

HOW TO AVOID RUBBER-STAMPING ANOTHER DRONE EXECUTION: LEAVE

NPR's Carrie Johnson reports that OLC head Virginia Seitz quietly left OLC before Christmas.

Virginia Seitz, who won Senate confirmation after an earlier candidate under president Obama foundered, resigned from federal service after two-and-a-half years on the job. The timing is unusual because her unit plays a critical role in drawing the legal boundaries of executive branch action—at a time when President Obama says he will do more to bypass a divided Congress and do more governing by way of executive order.

And while DOJ's official line is that Seitz left entirely for personal reasons, two sources told Johnson the ongoing discussions about whether to drone kill another American were another factor.

Two other sources suggested that aside from the tough work, another issue weighed heavily on her mind over the last several months: the question of whether and when the US can target its own citizens overseas with a weaponized drone or missile attack. American officials are considering such a strike against at least one citizen linked to al Qaeda, the sources said.

While a "law enforcement" source (but wait! the entire point of drone assassinations is they replace law enforcement with intelligence entirely!) suggests the decision has not yet been made.

A law enforcement source told NPR the controversy over the use of drones against Americans in foreign lands did not play a major role in Seitz's decision to leave government, since the OLC is continuing to do legal analysis on the issue and there was no firm conclusion to which she may have objected or disagreed.

Which is sort of funny, because Kimberly Dozier's report on the American in question says DOD, at least, has made its decision.

But one U.S. official said the Defense Department was divided over whether the man is dangerous enough to merit the potential domestic fallout of killing an American without charging him with a crime or trying him, and the potential international fallout of such an operation in a country that has been resistant to U.S. action.

Another of the U.S. officials said the Pentagon did ultimately decide to recommend lethal action.

And remember, as I've pointed out, this potential drone execution target is differently situated from Anwar al-Awlaki, in that there appears to be no claim this one is targeting civilians in the US.

But let's take a step back and consider some other interesting details of timing.

First, on November 29 of last year, Ron Wyden, Mark Udall, and Martin Heinrich released a letter they sent to Eric Holder asking for more clarity on when the President could kill an American.

[W]e have concluded that the limits and boundaries of the President's power to authorize the deliberate killing of Americans need to be laid out with much

greater specificity. It is extremely important for both Congress and the public to have a fully understanding of what the executive branch thinks the President's authorities are, so that lawmakers and the American people can decide whether these authorities are subject to adequate limits and safeguards.

Retrospectively, it seems this letter may have pertained to this new execution target, particularly given the different circumstances regarding his alleged attacks against the US. I might even imagine this serving as a public demand that DOJ not simply rely on the existing Awlaki drone assassination memo, creating the need to do a new one.

Now consider how (currently acting OLC head) Caroline Krass' confirmation hearing plays in. On December 17, Wyden asked her who had the authority to withdraw an OLC opinion (the opinion in question pertains to common commercial services in some way related to cybersecurity, but I find it interesting in retrospect).

Wyden: But I want to make sure nobody else ever relies on that particular opinion and I'm concerned that a different attorney could take a different view and argue that the opinion is still legally valid because it's not been withdrawn. Now, we have tried to get Attorney General Holder to withdraw it, and I'm trying to figure out – he has not answered our letters – who at the Justice Department has the authority to withdraw the opinion. Do you currently have the authority to withdraw the opinion?

Krass: No I do not currently have that authority.

Wyden: Okay. Who does, at the Justice

Department?

Krass: Well, for an OLC opinion to be withdrawn, on OLC's own initiative or on the initiative of the Attorney General would be extremely unusual.

She said she did not "currently have that authority." Was she about to get that authority in days or hours?

Then finally there are the implications for Krass' confirmation. The leaks about this current drone execution target almost certainly came from Mike Rogers' immediate vicinity. He's torqued because Obama's efforts to impose some limits on the drone war have allegedly made it more difficult to execute this American with no due process.

And while Rogers doesn't get a vote over Krass' confirmation to be CIA General Counsel, Dianne Feinstein and Saxby Chambliss do. And their efforts to keep CIA in the drone business may well have an impact on – and may have been motivated by – our ability to assassinate Americans.

I don't recall Krass getting questions that directly addressed drone killing, though she did get some that hinted at the edges of such questions, such as this one:

Are there circumstances in which a use of force, or other action, by the U.S. government that would be unlawful if carried out overtly is lawful when carried out covertly? Please explain.

ANSWER: As a matter of domestic law, I cannot think of any circumstances in which a use of force or other action by the U.S. government that would be unlawful if carried out overtly would be lawful when carried out covertly, but I have not studied this question.

This seems to be a question she would have had

to consider if she had any involvement in OLC's consideration of a new drone execution memo.

All that said, she hasn't yet gotten her vote (though any delay may arise from holds relating to the Senate Torture Report).

It just seems likely that – as we did in May 2005 when Steven Bradbury reapproved torture in anticipation of a promotion to head OLC – we're faced yet again with a lawyer waiting for a promotion being asked to give legal sanction to legally suspect activity. My impression is that Krass has far more integrity than Bradbury (remember, she's the one who originally imposed limits on the Libya campaign), so I'm only raising this because of the circumstances, not any reason to doubt her character.

It just seems like if you need lawyers to rubber stamp legally suspect activities, there ought to be more transparency about what promotions and resignations are going on.