ARTICLE II OR AUMF? "A HIGH LEVEL OFFICIAL" (AKA JOHN BRENNAN) SAYS CIA CAN MURDER YOU

I'm not sure whether Michael Isikoff decided to stamp his version of the white paper all over with "NBC News" to make sure we all knew who was the go-to for sanctioned leaks, or whether Dianne Feinstein and the Administration asked him to do so to make it all but unreadable.

But I'm grateful that Jason Leopold has now liberated another copy that he has made available in readable form. Because now that I can read it, it becomes even more clear why Ron Wyden has persistent questions about whether the Administration killed Anwar al-Awlaki based on authorities granted under the the 2001 Authorization to Use Military Force or Article II.

Contrary to what I said in this post, the memo is actually very nearly balanced, never ultimately committing to whether it relies on AUMF or Article II. In fact, the white paper often employs a dual structure, invoking both the AUMF and self-defense in the same sentence or successive ones. At times, that dual structure is sound. At other times — as with its invocation of Hamdi — it uses the dual structure to rhetorically adopt a precedent for Article II authority that has only been granted under the AUMF.

The most troubling incidence of that comes in one of the white paper's most extensive sections, analyzing whether 18 USC 1119's prohibition on murdering Americans overseas includes a public authority exception for those acting in an official capacity. While bmaz promises to refute the argument they do make,

for the military it does seem to make sense. A soldier at war can kill someone without being subject to murder charges, right? But applying such a public authority exception to the CIA — which is prohibited from breaking US law under the National Security Act — effectively asserts that if the President authorizes the CIA to murder Americans, based solely on his Article II authority, it can murder Americans.

This dual structure, then, seems to serve more to allow rhetorical argumentative moves that would be astonishing if made to apply to the CIA alone than to authorize DOD to kill Anwar al-Awlaki.

I noted in that post that the white paper actually lists the President's "constitutional responsibility to protect the country" before it does "Congress's authorization of the use of all necessary and appropriate military force against this enemy" in paragraph 2. Indeed, just two sentences later, it asserts:

> Targeting a member of an enemy force who poses an imminent threat of violent attack to the United States is not unlawful. It is a lawful act of national self defense.

Pure self defense arises from Article II, not the AUMF, which isn't mentioned again until paragraph 4, when it describes the potential target in both Article II terms — "a terrorist organization engaged in constant plotting against the United States" — and AUMF terms — "as well as an enemy force with which the United States is in a congressionally authorized armed conflict."

The pattern of invoking both continues. Paragraph 5 (the first in Section I) reads,

> In addition to the authority arising from the AUMF, the President's use of force against al-Qa'ida and associated forces is lawful under other principles of U.S. and international law, including

> the President's constitutional responsibility to protect the nation …

Paragraph 6 (the second in Section I) reads,

> A use of force under such circumstances would be justified as an act of national self-defense. In addition, such a person would be within the core of individuals against whom Congress has authorized the use of necessary and appropriate force.

Paragraph 7 (the third in Section I) applies Hamdan to both "enemy forces who [are] actively engaged in planning operations to kill Americans" and those "in a non-international armed conflict with al-Qa'ida and its associated forces." Though the end of that paragraph claims "none of the three branches of the U.S. Government has identified a strict geographical limit" to the AUMF, citing a 2010 letter to Nancy Pelosi as Speaker and Daniel Inouye as President Pro Tempore and two DC Circuit decisions. Not only does it not cite any endorsement from Congress of this principle, but it fails to mention that Tom Daschle refused to extend the AUMF to apply to the US when it was originally passed (I guess that's why Wyden keeps asking if this authority to murder Americans would extend to the US). But it does turn solely to the AUMF for limits on these authorities.

Paragraph 10 — the last in section I — again invokes both.

> In such circumstances, targeting a U.S. citizen of the kind described in this paper would be authorized under the AUMF and the inherent right to national self-defense.

