

IS THE GOVERNMENT WORRIED ABOUT REVEALING BROADER TARGETED KILLING AUTHORITY IN THE DRONE FOIAS?

In addition to yesterday's letter's explanation that the government needed an extension in ACLU and NYT's Anwar al-Awlaki drone FOIA because Obama and/or his closest aides—the highest level of the Executive Branch—were getting involved, there was one other interesting phrase I wanted to note: the way in which it portrays the FOIA.

We write respectfully on behalf of the Department of Justice and the Central Intelligence Agency (collectively, the "Government") to seek a further extension until May 21, 2012, of the Government's deadline to file its consolidated motion for summary judgment in these related Freedom of Information Act cases seeking records pertaining to **alleged targeted lethal operations directed at U.S. citizens and others affiliated with al Qaeda or other terrorist groups.** [my emphasis]

That description doesn't precisely match the request in any of the three FOIAs, which ask for:

ACLU: the legal authority and factual basis of the targeted killing of [Anwar] al-Awlaki, Abdulrahman [al-Awlaki], and [Samir] Khan.

NYT Savage: all Office of Legal Counsel memorandums analyzing the circumstances under which it would be lawful for United States armed forces or

intelligence community assets to target for killing a United States citizen who is deemed to be a terrorist.

NYT Shane: all Office of Legal Counsel opinions or memoranda since 2001 that address the legal status of targeted killings, assassination, or killing people suspected of ties to Al-Qaeda or other terrorist groups by employees or contractors of the United States government.

The government seems squeamish, first of all, about repeating the language used in all three of these requests—targeted killing—opting instead for the phrase “targeted lethal operations.” Note, significantly, that these requests, and especially Shane’s, would not be limited to drone strikes, but also would include hit squads.

The government understandably opts not to use the names specified by ACLU, opting instead to use the generic “US citizen” used by Savage.

Equally understandably, it uses Shane’s language to describe the target: “Al-Qaeda or other terrorist groups.” But I find the adoption of Shane’s formulation significant, because it is much broader than the language from the AUMF:

those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons

And somewhat broader than the language from the NDAA:

person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners

Now, it's not just Shane's language that broadens the scope here. None of the three requests mention AQAP, which would at least give the government the ability to focus on questions about how it decided that Awlaki was a legitimate target under the AUMF (on that topic, note this exchange between Robert Chesney and Bruce Ackerman). Both NYT requests ask for information about targeting terrorists generally. Which might get into some interesting targeting decisions both specific to Pakistan (for example, the original decision to target Beitullah Mehsud—and therefore the Pakistani Taliban—was based on a potentially erroneous information about a dirty bomb) and more generally in places like Gaza or Iran or Latin America.

In other words, if the government maintains it has the authority to assassinate terrorists, generally, perhaps tied to the Iraq AUMF or perhaps tied to the Gloves Come Off MON, then this language might make it hard for the government to provide a tidy response to this FOIA.

Not only that, there's one more issue going on: the government is also working on its DC Circuit response to ACLU's appeal of a more general FOIA suit filed in DC in early 2010 asking for:

All records created after September 11, 2011 pertaining to the legal basis in domestic, foreign and international law upon which unmanned aerial vehicles ("UAWs" or "drones") can be used to execute targeted killings ("drone strikes"), including but not limited to records regarding [among other things] who may be targeted.

The judge in this suit, Rosemary Collyer, granted the government summary judgment last September. She judged that the CIA generally and Leon Panetta in particular had acknowledged neither the CIA's role in the drone program nor the existence of records about the program, and

therefore the Agency's Glomar response was proper.

Plaintiffs submitted ten detailed requests for records, covering the gamut from the "legal basis" for drone strikes; the selection of human targets; civilian casualties; post-strike assessments; limits to the use of drones; the agency of government or branch of the military involved; the supervision, oversight, discipline, or training of drone operators and those involved in targeting decisions, and more. There is nothing in the various statements submitted by Plaintiffs which speaks to any records on these points; only by inference from former Director Panetta's statements might one conclude that the CIA might have some kind(s) of documentation somewhere. Thus, even if former Director Panetta could be understood colloquially to have suggested some sort of CIA involvement in drone strikes, he neither referenced specific records nor referenced records that go to the exact requests posed by Plaintiffs.

[snip]

Plaintiffs fail to demonstrate that the CIA has officially acknowledged either the CIA's involvement in a drone strike program or the existence or nonexistence of pertinent agency records. Plaintiffs' arguments to the contrary, the CIA has not waived its ability to issue a broad Glomar response.

While I haven't reviewed the abundant blabbing Panetta and President Obama have been doing about the drone program since Collyer's ruling, it's clear that there has been far more official acknowledgment of the program since the time she judged the blabbing to fall below the level of official acknowledgment.

The government's response in this suit—assuming they don't say the dog ate their homework here, too—is due May 7.

Note this FOIA, too, might present the same broadening problems for the government. While it does limit its request to drone strikes, it doesn't even limit the request to terrorists (in its treatment of who might be targeted, for example, it asks whether "individuals involved in the Afghan drug trade" could be included).

Central to the question of Anwar al-Awlaki's targeting is the fairly narrow—but still contentious—question of whether and when AQAP qualified as legitimate targets under the AUMF (or the Gloves Come Off MON). But these FOIAs ask broader questions about targeting generally, which may be one of the reasons the government is not rushing to provide clarity to its targeting killing policy.