DID AN INTELLIGENCE ASSET PERSUADE ABDULRAHMAN AL-AWLAKI TO SEARCH FOR HIS FATHER?

There's an inconclusive — but nevertheless intriguing — detail in Jeremy Scahill's Dirty Wars that might explain why Abdulrahman al-Awlaki decided, in September 2011, to go search for his father. After the boy ran away from home, the family tried to figure out why, having expressed no plans to go search for his father, he would up and leave like he did.

> The family called around to Abdulrahman's friends. Someone told [Awlaki's father] Nasser that a teacher at the school had recently gotten close to Abdulrahman, and Nasser believed the teacher had been encouraging Abdulrahman to find his father and to reconnect with him, that it would be good for the boy. "He had influence on him, an they used to go to a pizza parlour to eat pizza." Nasser said. When Nasser tried to find the teacher to ask him if he had any information about Abdulrahman's whereabouts, the teacher had "vanished."

Granted, this amounts to no more than an observation that someone who had become influential on the boy disappeared right as the family started looking for answers; there's no affirmative evidence there was a connection.

That said, the CIA had already twice tried to use family ties to get to Awlaki by this point. As the Danish agent Morten Storm has described, he arranged a marriage between a Croatian convert to Islam and Awlaki in a failed attempt to track the cleric.

In addition, as Scahill laid out in his book and excerpted in the Nation, a CIA officer unsuccessfully approached Awlaki's brother, Ammar, in February 2011 to help them find Awlaki.

> Chris made it clear that he worked for the CIA. He told Ammar that the United States had a task force dedicated to "killing or capturing your brother"—and that while everyone preferred to bring Anwar in alive, time was running out. "He's going to be killed, so why don't you help in saving his life by helping us capture him?" Chris said. Then he added, "You know, there's a $5 million bounty on your brother's head. You won't be helping us for free."
>
> Ammar told Chris that he didn't want the money, that he hadn't seen Anwar since 2004 and had no idea where he was. The American countered, "That $5 million would help raise [Anwar's] kids."
>
> "I don't think there's any need for me to meet you again," Ammar told Chris. Even so, the American told Ammar to think it over, perhaps discuss it with his family. "We can meet when you go to Dubai in two weeks," he said. Ammar was stunned: his tickets for that trip had not yet been purchased, and the details were still being worked out. Chris gave Ammar an e-mail address and said he'd be in touch.

Clearly, by 2011, the CIA was willing to try any scheme that might help them find Awlaki, regardless of the family bounds it abused. So it is conceivable, at least, that they might try to use Abdulrahman as "bait," a word Awlaki's mother used.

I wonder if John Brennan considered this possibility in his review of why the United States assassinated one of its teenaged

citizens?

AFTER CONTINUED BLOW-OFF, HOUSE JUDICIARY REQUESTS AWLAKI AND SIGNATURE STRIKE MEMOS

The other day, when I reported that the Senate Judiciary Committee would get to glimpse the Office of Legal Counsel memos authorizing the killing of Anwar al-Awlaki, I noted that the House Judiciary Committee was not included in that reporting.

> Also no word on whether the House Judiciary Committee will laso get to glimpse these memos.

I guess they noted the same.

> Dear President Obama,
>
> We write to renew our request from February 8th that members of the House Judiciary Committee be granted the opportunity to review all Justice Department legal opinions related to the use of lethal force in both targeted and so-called “signature strikes” against unidentified terrorist suspects.
>
> Members of the House and Senate Intelligence Committees have been provided an opportunity to review at least some of these opinions. Today, members of the Senate Judiciary Committee were also given access to some, but not all, of the documents that we have requested. There is no reason

> why a similar bipartisan request from the House Judiciary Committee continues to go unanswered. If arrangements for our review of these materials are not finalized by COB tomorrow (Thursday, April 11, 2013), the Committee will have no choice but to move forward with issuance of subpoenas for the documents.

What's particularly amusing about this response to the White House's continued refusal to permit HJC to oversee DOJ is the scope of HJC's request: Since last December, they've been asking for the broader backup, **including the memos authorizing signature strikes** explicitly. As a result, the Administration's refusal to share even what they've shared with the other oversight committees puts that signature strike request on the subpoena table where it otherwise might not be.

Given Jonathan Landay's reporting showing the extent not just of strikes where we don't know the target's identity, but also the number of side payment strikes we're conducting, seeing such memos are even more urgent.

I'm guessing the timing gives the White House new-found interest in negotiating sharing those other memos.

February 2011: Ron Wyden asks the Director of National Intelligence for the legal analysis behind the targeted killing program; the letter references "similar requests to other officials." **(1)**

April 2011: Ron Wyden calls Eric Holder to ask for legal analysis on targeted killing. **(2)**

May 2011: DOJ responds to Wyden's request, yet doesn't answer key questions.

May 18-20, 2011: DOJ (including Office of Legislative Affairs) discusses "draft legal analysis regarding the application of domestic

and international law to the use of lethal force in a foreign country against U.S. citizens" (this may be the DOJ response to Ron Wyden).

October 5, 2011: Chuck Grassley sends Eric Holder a letter requesting the OLC memo by October 27, 2011. **(3)**

November 8, 2011: Pat Leahy complains about past Administration refusal to share targeted killing OLC memo. Administration drafts white paper, but does not share with Congress yet. **(4)**

February 8, 2012: Ron Wyden follows up on his earlier requests for information on the targeted killing memo with Eric Holder. **(5)**

March 7, 2012: Tom Graves (R-GA) asks Robert Mueller whether Eric Holder's criteria for the targeted killing of Americans applies in the US; Mueller replies he'd have to ask DOJ. Per his office today, DOJ has not yet provided Graves with an answer. **(6)**

March 8, 2012: Pat Leahy renews his request for the OLC memo at DOJ appropriations hearing.**(7)**

June 7, 2012: After Jerry Nadler requests the memo, Eric Holder commits to providing the House Judiciary a briefing—but not the OLC memo—within a month. **(8)**

June 12, 2012: Pat Leahy renews his request for the OLC memo at DOJ oversight hearing. **(9)**

June 22, 2012: DOJ provides Intelligence and Judiciary Committees with white paper dated November 8, 2011.

