki, the memos authorizing which Judge Colleen McMahon, citing *Alice in Wonderland* for the bizarreness of it all, had just ruled remained exempt from FOIA on January 2, 2013.

In other words, Litt was suggesting that Wyden should not have said the following – which cites McMahon!! – because McMahon had ruled that the government did not have to give the OLC memos authorizing the Awlaki killing to ACLU and NYT, which is rather different from ruling they didn't have to share such information with the Intelligence Committee or claiming that Wyden could not refer to official comments in a letter to someone who made those comments because citing back those comments made them classified.

I have asked repeatedly over the past two years to see the secret legal opinions that contain the executive branch's understanding of the President's authority to kill American citizens in the course of counterterrorism operations. Senior intelligence officials have said publicly that they have the authority to knowingly use lethal force against Americans in the course of counterterrorism operations, and have indicated that there are secret legal opinions issued by the Justice Department's Office of Legal Counsel that explain the basis for this authority. I have asked repeatedly to see these opinions and I have been

provided with some relevant information on the topic, but I have yet to see the opinions themselves.

Both you and the Attorney General gave public speeches on this topic early last year, and these speeches were a welcome step in the direction of more transparency and openness, but as I noted at the time, these speeches left a large number of important questions unanswered. A federal judge recently noted in a Freedom of Information Act case that “no lawyer worth his salt would equate Mr. Holder’s statements with the sort of robust analysis that one finds in a properly constructed legal opinion,” and I assume that Attorney General Holder would agree that this was not his intent.

As Wyden noted, both Brennan and Holder had given big dog-and-pony shows that were clearly about killing Awlaki, and yet Bob Litt wanted to prevent Wyden from pressuring Brennan to turn over the actual legal authorizations to the Intelligence Community’s oversight committee? Really?

Ah well, it all worked out for the forces of good, as when the Committee threatened to hold up Brennan’s confirmation, someone leaked the White Paper to Mike Isikoff that therefore had to be shared with Jason Leopold that ultimately led McMahon to liberate the opinions themselves.

Which is probably precisely what Bob Litt was worried about.

Drone memo

January 14, 2013: Senate Intelligence Committee Member Ron Wyden STILL Hasn’t Seen Targeted Killing Memo

January 23, 2013: Ron Wyden: There Is More than One Targeted Killing Memo

Lethal Authority

January 22, 2013: Rather than Lying to Congress, CIA Now Blows It Off

Common Commercial Service Agreement OLC Memo

October 23, 2013: The Common Commercial Services OLC Memo and Zombie CISPA

January 14, 2014: The Common Commercial Services OLC Opinion Affecting Cyber Policy Is Over a Decade Old

February 4, 2015: Why Aren't Tech Companies Demanding the Common Commercial Service Agreement OLC?