Section II A doesn't maintain this strict dualism. Paragraph 12 (the first in Section IIA) applies Hamdi's law-of-war detention to those described as something between enemies under

AUMF (which is all Hamdi should apply to) and those who, by virtue of constant attacks, are legitimate self-defense targets under Article II.

> The due process balancing analysis applied to determine the Fifth Amendment rights of a U.S. citizen with respect to law-of-war detention supplies the framework for assessing the process due a U.S. citizen who is a senior operational leader of an enemy force planning violent attacks against Americans before he is subjected to lethal targeting.

And as I noted here, the imminent threat paragraph is applied to AUMF targets and members — not operational leaders — of a group that pose an imminent threat to the US.

> With this understanding, a high-level official could conclude, for example, that an individual poses an "imminent threat" of violent attack against the United States where he is an operational leader of al-Qa'ida or an associated force and is personally and continually involved in planning terrorist attacks against the United States. Moreover, where the al-Qa'ida member in question has recently been involved in activities posing an imminent threat of violent attack against the United States, and there is no evidence suggesting that he has renounced or abandoned such activities, that member's involvement in al-Qa'ida's continuing terrorist campaign against the United States would support the conclusion that the member is an imminent threat.

And then, perhaps unsurprisingly, the Fourth Amendment discussion in paragraph 21 (the first in section IIB) only applies to those targeting the US, not members of an AUMF enemy per se.

> Similarly, assuming that a lethal operation targeting a U.S. citizen abroad who is planning attacks against the United States would result in a "seizure" under the Fourth Amendment, such an operation would not violate that Amendment in the circumstances posited here.

But wait! The passage goes on to cite two domestic law enforcement cases, Tennessee v. Garner and Scott v. Harris. That's a problem, because Article II authorities are going to be a covert operation, and therefore the CIA, which is prohibited from serving as a law enforcement agency. Maybe that's why this passage appears in paragraph 22 (the second in IIB):

> What would constitute a reasonable use of lethal force for purposes of domestic law enforcement operations differs substantially from what would be reasonable in the situation and circumstances described in this white paper. But at least in circumstances where the targeted person is an operational leader of an enemy force and an informed, high-level government official has determined that he poses an imminent threat of violent attack against the United States, and those conducting the operation would carry out of the operation only if capture were unfeasible, the use of lethal force would not violate the Fourth Amendment.

Here the dualism collapses, not distinguishing an enemy from one posing an imminent threat.

Hmm. A law enforcement precedent applied to an Agency prohibited from acting as a law enforcement agency yoked back onto AUMF? Ah well, the Fourth Amendment has been all but gutted anyway …

Similarly, paragraph 23 (section IIC) refuses

any review from Article III courts by invoking military (AUMF) operations to apply to some very spooky language.

> Were a court to intervene here, it might be required inappropriately to issue an ex ante command to the President and officials responsible for operations with respect to their specific tactical judgement to mount a potential lethal operation against a senior operational leader of al Qa'ida or its associated forces. And judicial enforcement of such orders would require the Court to supervice inherently predictive judgments by the President and his national security advisors as to when and how to use force against a member of an enemy force against which Congress has authorized the use of force.

I get that Courts shouldn't be making battlefield decisions. But in spite of the fact this passage invokes the AUMF twice, the invocation of "officials responsible for operations" falls far short of limiting the assertions to just the military.

In other words, it's another instance where the white paper asserts a claim that is uncontroversial for the military to apply to the CIA as well.

Section III — which is the most extensive applying to just one question — repeats precisely the same problem with the Fourth Amendment analysis. Though III A and B just lay out the principle that, in the same way that public officials who might execute a criminal or go to war wouldn't be liable for murder charges, they also wouldn't be liable for murder overseas. As I said, bmaz will assess the validity of that claim.

Those sections don't really distinguish between AUMF and Article II authority, but this passage in paragraph 28 is worth noting for its use of

"otherwise lawful" language.