June 27, 2012: In Questions for the Record following a June 7 hearing, Jerry Nadler notes that DOJ has sought dismissal of court challenges to targeted killing by claiming "the appropriate check on executive branch conduct here is the Congress and that information is being shared with Congress to make that check a meaningful one," but "we have yet to get any response" to "several requests" for the OLC memo authorizing targeted killing. He also renews his request for the briefing

Holder had promised. **(10)**

July 19, 2012: Both Pat Leahy and Chuck Grassley complain about past unanswered requests for OLC memo. (Grassley prepared an amendment as well, but withdrew it in favor of Cornyn's.) Leahy (but not Grassley) votes to table John Cornyn amendment to require Administration to release the memo.

July 24, 2012: SSCI passes Intelligence Authorization that requires DOJ to make all post-9/11 OLC memos available to the Senate Intelligence Committee, albeit with two big loopholes.

December 4, 2012: Jerry Nadler, John Conyers, and Bobby Scott ask for finalized white paper, all opinions on broader drone program (or at least a briefing), including signature strikes, an update on the drone rule book, and public release of the white paper.

December 19, 2012: Ted Poe and Tredy Gowdy send Eric Holder a letter asking specific questions about targeted killing (not limited to the killing of an American), including "Where is the legal authority for the President (or US intelligence agencies acting under his direction) to target and kill a US citizen abroad?"

January 14, 2013: Wyden writes John Brennan letter in anticipation of his confirmation hearing, renewing his request for targeted killing memos. **(11)**

January 25, 2013: Rand Paul asks John Brennan if he'll release past and future OLC memos on targeting Americans. **(12)**

February 4, 2013: 11 Senators ask for any and all memos authorizing the killing of American citizens, hinting at filibuster of national security nominees. **(13)**

February 6, 2013: John McCain asks Brennan a number of questions about targeted killing, including whether he would make sure the memos

are provided to Congress. **(14)**

February 7, 2013: Pat Leahy and Chuck Grassley ask that SJC be able to get the memos that SSCI had just gotten. **(15)**

February 7, 2013: In John Brennan's confirmation hearing, Dianne Feinstein and Ron Wyden reveal there are still outstanding memos pertaining to killing Americans, and renew their demand for those memos. **(16)**

February 8, 2013: Poe and Gowdy follow up on their December 19 letter, adding several questions, particularly regarding what "informed, high level" officials make determinations on targeted killing criteria.

February 8, 2013: Bob Goodlatte, Trent Franks, and James Sensenbrenner join their Democratic colleagues to renew the December 4, 2012 request. **(17)**

February 12, 2013: Rand Paul sends second letter asking not just about white paper standards, but also about how National Security Act, Posse Commitatus, and Insurrection Acts would limit targeting Americans within the US.

February 13, 2013: In statement on targeted killings oversight, DiFi describes writing 3 previous letters to the Administration asking for targeted killing memos. **(18, 19, 20)**

February 20, 2013: Paul sends third letter, repeating his question about whether the President can have American killed inside the US.

February 27, 2013: At hearing on targeted killing of Americans, HJC Chair Bob Goodlatte — and several other members of the Committee — renews request for OLC memos. **(21)**

March 11, 2013: Barbara Lee and 7 other progressives ask Obama to release "in an unclassified form, the full legal basis of executive branch claims" about targeted killing, as well as the "architecture" of the drone program generally. **(22)**

April 10, 2013: Bob Goodlatte and John Conyers send Obama a letter threatening a subpoena if they don't get to see the drone killing memos. **(23)**

YEMENI GOVERNMENT INTENSIFIES HARASSMENT OF JOURNALIST WHO PRESENTED COUNTER-EVIDENCE TO US CASE AGAINST AWLAKI

Ever since I wrote this post, I've been thinking about the fate of Yemeni journalist Abdulelah Haider Shaye. As Jeremy Scahill reported last year, President Obama personally intervened in February 2011 to make sure that Shaye would remain in prison, for terrorism charges presented at a kangaroo court, for at least five years.

In the course of pointing out the holes in the NYT piece on Anwar al-Awlaki, I revisited the discrepancy between what, according to DOJ, Umar Farouk Abdulmutallab confessed to immediately after he was arrested on December 25, 2009 and what, according to DOJ, he said in interrogations conducted a month and more later. I'm now convinced, at a minimum, that the discrepancies are much more problematic than I thought when I first reported the discrepancy, and I also think (though I'm still working on this) that the original confession may be more reliable given other known facts. If that's true, it significantly undermines the government's case against Awlaki, as

Abdulmutallab is the key known witness attesting to Awlaki's operational role which — at least publicly — is the key criteria that must be met before Awlaki's killing was legal (though at precisely the moment Abdulmutallab started cooperating, Dennis Blair described the standard to be something different).

Which brings me to this article, which reports on an interview Shaye conducted with Awlaki some time after the UndieBomb attack, presumably at least several days before it was published and therefore before Abdulmutallab started cooperating. The story originally took Awlaki's acknowledgment he had "communications" with Abdulmutallab to support its claim that Awlaki "met" with the UndieBomber.

> Anwar al-Awlaki, the fugitive American-born cleric accused of terrorist ties, **acknowledged for the first time that he met** with the Nigerian suspect in the Dec. 25 airliner bomb plot, though he denied any role in the attack, according to a Yemeni journalist who said he met with him.
>
> **Mr. Awlaki said he had met and spoken with the Nigerian suspect**, Umar Farouk Abdulmutallab, in Yemen last fall, according to the journalist, Abdulelah Hider Sha'ea, who played a digital recording of the cleric's comments for this reporter.
>
> [snip]
>
> "Umar Farouk is one of my students; **I had communications with him**," Mr. Awlaki can be heard saying on the recording. "And I support what he did, as America supports Israel's killing of Palestinians, and its killing of civilians in Afghanistan and Iraq."
>
> [snip]
>
> Mr. Awlaki, 38, said on the recording that he had no part in the planning or

> execution of the bomb plot. He did not say whether he had advance knowledge of it. "**I did not tell him to do this operation**, but I support it," Mr. Awlaki said on the tape, adding that he was proud of Mr. Abdulmutallab. [my emphasis]

Nine days later it added this correction, and took the word "met" out of the second though not lead paragraph of the article.

