

DOJ PLACES DAVID BARRON'S ANWAR AWLAKI MEMOS ON THE "NOT SELECTED FOR PUBLICATION"

Sometime between March 27 and April 15 of last year, the Office of Legal Counsel posted the two memos David Barron wrote authorizing the execution of Anwar al-Awlaki (February 19, 2010; July 16, 2010) on its list of memos "Not selected for publication" in its reading room. The website explains that these are memos that have been posted through discretionary release, but "may not reflect the Office's current views."

Consistent with the President's FOIA memorandum dated January 21, 2009, and the Attorney General's FOIA guidelines dated March 19, 2009, OLC sometimes releases requested records as a matter of discretion, even if they fall within the scope of a FOIA exemption or have not been the subject of a FOIA request. To make such documents generally available when they are the subject of repeated requests or may be of public or historical interest, the Office may post them in this electronic reading room. Documents posted in this electronic

reading room are being disclosed through discretionary release, but they have not been selected for official publication and thus they are not included among the Office's formal published opinions. Although these records may be of public or historical interest, the views expressed in some of these records may not reflect the Office's current views.

Of course, a number of the memos (most but not all of which are tied to the war on terror) weren't released at DOJ's discretion. Rather, some of these memos (including the two Awlaki ones) were released after DOJ tried to suppress them, only to have a Federal judge force their release.

I've got a call in to see if OLC has some easy explanation. But I'm wondering if it means DOJ may have thought better of now Circuit Court judge David Barron's advice that you can kill an American citizen with no real due process.

Particularly given the timing, I'm wondering whether any change in DOJ's views about these memos would affect American citizens overseas, such as Liban Haji Mohamed, a Somali American who was put on the Most Wanted List last year, then detained (never to publicly have shown up in an American court) on March 2, 2015. Unlike Anwar al-Awlaki, Mohamed (who is the brother of Gulet Mohamed, who has had a whole different set of problems with the government) has actually been indicted.

ACLU's Jameel Jaffer points to a potentially more cynical (and therefore likely) explanation though. As he noted last year, at about the same

time DOJ was deeming the Barron memos discretionary releases, it submitted a filing in their lawsuit against ACLU, insisting that having been ordered by a court to release the memo doesn't count as official disclosure. In a footnote of the April 2 filing, DOJ claimed,

We further note that the Court's release of the OLC-DOD Memorandum and its order compelling disclosure by the government of additional information would not themselves constitute an independent official disclosure or waiver by the government that would strip protection from otherwise exempt information and material.

That is, during precisely the time period when it was deeming this memo discretionary on its website, it was making that argument to the courts.

So I assume they believe they still have the right to execute American citizens at their discretion. *And* keep their rationale for doing so secret.