> But the generally recognized public authority justification reflects that it would not make sense to attribute to Congress the intent to criminalize all covered activities undertaken by public officials in the legitimate exercise of their otherwise lawful authorities, even if Congress clearly intends to make those same actions a crime when committed by persons not acting pursuant to public authority.

If public officials are legitimately exercising otherwise lawful authorities, then it should be assumed Congress didn't mean to make laws apply to their so-called duties. But according to the National Security Act, the CIA engaging in covert operations may not break US law.

> A finding may not authorize any action that would violate the Constitution or any statute of the United States.

Perhaps that's why when section IIIC starts (in paragraph 31) to apply this question, it reverts to the strict dual structure found earlier in the white paper.

> A lethal operation against an enemy leader undertaken in national self-defense or during an armed conflict that is authorized by an informed, high-level official and carried out in a manner that accords with applicable law of war principles would fall within a well established variant of the public authority justification and therefore would not be murder.

Because it invites the citation of the seemingly slam dunk case of a solider killing during war.

> Perkins & Boyce, Criminal Law at 1093 (noting that a "typical instance [] in

> which even the extreme act of taking human life is done by public authority" involves "the killing of an enemy as an act of war and within the rules of war.")

The example of killing an enemy in a formal war is cited twice more in a footnote.

This passage cites the dual structure again in paragraph 32 and then invokes Hamdi again for the principle that the "military may constitutionally use force against a U.S. citizen who is part of enemy forces in paragraph 33.

Then in that same paragraph — retaining this dual structure — the white paper effectively argues (though it doesn't say so) that the President may, under Article II power alone, authorize the CIA to kill a U.S. citizen.

> 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 [note, they've dropped the senior operational leader modifier here!] of al-Qa'ida or its associated forces who poses an imminent threat of violent attack against the United States.

And just to be sure, the following paragraph again adopts the dual structure, and ends by says killing an American under such circumstances isn't assassination because the President authorized it.

Paragraph 35 (the second in section IV) uses the same dual structure to claim it would not be a War Crime to kill under these circumstances because,

> Common Article 3 does not alter the fundamental law of war principle concerning a belligerent party's right

> in an armed conflict to target individuals who are part of an enemy's armed forces or eliminate a nation's authority to take legitimate action in national self-defense.

The paragraph is particularly interesting for two reasons. First, it adopts Common Article 3 to get to the definition, used in the white paper's argument on imminence, requiring a person to formally renounce belligerence — "mere suspension of combat is not insufficient" — before he counts as a non-combatant. I suspect we're going to learn that the government had no evidence Anwar al-Awlaki had recently been operational when we killed him in 2011.

The paragraph is also interesting because it's one the areas where the white paper deviates from the detail offered by Charlie Savage most significantly. Here's what the June 2010 memo says on this point, according to Savage (I've included the 1119 language here as well).

> A federal statute that prohibits Americans from murdering other Americans abroad, the lawyers wrote, did not apply either, because it is not "murder" to kill a wartime enemy in compliance with the laws of war.
>
> But that raised another pressing question: would it comply with the laws of war if the drone operator who fired the missile was a Central Intelligence Agency official, who, unlike a soldier, wore no uniform? The memorandum concluded that such a case would not be a war crime, although the operator might be in theoretical jeopardy of being prosecuted in a Yemeni court for violating Yemen's domestic laws against murder, a highly unlikely possibility.

That is, this War Crimes analysis pertained specifically to the question of whether the CIA

could kill Awlaki. But they again used the dual structure to make its application to the CIA less obviously controversial (it helps, of course, that the white paper doesn't admit it's really talking about the CIA when it invokes Article II).

It's an elaborate rhetorical gambit, suggesting that DOD and CIA are like entities. As Colonel Morris Davis keeps insisting (to far too little notice) they're not.

Heck, to be legal under the National Security Act, this white paper effectively argues that if the President orders the CIA to murder Americans, it doesn't count as murder.

Ron Wyden as much as said that's what the actual OLC memos say during John Brennan's hearing the other day. Now that we can read the white paper clearly — and understand its rhetorical ploy — I can see why.