> An article last Monday about possible connections between Anwar al-Awlaki, a fugitive American-born cleric accused of terrorist ties, and Umar Farouk Abdulmutallab, the Nigerian suspect in the Christmas Day plot against an American passenger jet, paraphrased incorrectly from comments by a Yemeni journalist about the relationship between the two men. **The journalist, Abdulelah Hider Sha'ea, said that Mr. Awlaki told him he had "communications" with Mr. Abdulmutallab last fall, not that the two men had met in person**. [my emphasis]

To be sure, the correction (which presumably came from Shaye and not Awlaki) doesn't rule out Awlaki meeting with Abdulmutallab; it just clarifies that's not what Awlaki said (or even, to take the most cynical view, that Shaye shifted the emphasis after reports of Abdulmutallab's cooperation were made public).

What's interesting, though, is that Shaye's narrative is consistent with Abdulmutallab's first confession — which describes meeting a Saudi bombmaker assumed to be Ibrahim al Asiri but does not mention meeting Anwar al-Awlaki — but not the later confessions, which describes a text, a call, and a written message (it is not clear how it was conveyed) exchanged between the two, which count as communication but not a meeting, but also a three day stay at Awlaki's

house.

Now, if Shaye really is, as the US government claims, an AQAP propagandist, you could claim Shaye's interview served primarily to repeat an agreed upon cover story that Awlaki hoped Abdulmutallab would hew to. If he's a straight journalist, as most journalists who know him argue, then he, at a minimum, is a witness to Awlaki's own case.

But here's the thing: Shaye's earlier reporting on Awlaki's tie to Nidal Hasan's attack appears to have been more accurate than American counterterrorism sources. The report, of course, relies on Awlaki's honesty, and that I can't speak to. But it is possible that Shaye has Awlaki's side of the story, including his assertion that he did not tell him to conduct the attack, correct, and that Awlaki's claims — as they were after the Nidal Hasan attack — were generally accurate.

Which is all a long-winded way to describe why I've been thinking about Obama's interference to keep Shaye in prison. So long as Shaye's in prison, it keeps one source that could challenge the US story on Awlaki, silenced. Shaye was in Yemeni custody from around the time the OLC authorized Awlaki's killing in July 2011 through today.

Monday, Scahill described Shaye's condition.

> just got note from Abdulelah Haider Shaye's brother saying his conditions have worsened & that his cell was raided last week by 20 soldiers

Shaye's not just still in prison and in deteriorating condition, apparently, but he's being subject to the special attention from prison guards.

SOMEHOW DOD KEPT MISSING ANWAR AL-AWLAKI

I was going to leave well enough alone with this NYT article on Anwar al-Awlaki, having criticized both its legal editorializing and its selective presentation of evidence against Awlaki. But since I suspect it is intended to prepare the ground for an Obama speech on targeted killing, I want to look at how assiduously the article hides Yemeni former President Ali Abdullah Saleh's questionable commitment to our war on terror.

Let's start by comparing this description of the May 25, 2010 drone strike that killed Saleh rival Jabir Shabwani from the WSJ:

> On May 25, 2010, a U.S. missile attack killed at least six people including Jabir Shabwani, the 31-year-old deputy governor of Yemen's central Mareb province. The Yemeni government provided intelligence used in the strike but didn't say Mr. Shabwani would be among those there, say several current and former U.S. military officials.
>
> These people say they believe the information from the Yemenis may have been intended to result in Mr. Shabwani's death. "We think we got played," said one participant in high-level administration discussions.
>
> The government of President Ali Abdullah Saleh denies it used the U.S. campaign to eliminate a political rival or provided misleading intelligence. They say the president and other officials were furious when they learned of Mr. Shabwani's death. Not all U.S. officials believe the U.S. was set up.

With the version the NYT gave us:

> A disastrous American missile strike in May 2010 accidentally killed a deputy provincial governor in Yemen and infuriated President Saleh, effectively suspending the clandestine war.

While even the WSJ pays lip service to Saleh's claim to be "furious," the NYT not only completely ignores the widely held understanding that Saleh was not furious at all because he set up the attack, but claims Shabwani was only accidentally targeted.

The event is one of the signature examples of how our reliance on unreliable partners has contributed to counterproductive drone deaths. And yet the NYT doesn't explain that part of the tragedy.

Likewise, the NYT expresses little curiosity as it describes one after another near misses of Awlaki (and Nasir Wuhayshi in the December 2009 attack), at least two led by Joint Special Operations Command, the part of DOD that was hunting Awlaki before the CIA took over the fight (I would also add the al-Majala killing to this, in which the US thought it was killing just militants but ended up killing a Bedouin tribe).

> On Dec. 24, 2009, in the second American strike in Yemen in eight days, missiles hit a meeting of leaders of the affiliate group. News accounts said one target was Mr. Awlaki, who was falsely reported to have been killed.
>
> [snip]
>
> Mr. Awlaki appears to have hidden most of the time in Shabwa Province, several hours' drive southeast of the capital, turf for Al Qaeda and also the traditional territory of his family's powerful tribe, the Awaliq. Yemen's cagey longtime president, Ali Abdullah

> Saleh, negotiated with tribal leaders, who offered to hold Mr. Awlaki under house arrest, according to a Yemeni official. The talks were inconclusive.
>
> [snip]
>
> In late 2010 or early 2011, Yemeni security troops surrounded a village in Shabwa Province where Mr. Awlaki was reported to be hiding, said Gregory Johnsen, a Princeton scholar and author of "The Last Refuge: Yemen, al-Qaeda, and America's War in Arabia." But a house-to-house search did not find him.
>
> [snip]
>
> In May 2011, days after the American commando raid in Pakistan that killed Bin Laden, the Pentagon's Joint Special Operations Command, the hub for classified Army and Navy commando units, had its best chance to kill Mr. Awlaki as he moved around Shabwa Province. Drones and Marine Harrier jets fired at his truck, but he managed to escape and took refuge in a cave.

Golly, those JSOC teams sure were unlucky, with Awlaki escaping time after time! You don't suppose someone tipped him off, do you?

Because, as the WSJ notes, JSOC usually shared any attack information with Saleh's government.

> Since December 2009, the U.S. military's Joint Special Operations Command, or JSOC, had launched a handful of attacks on suspected al Qaeda gatherings in Yemen. Intelligence for such strikes was largely provided by Mr. Saleh's government, U.S. officials say, which was consulted by the U.S. military before each counterterrorism operation.

After Awlaki died, Saleh sent word to Awlaki's father swearing he had had no role in the attack

on his son. I would suggest it is likely that Saleh may have, however, had a role in Awlaki evading at least two JSOC attacks.

Now, the NYT is not entirely silent about Saleh's questionable commitment to targeting Awlaki. It does note that Arab Spring unrest and the June 2011 attack on Saleh gave the US more freedom in pursuing Awlaki.

