THE NYT GRANTS DAVID BARRON AND MARTY LEDERMAN A MULLIGAN ON 18 USC 1119

I'll have far more to say about this irresponsibly credulous accounting of the background to the Anwar al-Awlaki killing from the NYT tomorrow. But for the moment I wanted to point to an interesting detail about the genesis of the June-July 2010 OLC memo.

The NYT explains that David Barron and Marty Lederman wrote an initial short OLC memo to authorize Anwar al-Awlaki's killing. But then, after reading a blog post that describes why such a killing would be a violation of 18 USC 1119, they decided they needed to do a more thorough memo.

> According to officials familiar with the deliberations, the lawyers threw themselves into the project and swiftly completed a short memorandum. It preliminarily concluded, based on the evidence available at the time, that Mr. Awlaki was a lawful target because he was participating in the war with Al Qaeda and also because he was a specific threat to the country. The overlapping reasoning justified a strike either by the Pentagon, which generally operated within the Congressional authorization to use military force against Al Qaeda, or by the C.I.A., a civilian agency which generally operated within a "national self-defense" framework deriving from a president's security powers.
>
> They also analyzed other bodies of law to see whether they would render a strike impermissible, concluding that they did not. For example, the Yemeni

> government had granted permission for airstrikes on its soil as long as the United States did not acknowledge its role, so such strikes would not violate Yemeni sovereignty.
>
> And while the Constitution generally requires judicial process before the government may kill an American, the Supreme Court has held that in some contexts — like when the police, in order to protect innocent bystanders, ram a car to stop a high-speed chase — no prior permission from a judge is necessary; the lawyers concluded that the wartime threat posed by Mr. Awlaki qualified as such a context, and so his constitutional rights did not bar the government from killing him without a trial.
>
> But as months passed, Mr. Barron and Mr. Lederman grew uneasy. They told colleagues there were issues they had not adequately addressed, particularly after reading a legal blog that focused on a statute that bars Americans from killing other Americans overseas. In light of the gravity of the question and with more time, they began drafting a second, more comprehensive memo, expanding and refining their legal analysis and, in an unusual step, researching and citing dense thickets of intelligence reports supporting the premise that Mr. Awlaki was plotting attacks. [my emphasis]

This post — an April 8, 2010 post entitled "Let's Call Killing al-Awlaki What It Is — Murder" — is almost certainly the blog post in question. There's almost nothing else written on 1119 (there's this legal journal article, but from Fall 2011), much less focusing specifically on Awlaki and published in a legal blog.

Which is interesting, because the post describes

one of the possible bases for arguing that 1119 does not apply to the killing of Awlaki that Obama is just ignoring the statute as Commander-in-Chief.

> Which leads us to the second possible explanation of why 18 USC 1119 does not apply: because Obama has authorized the CIA to kill al-Awlaki. That explanation seems implicit in much of the media's coverage of the Obama administration's decision; I have yet to see any reporter ask why Obama believes he has the legal authority to order Americans killed, given that 18 USC 1119 specifically criminalizes such killings. The argument, however, is deeply problematic — and eerily reminiscent of debates over the Bush administration's authorization of torture. The Bush administration argued that Bush had the authority as Commander-in-Chief to ignore the federal torture statute, 18 USC 2340; the Obama administration seems to now be arguing, albeit implicitly, that Obama has the authority as Commander-in-Chief to ignore the foreign-murder statute.

As I noted, while the white paper, at least, plays a neat rhetorical game to collapse AUMF and Article II authorizations, ultimately it uses this language to explain why an Article II authorized killing of Awlaki would not violate 1119.

> Similarly, under the Constitution and the inherent right to national self-defense recognized in international law, the President may authorize the use of force against a U.S. citizen who is a member of al-Qa'ida or its associated forces who poses an imminent threat of violent attack against the United States.

In other words, the white paper, at least, does

precisely what Kevin Jon Heller warned might be so troubling — it said that if the President authorized Awlaki's killing, it would mean 1119 would not apply.

To the extent that the white paper fairly reflects the content of the OLC memo, then, David Barron and Marty Lederman failed to find a counterargument to precisely the argument that appears to have convinced them to write a second, longer OLC memo in the first place.

Which may be why the NYT article goes to such lengths to try to explain away this apparent problem.

It does so, first of all, by suggesting the white paper may not be a faithful rendition of the argument Barron and Lederman made in the memo itself.