> That June, a barrage of rockets struck the room of the presidential palace where Mr. Saleh was hiding, severely injuring him and effectively ending his rule.
>
> The weakening of Mr. Saleh gave the Americans more latitude for the Awlaki manhunt.

But it doesn't explain why the US might have greater leeway as Saleh struggled to hold on to power (I suspect some of that will appear in Mark Mazzetti's book, due out next month). One likely possibility is that Saleh's physical and political incapacitation gave the US an excuse to bypass the Yemeni President.

The Obama Administration repeats over and over this formula for how its drone strikes are legal under international law.

> … the use of force in foreign territory would be consistent with these international legal principles if conducted, for example, with the consent of the nation involved — or after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States.

The government envisions two possibilities: Either a government permits us to conduct drone strikes as part of a cooperation agreement; this usually involves DOD partnering with the host country's military.

Or we decide a nation is unable or unwilling to

deal with a threat. This qualifies as self-defense and may (though doesn't necessarily) involve covert operations. Or, as happens with Pakistan, it pretends not to consent and we operate covertly with its approval (potentially up to and including the Osama bin Laden raid).

The NYT piece provides one new explanation for the CIA base in Saudi Arabia: the government of Djibouti imposed certain rules on us that the Saudis were not going to impose.

> And, very quietly, the C.I.A. began to build its own drone base in Saudi Arabia. Saudi officials had given the C.I.A. permission to build the base on the condition that the kingdom's role was masked. And the base took care of a separate problem: the government of Djibouti, where the military was basing its drone operations in the region, put tight restrictions on any lethal operations carried out from its soil. The Saudi government made no similar demands.

I look forward to Mazzetti's further explanation of what those rules were (in his book), but I wonder whether one of them is that the targeted country consent to the strike. (Update: The report from this weekend suggesting the Brits have a role in the Djibouti targeting may also be a factor in making a Saudi base more appropriate for a covert op.)

That is, it seems that two things happened that set up the Awlaki strike: the Saudis let us build a CIA base that would allow us to conduct technically covert operations without the consent of the government, and Saleh's struggle to stay in power gave us an excuse to say he was unable to target Awlaki (so we didn't have to admit he was also unwilling to).

So why would pitching this story as one of Saleh's incapacitation rather than his unwillingness to cooperate and our subsequent

decision to bypass him set up a Presidential speech?

As you'll recall, the National Journal reported that one of the main reasons the Administration didn't want to release the OLC memos to Congress is because they spell out the terms of understanding between the US and those governments who let us drone their country.

> A key reason for that reticence, according to two sources who have read the memos or are aware of their contents, is that the documents contain secret protocols with foreign governments, including Pakistan and Yemen, as well as "case-specific" details of strikes.
>
> A legal expert outside the government who is intimately familiar with the contents of the memos said the government-to-government accords on the conduct of drone strikes are an important element not contained in the Justice Department "white paper" revealed recently by NBC News. He said it is largely in order to protect this information that the targeted-killing memos drafted by Justice's Office of Legal Counsel are not being released, and that even the Senate and House Intelligence committees have been allowed to examine only four of the nine OLC memos.

While I suspect there probably are memos — two different memos — that lay the ground rules for signature strikes with both Pakistan and Yemen, this NJ story is meant to explain the Administration's reluctance to share the OLC memos on Awlaki as well. In the Awlaki memos (both of which, according to the NYT, allow for the involvement of the CIA and therefore covert status), sensitive details about the Yemeni arrangement are just as likely to explain why the US might choose to use CIA to conduct a

strike rather than JSOC. And that would probably have everything to do with the remarkable problems we had in pursuing Awlaki while partnering with the Yemeni government.

If Obama's going to make a speech, up to and including admitting we killed Awlaki, it's going to be a speech that not only obscures both the evidentiary and legal problems with the killing, but also obscures the degree to which the Obama Administration's counterterrorism efforts in Yemen have been counterproductive, largely because we let Saleh play us for years.

If Obama's going to give a speech, it's going to be a triumphant narrative about nailing a baddie with the help of our international partners whose particular contributions (or obstructionism) shall remain unexplained. And to make that speech, Obama's going to need to bury a whole lot of evidence that Ali Abdullah Saleh was as much part of the problem as he was any part of the solution.

ANWAR AL-AWLAKI IS THE NEW ALUMINUM TUBE

Mark Mazzetti, Charlie Savage, and Scott Shane team up to provide the government's best case — and at times, an irresponsibly credulous one — for the killing of Anwar al-Awlaki and the collateral deaths of Samir Khan and Abdulrahman al-Awlaki.

Yet even in a 3,600 word story, they don't present any evidence against the senior Awlaki that was fresher than a year old — the October 2010 toner cartridge plot — at the time the Yemeni-American was killed. (I'm not saying the government didn't have more recent intelligence; it just doesn't appear in this very

Administration-friendly case.) Not surprisingly, then, the story completely ignores questions about the definition of "imminent threat" used in the OLC memo and whether Awlaki was an "imminent" threat when he was killed.

The "linked in various ways" standard for killing Americans

Moreover, the case they do present has various weaknesses.

The story provides a fair amount of space to Awlaki's celebration of the Nidal Hasan attack (though it does make it clear Awlaki did not respond enthusiastically to Hasan's queries before the attack).

> Investigators quickly discovered that the major had exchanged e-mails with Mr. Awlaki, though the cleric's replies had been cautious and noncommittal. But four days after the shootings, the cleric removed any doubt about where he stood.
>
> "Nidal Hassan is a hero," he wrote on his widely read blog. "He is a man of conscience who could not bear living the contradiction of being a Muslim and serving in an army that is fighting against his own people."

It uses far vaguer language to describe Awlaki's role in the Faisal Shahzad and toner cartridge plots.

> Meanwhile, attacks **linked in various ways** to Mr. Awlaki continued to mount, including the attempted car bombing of Times Square in May 2010 by Faisal Shahzad, a naturalized American citizen who **had reached out to the preacher on the Internet**, and the attempted bombing by Al Qaeda in the Arabian Peninsula of cargo planes bound for the United States that October.

"Linked in various ways" seems to be the new

standard for killing an American. That, in spite of the fact that Shahzad's tie to Awlaki seems to be the same Hasan had: an inspiration, but not any involvement in the plot. And while Awlaki is reported to have had some role in the toner cartridge plot, reports from Saudi infiltrator Jabir al-Fayfi apparently fingered others in AQAP as the chief plotters.

I guess that would be too much nuance to include in a 3,600 word article.

NYT doesn't care about problems with the Abu Tarak explanation

Which leaves the UndieBomb attack as the sole attack in which the NYT presents evidence about Awlaki's direct role. But there's a problem with their claims there, too.

> The would-be underwear bomber told F.B.I. agents that after he went to Yemen and tracked down Mr. Awlaki, his online hero, the cleric had discussed "martyrdom and jihad" with him, approved him for a suicide mission, helped him prepare a martyrdom video and directed him to detonate his bomb over United States territory, according to court documents.
>
> In his initial 50-minute interrogation on Dec. 25, 2009, before he stopped speaking for a month, Mr. Abdulmutallab said he had been sent by a terrorist named Abu Tarek, although intelligence agencies quickly found indications that Mr. Awlaki was probably involved. **When Mr. Abdulmutallab resumed cooperating with interrogators in late January, an official said, he admitted that "Abu Tarek" was Mr. Awlaki**. With the Nigerian's statements, American officials had witness confirmation that Mr. Awlaki was clearly a direct plotter, no longer just a dangerous propagandist.

I don't doubt that Awlaki was directly involved

in this attack in some way. And I got the same explanation about Abu Tarak from "an official" back when I first noted the discrepancy between DOJ's public claims (thanks for not crediting me on that one, NYT boys). But either Abdulmutallab said something beyond "Abu Tarak was Awlaki," or the entire explanation is not credible.

That's because Abdulmutallab's initial interrogation — according to the version presented by Jonathan Tukel in the opening arguments of Abdulmutallab's trial — said Abu Tarak did the following:

1. Spoke daily with Abdulmutallab about jihad and martyrdom
2. Suggested to Abdulmutallab that he become involved in a plane attack against the United States aircraft
3. Gave him training in detonating the bomb
4. Told him to make sure he attacked a U.S. aircraft and make sure the attack takes place over the United States

Yet according to the version of Abdulmutallab's interrogation presented in his sentencing memo, here's who did those things:

1. **Awlaki** and Abdulmutallab discussed martyrdom and jihad
2. Defendant and **Ibrahim Al Asiri** discussed defendant's desire to commit an act of jihad; **Asiri** discussed a plan for a martyrdom mission with **Awlaki**, who gave it final approval

3. **Asiri** trained defendant in the use of the bomb
4. **Awlaki** instructed defendant that the only requirements were that the attack be on a U.S. airliner, and that the attack take place over U.S. soil

That is, the things Abdulmutallab attributed to Abu Tarak in his first interrogation include two things the government now says Awlaki did — talk about martyrdom and gave final instructions about attacking the US — and at least one thing Asiri did — train him on the bomb (the government narrative seems to suggest Asiri was the one who first approached Abdulmutallab about the plane attack, too, but that is perhaps deliberately left more vague).

Moreover, Abdulmutallab also said he met Abu Tarak at a mosque and stayed with him for a period in Sanaa, which is totally inconsistent with the government narrative of how and where he met either Awlaki or Asiri.

Abu Tarak is not simply Awlaki. Perhaps Abdulmutallab said Abu Tarak was an amalgam of three different people he met in Yemen. Perhaps he never said anything to explain the Abu Tarak reference, and DOJ just claims he did because some of what he attributed to Abu Tarak he later attributed to Awlaki. But the NYT presents a claim — that Abdulmutallab said Abu Tarak was Awlaki — that is not consistent with the public records and the government's own claims about what that public record represents.

Add in the fact that the government's own expert, Dr. Simon Perry, after having read 18 or 19 of Abdulmutallab's interrogation reports, including the ones where he reportedly implicated Awlaki, seemed to believe that Abu Tarak was someone different than Awlaki. Perry further pointed out that one of the few public statements Abdulmutallab ever made about his

attack — accusing Americans of being guilty at his trial — contradicts the claims he made in February 2010 interrogations where he said Awlaki chose his target.

> For example, in his statement to the court he claims that his attack was an outcome of the fact that the "American people are guilty of the sin, and Obama should pay for the crime". In contradiction to this statement made in court, UFAM previously, in his FBI debriefing, claims that he did not specifically target the U.S. for his mission.
>
> [snip]
>
> Once again as explained above (p.9 [sic] of this memorandum) what UFAM said when interviewed by FBI agents is a direct contradiction to later statement in court upon the entry of his guilty plea.

None of this proves that Abdulmutallab didn't implicate Awlaki. I think he probably did. But what it does prove is the NYT took a single anonymous source's word as reason to dismiss real (albeit minor) inconsistencies with the government's public story, even though that anonymous source's explanation introduced more problems than it solved. That is, the way NYT treated the Abu Tarak reference doesn't necessarily say anything about the evidence against Awlaki, but it does show how uncritically it took the claims made by sources.

NYT finally finds a WikiLeaks cable it doesn't like!

There's one other really irresponsible piece to this story. Here's how they describe the December 24, 2009 strike when the government missed Awlaki.

> On Dec. 24, 2009, in the second American strike in Yemen in eight days, missiles hit a meeting of leaders of the

> affiliate group. **News accounts said one target was Mr. Awlaki**, who was falsely reported to have been killed.
>
> **In fact, other top officials of the group were the strike's specific targets, and Mr. Awlaki's death would have been collateral damage** — legally defensible as a death incidental to the military aim. As dangerous as Mr. Awlaki seemed, he was proved to be only an inciter; counterterrorism analysts did not yet have incontrovertible evidence that he was, in their language, "operational." [my emphasis]

It was not just "news accounts" that said one target was Awlaki. Then Yemeni President Ali Abdullah Saleh strongly implied as much, in the days after the attack, in a conversation with David Petraeus (who apparently didn't dispute his understanding) recorded in a WikiLeaks cable. Now, that doesn't disprove the NYT's claim that the justification the US used for targeting Awlaki at a time they believed him not to be operational is that he would be known collateral damage in a strike ostensibly targeted at someone else. But introducing the cable (this is the NYT! They never pass up an opportunity to rely on WikiLeaks cables!) would have undermined the rest of their article.

That's because the cable provides a great deal of evidence that the government has used a "sitting next to baddies" justification for killing (or, in this case, trying to kill) Americans against whom they don't have enough evidence to target directly. That's almost certainly what happened with Kamal Derwish back in 2002, too.