> Nearly three years later, a version of the legal analysis portions would become public in the "white paper," which stripped out all references to Mr. Awlaki while retaining echoes, like its discussion of a generic "senior operational leader." Divorced from its original context and misunderstood as a general statement about the scope and limits of the government's authority to kill citizens, the free-floating reasoning would lead to widespread confusion.
>
> [snip]
>
> The leak last month of an unclassified Justice Department "white paper" summarizing the administration's abstract legal arguments — prepared months after the Awlaki and Khan killings amid an internal debate over how much to disclose — has ignited demands for even greater transparency, culminating last week in a 13-hour Senate filibuster that temporarily delayed Mr. Brennan's confirmation. [my emphasis]

Remember (because at this point, you may have doubts), this is a "news" article. And yet, without presenting any evidence, or sourcing the judgment, the article claims that the white paper has been misunderstood and sown confusion. What anonymous sources told the NYT reporters this is true? And why did they believe it, particularly if, as the story goes, they haven't seen the memo itself?

In addition to suggesting that those who find the white paper's treatment of 1119 unpersuasive are simply confused, the NYT offers up the precedent Barron and Lederman cited in the actual OLC memo.

> Now, Mr. Barron and Mr. Lederman were being asked whether President Obama's counterterrorism team could take its own extraordinary step, notwithstanding potential obstacles like the overseas-murder statute. Enacted as part of a 1994 crime bill, it makes no exception on its face for national security threats. By contrast, the main statute banning murder in ordinary, domestic contexts is far more nuanced and covers only "unlawful" killings.
>
> As they researched the rarely invoked overseas-murder statute, Mr. Barron and Mr. Lederman discovered a 1997 district court decision involving a woman who was charged with killing her child in Japan. A judge ruled that the terse overseas-killing law must be interpreted as incorporating the exceptions of its domestic-murder counterpart, writing, "Congress did not intend to criminalize justifiable or excusable killings."
>
> And by arguing that it is not unlawful "murder" when the government kills an enemy leader in war or national self-defense, Mr. Barron and Mr. Lederman concluded that the foreign-killing statute would not impede a strike. They had not resorted to the Bush-style

> theories they had once denounced of sweeping presidential war powers to disregard Congressionally imposed limitations. [my emphasis]

Note what the NYT has done. Precisely what the white paper has done: yoke an AUMF public authority onto an Article II one, to hide the problem with authorizing the CIA to carry out murder in violation of 1119.

That is, try as it might to pretend that Barron and Lederman didn't do precisely what they've argued against, the NYT doesn't end up getting them out of their problem. The argument works great for DOD. But that's not — the NYT reconfirms in this story — who killed Awlaki.

CIA did.

But but but, NYT reports in a "news" article,

> They had not resorted to the Bush-style theories they had once denounced of sweeping presidential war powers to disregard Congressionally imposed limitations.

Curiously, this transparent attempt to make Barron and Lederman's work look better than it is doesn't account for this reading of the statute's application, from Judge Colleen McMahon's ruling in the Awlaki FOIA, now dicta on the matter.

> Assuming arguendo that in certain circumstances the Executive power extends to killing without trial a citizen who, while not actively engaged in armed combat against the United States, has engaged or is engaging in treasonous acts, it is still subject to any constraints legislated by Congress. One such constraint might be found in 18 U.S.C. § 1119, which is entitled "Foreign murder of United States nationals." This law, passed in 1994,

> makes it a crime for a "national of the United States" to "kill[] or attempt[] to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country." The statute contains no exemption for the President (who is, obviously, a national of the United States) or anyone acting at his direction. At least one commentator has suggested that the targeted killing of Al-Awlaki (assuming it was perpetrated by the Government) constituted a violation of the foreign murder statute. Philip Dore, Greenlighting American Citizens: Proceed with Caution, 72 La. L. Rev. 255 (2011).
>
> [snip]
>
> There are even statutory constraints on the President's ability to authorize covert activity. 50 U.S.C. §413b, the post-World War II statute that allows the President to authorize covert operations after making certain findings, provides in no uncertain terms that such a finding "may not authorize any action that would violate the Constitution or any statute of the United States." 50 U.S.C. § 413b(a)(5). Presidential authorization does not and cannot legitimize covert action that violates the constitution and laws of this nation.

That is, the one judge who has examined this matter — presumably with more background than any of us outsiders — has noted that the President is not exempted under 1119, nor can he authorize a covert op that violates US law.

It was really nice of the NYT's reporters to grant Barron and Lederman a mulligan on an OLC opinion the government purportedly refuses to share with two out of three reporters on this story via legal means.

Too bad the NYT didn’t get them out of the very same problem Heller identified 3 years ago, the one they wrote the OLC memo precisely to overcome.

In a memo the government refuses to share even with the Judiciary Committees, Barron and Lederman apparently argued that the President can authorize the CIA to conduct “justifiable or excusable killings,” and based on that, can overcome domestic law that legally limits CIA covert ops.

But don’t worry: the claim that the President can authorize “justifiable” killings bears no resemblance to Bush era arguments.