If the US does use a "sitting next to baddies" excuse for killing Americans against whom the government doesn't have adequate evidence to justify killing directly, then what is the value of all this blather?

> The missile strike on Sept. 30, 2011, that killed Mr. Awlaki — a terrorist leader whose death lawyers in the Obama administration believed to be justifiable — also killed Mr. Khan, though officials had judged he was not a significant enough threat to warrant being specifically targeted.
>
> [snip]
>
> In April 2011, the United States captured Ahmed Abdulkadir Warsame, a Somali man who worked closely with the Qaeda affiliate in Yemen. He was held aboard a naval vessel for more than two months and spoke freely to interrogators, including about his encounters with the former North Carolina man now editing the group's magazine, Samir Khan.
>
> While the United States had long tracked Mr. Khan, the new details from the Warsame interrogation raised the question of whether another American citizen should be considered for targeting. There was still scant evidence tying Mr. Khan to any specific plot, so the administration left him off the list. But events would not turn out so neatly.
>
> [snip]
>
> Mr. Khan, whom they had specifically decided not to add to the kill list, was dead, too. While the lawyers believed that his killing was legally defensible as collateral damage, the death cast a cloud over all those months of seemingly cautious efforts to analyze who should go on the list and who should not.

The NYT article strongly implies that in response to the Warsame intelligence, the government considered putting Khan on a targeting list at a time when he fit the same

category Awlaki had been in when the government first tried to kill him under a "sitting next to baddies" standard: a propagandist who was not operational. And yet the NYT concludes from that that Khan's death — which the government had apparently wanted but not found a way to justify legally — "cast a cloud" over the Awlaki killing?

Likewise, given the evidence the government does use a "sitting next to baddies" standard to kill people who are inconvenient, what is the credibility of this sob story?

> Then, on Oct. 14, a missile apparently intended for an Egyptian Qaeda operative, Ibrahim al-Banna, hit a modest outdoor eating place in Shabwa. The intelligence was bad: Mr. Banna was not there, and among about a dozen men killed was the young Abdulrahman al-Awlaki, who had no connection to terrorism and would never have been deliberately targeted.
>
> It was a tragic error and, for the Obama administration, a public relations disaster, further muddying the moral clarity of the previous strike on his father and fueling skepticism about American assertions of drones' surgical precision. The damage was only compounded when anonymous officials at first gave the younger Mr. Awlaki's age as 21, prompting his grieving family to make public his birth certificate.
>
> He had been born in Denver, said the certificate from the Colorado health department. In the United States, at the time his government's missile killed him, the teenager would have just reached driving age.

Um, fellas? You note that the Administration had a cover story ready for Abdulrahman's death (rather than remaining silent, which is what

they normally do), but from that you conclude the government treats this as a horrible mistake?

Mind you, the NYT makes their job — which, in addition to claiming critics of the legal case behind the Anwar al-Awlaki killing are simply confused, seems to be inventing narratives to make the Khan and Abdulrahman deaths less appalling — much easier by ignoring that WikiLeaks cable. But ignoring it does the same thing their demonstrably credulous acceptance of the Abu Tarak story does: it demonstrates how hard the NYT worked to preserve the narrative the government fed them, public evidence to the contrary.

It's all very convenient, that the NYT worked so hard to preserve the Administration's narrative spinning its action as reasonable, just before Obama will reportedly make a speech about it. Any bets that what Obama says will match the story told here?

COLLEEN MCMAHON: THE COVERT OP THAT KILLED ANWAR AL-AWLAKI WAS ILLEGAL

A lot of people have discussed this section of Judge Colleen McMahon's January 2, 2013 ruling dismissing ACLU and NYT's FOIA for memos and other documents related to the targeted killing of Anwar al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki:

> I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain **actions that seem on**

> **their face incompatible with our Constitution and laws**, while keeping the reasons for their conclusion a secret. [my emphasis]

But I'm not aware of anyone commenting at length on the section she titles, "Constitutional and Statutory Concerns about Targeted Killings," a 5-page discussion of assessing targeted killing in terms of due process, treason, and other laws.

While the section is not entirely off point — she explores some of the legal questions raised in ACLU's FOIA, though as I'll show, she expands on the questions ACLU raised — the section is completely extraneous to her task at hand, determining whether or not the government has to turn over its legal justifications for killing Anwar al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki. In other words, McMahon takes a 5-page detour from her work of adjudicating a FOIA dispute and lays out several reasons why the Awlaki killing may not be legal.

She recalls how central due process was to the founding of our nation.

> As they gathered to draft a Constitution for their newly liberated country, the Founders — fresh from a war of independence from the rule of a King they styled a tyrant- were fearful of concentrating power in the hands of any single person or institution, and most particularly in the executive. That concern was described by James Madison in Federalist No. 47 (1788):
>
> > The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny ….

> The magistrate in whom the whole executive power resides cannot of himself … administer justice in person, though he has the appointment of those who do administer it.

She reminds that the Treason Clause appears in Article III of the Constitution, not Article II.

> Interestingly, the Treason Clause appears in the Article of the Constitution concerning the Judiciary — not in Article 2, which defines the powers of the Executive Branch. This suggests that the Founders contemplated that traitors would be dealt with by the courts of law, not by unilateral action of the Executive. As no less a constitutional authority than Justice Antonin Scalia noted, in his dissenting opinion in *Hamdi*, 542 U.S. at 554, "Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime."

Thus far, she has just made it abundantly clear she meant her earlier comment about "actions that seem on their face incompatible with our Constitution and laws" seriously (and she addresses points — due process and Treason — the ACLU brought up explicitly). She interrupts her work of assessing the FOIA case before her to make it very clear she believes the Awlaki killing violated key principles of our Constitution.

But I'm particularly interested in the last two pieces of law she raises to suggest she thinks the Awlaki killing might be illegal. First, she looks at 18 USC 1119.

> 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).

18 USC 1119 is, of course, the passage of the white paper I focused on here, which the Administration dismisses, in part, this way.

> 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.

And I'm such a geek that I actually mapped out what Eric Holder said in his Northwestern Speech and what actually appears in the white paper. The discussion on section 1119 is, **by far**, the

topic explored in greatest length in the white paper but left unmentioned in Holder's public spin of the legal thinking behind Awlaki's killing. Section 1119 is something that Administration was very worried about, but didn't want the public to know how worried they were.

McMahon's discussion is interesting, too, because it's somewhat tangential to the list of things ACLU asked about. They ask for "the reasons why domestic-law prohibitions on murder … do not preclude the targeted killing of Al-Awlaki." And their original FOIA letter cites the same Dore article that McMahon cites. The ACLU never mentions section 1119 by name. But McMahon does, honing in on the statute that — at least given the relative focus of the white paper — the Administration seemed most concerned about. (She did get classified declarations, so it's possible she got the white paper, though her comments about not needing to see the one OLC memo identified in the Vaughn Indices would seem to suggest she had not seen it.)

Then McMahon brings up something that doesn't show up in the white paper (but one I've brought up).

> 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.

McMahon is, by this point, basically arguing that the Article II rationalizations that end up

in the white paper (whether or not she had seen it) are invalid. The President cannot authorize something that violates the Constitution and US law, not even for (or especially not for) a covert operation the CIA would conduct.

Mind you, she's a bit more gentle in her legal condemnation of the argument.

> So there are indeed legitimate reasons, historical and legal, to question the legality of killings **unilaterally** authorized by the Executive that take place otherwise than on a "hot" field of battle. [my emphasis]

But she refutes, in 5 pages, not only what the government argued in the white paper (including its extensive section 1119 argument), but also the Treason Clause question they didn't address.

And look at **what** she's refuting here. She says the Executive "unilaterally authorized" Awlaki's killing. She suggests they did so via a covert op.

In this section, she doesn't once mention the Authorization to Use Military Force the Administration tries to yoke CIA actions onto, in spite of her discussion of the AUMF earlier in her ruling. (Update: Though she does introduce her Treason section by saying, "If the War on Terror is indeed a war declared by Congress pursuant to its constitutional power, and if Al-Awlaki was a combatant in that war, then he is a traitor.")

In Colleen McMahon's 5-page detour, having read a slew of classified declarations on the legality of the Awlaki killing — including CIA's rationale for invoking Glomar — she addresses this killing as a covert operation authorized "unilaterally," with no mention of the AUMF attaching Congressional authorization to the killing.

Perhaps that's just her skepticism about whether the AUMF applies away from the "hot"

battlefield; elsewhere, she notes that Awlaki "was located about 1500 miles from Afghanistan, in Yemen, a country with which the United States is not at war (indeed, which the United States counts as an ally)." That is, perhaps she just doesn't buy the Administration's arguments about the global battlefield.

But I find it very telling that a Judge who has read classified declarations from several agencies (and went on to write her own classified ruling, in addition to the public one) assesses the legality of the Awlaki killing as if it were solely based on Article II authority.

THE WAR AND INTELLIGENCE BEHIND ANWAR AL-AWLAKI'S TARGETING

Believe it or not, there's a fascinating debate going on over at NRO. First, Charles Krauthammer points to the muddle of the Administration's white paper, which could have (he argues) just authorized Awlaki's killing under the laws of war.

> Unfortunately, Obama's Justice Department memos justifying the drone attacks are hopelessly muddled. They imply that the sole justification for drone attack is imminent threat — and since al-Qaeda is plotting all the time, an al-Qaeda honcho sleeping in his bed is therefore a legitimate target.
>
> Nonsense. Slippery nonsense. It gives the impression of an administration making up criteria to fit the president's kill list. No need to

> confuse categories. A sleeping Anwar al-Awlaki could lawfully be snuffed not because of imminence but because he was a self-declared al-Qaeda member and thus an enemy combatant as defined by congressional resolution and the laws of war.

Nowhere, unfortunately, does Krauthammer consider why they didn't do this — or indeed look more closely at the details behind Awlaki's killing.

Kevin Williamson takes issue with that, reviewing both Awlaki's lack of indictment after 9/11, but also expressing doubt that Awlaki moved beyond propaganda.

> There is a difference between sympathizing with our enemies and taking up arms against the country; there is even a difference between actively aiding our enemies and taking up arms against the country, which is why we have treason trials rather than summary execution.
>
> The question of whether al-Awlaki in fact took up arms against the United States is unanswered, at least in my mind. The evidence suggests that he was very much the "bin Laden of the Internet" rather than a man at arms. What perplexes me is that so many conservatives trust the same government authorities who got it so spectacularly wrong about al-Awlaki the first time around — feting him at the Pentagon, treating him as an Islamic voice of reason — to get it right the second time around. This is not a libertarian criticism but a conservative one. It is entirely possible that the same unique strain of stupidity that led to al-Awlaki's being invited to the Pentagon as an honored guest of the U.S. military is alive and well in the Obama

> administration. This is precisely why we have institutions such as the separation of powers, congressional oversight, and trials. Killing a U.S. citizen in the heat of battle is one thing, but Al-Awlaki was not killed in a battle; he was not at arms, but at breakfast. Enemy? Obviously. Combatant? Not obviously.

And then Andrew McCarthy writes in to suggest that Jane Fonda would have made the Kill List had we had one during Vietnam.

Now aside from McCarthy (who serves here only as a warning in where this is going), both these contributions are worth reading.

But what both are missing are the known details about the development of intelligence on Anwar al-Awlaki between the time he was first targeted, on December 24, 2009, and the time he was killed, on September 30, 2011. And while I can't claim to know the classified intelligence, there's enough in the public record that ought to give both men more nuance in their arguments. Three key points I lay out in more detail here:

- Awlaki was first targeted, by the military and before the OLC memo the white paper is based on was written, at a time when the intelligence community did not consider him operational.
- During negotiations for a plea agreement that never happened, Umar Farouk Abdulmutallab implicated Awlaki in a clearly operational role, but after plea negotiations fell apart, that testimony was

never presented in an antagonistic courtroom (indeed, the government itself told a significantly different story at Abdulmutallab's trial).

- By the time Awlaki was killed, the government likely had additional evidence suggesting Awlaki's role in actual plots — notably the October 2010 toner cartridge plot — was weaker than the "senior operational leader" role they invoked when they killed him.

The one time we presumably did try to kill Awlaki under the Krauthammer standard — even the government now says — he did not fit that standard. There was probably a moment to kill Awlaki under that standard (if you ignore that the government was only at this point formalizing AQAP's status as a terrorist group) around February 2010, before the white paper was written. But by the time we did kill him, not only were there unidentified reasons to get CIA involved (probably having to do with the unreliability of Ali Abdullah Saleh), but the contorted pre-crime standard of imminence John Brennan described probably was what the government was working with (as well as, I suspect, a theory that made Awlaki's propaganda into an act of war), because the intelligence implicating Awlaki had gotten weaker over time.

There are probably multiple reasons why the argument in support of Awlaki's killing is so contorted. But one of them appears to be changes in the intelligence the government had implicating him.

Which is why Williamson is ultimately correct. This is why we have courts and separation of powers.

THEY KNEW THE EVIDENCE AGAINST ANWAR AL-AWLAKI WAS WEAK WHEN THEY KILLED HIM

In case you don't want to read these two long posts, I want to point to two passages from the white paper that show, on two key points, the government wasn't even claiming Anwar al-Awlaki was the "senior operational leader of Al Qaeda or associated forces" they keep saying he was when they killed him.

First, on the issue of whether someone is an imminent threat or not, the white paper says a person is an imminent threat if he has "recently been involved in activities posing an imminent threat against the US" and has not renounced those activities.

> 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 this part of the definition requires only that the target be an al Qaeda member, not a

“senior operational leader.”

And then, when examining whether killing an American overseas counts as murder, the white paper says the President can order the murder of an al Qaeda member who poses an imminent threat to the US.

> 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.

Again, the American need only be a member, not a senior operational leader.

These are, to be sure, two short passages in a much longer memo. But consider how they work with the 3-part criteria laid out in the memo, which requires only that 1) John Brennan determines that someone is an imminent threat, 2) John Brennan determines that capture is not feasible, and 3) that the killing be consistent with applicable law of war principles.

Once you get to that “imminence” designation, you can kill the American, based on John Brennan’s say so. And “imminence,” for these purposes, can be as weak as past involvement (not leadership — and remember they once said that actions that lead to actions that pose a threat can get you killed, too) in activities that pose an imminent threat of violent attack on the US, so long as you haven’t formally renounced those activities.

This, I strongly suspect, is why Ron Wyden keeps asking “Does the President have to provide individual Americans with an opportunity to surrender before using lethal force against them?” Because as the white paper stands, being uninvolved with any attack for at least a year and perhaps as long as 20 months — which may

well be the case with Awlaki — doesn't count as renunciation.

I have suggested this language may have gotten introduced in a second memo, not long before they killed Awlaki in September 2011, at a point when all the evidence against him was very stale and had gotten weaker over time (the government moved to protect something under CIPA in the UndieBomber case just a week before Awlaki was killed, though that could have been the first memo).

Whether that's what happened, though, it seems highly unlikely the language would be in the white paper if it weren't in some document somewhere authorizing Awlaki's killing.

Which seems to suggest they couldn't prove — even if they once had been able to — that Awlaki was the senior operational leader they have insisted him to be. And so they wrote the memo to authorize the killing anyway.

IS ONE OF THE ANWAR AL-AWLAKI MEMOS A REVISED IMMINENCE STANDARD?

I've been working on a theory on why the white paper is so crappy based, in part, on a problem international law experts keep making. For my purposes, Noura Erakat's description of the problem will suffice, but a ton of people have raised it.

> Imminence is one element of the law of self defense and has no bearing upon the lawfulness of a target where there is an existing armed conflict. Instead, in ongoing hostilities, the legality of a

> target is a status-based assessment that distinguishes combatants from civilians. Unless he surrenders, a combatant can be killed regardless of activity. In contrast, a civilian retains his immunity unless he directly participates in hostilities, which is subject to a wholly distinct legal analysis. The point is this: if Al-Awlaki, or another target, is indeed a combatant in the U.S.'s ongoing hostilities authorized by the 2001 Authorization for the Use of Military Force (AUMF), an imminence analysis is not relevant at all.

If, as the white paper sort of suggests, the AUMF is what justifies Anwar al-Awlaki's killing and the government had evidence he was operational (that is, a legitimate combatant with AQAP after the point when AQAP was added to the official AQ roster) then imminence should be moot. So why is it in there, particularly in such a crazyass form?

Consider, though, that we know there are multiple memos: two, according to DiFi, in the opening moments of the John Brennan hearing, though Ron Wyden insisted the Committee hadn't received all the targeted killing memos and DiFi may have said they're waiting on 8 more.

Also we know that Ron Wyden has been asking whether the Administration killed Awlaki under AUMF or Article II authorities, suggesting that the Administration may be making arguments based on one or another in different memos.

So I'm going to advance the wildarsed guess that — rather than being a simple summary of the June 2010 memo we know about — the white paper is actually a pained amalgam meant to encompass the more radical memos, while still retaining some patina of whatever decent argument Marty Lederman and David Barron made in June 2010.

Consider the overarching history of what

happened with Awlaki (I aspire to lay this out in more detail at some point). Awlaki would fit one criteria for being an imminent threat in December 2009, when they first targeted him, another in June 2010, when we know they wrote one memo, and a third in September 2011, when they finally got around to killing him. Plus, for a variety of reasons, they changed which agency they were using to hunt him.

What we understand to be DOD tried to kill Awlaki on December 24, 2009 but missed.

The problem is, on that date, the Intelligence Community did not believe Awlaki to be operational. Had they waited two weeks, and if DOJ really did collect the information implicating Awlaki in the UndieBomb they say they collected, that attempt on December 24, 2009 (er, January 7, 2010) would have been clearly legal, a DOD strike on a combatant. But as it was, it was a stretch. (By the end of 2010, WikiLeaks exacerbated this problem by making it clear we were actually targeting Awlaki, by name, not just targeting the guy next to him, which probably has raised the Administration's angst about their legal claims.)

Dennis Blair advanced a rationale for targeting Awlaki on February 3, 2010. And while some of his explanation maps what now appears in the white paper, this does not.

> "We don't target people for free speech. We target them for taking action that threatens Americans or has resulted in it."

"Taking action that has resulted in threats to Americans" definitely describes what we knew of Awlaki on December 24, 2009. His propaganda had inspired Nidal Hasan, who had attacked Fort Hood. That said, this would still be a First Amendment justification, no matter how much Blair claimed it wasn't.

I'm not sure whether there's a memo authorizing

the 2002 Kamal Derwish killing (that is, authorizing knowingly killing an American as collateral damage in a strike purportedly on another target). But I suspect after the attempt on Awlaki (and the publicity surrounding it), but especially after Blair ran his mouth, DOJ started panicking about needing a memo to cover both the 2009 attempt on Awlaki and the ones they were planning.

It's not clear when Umar Farouk Abdulmutallab actually implicated Awlaki in his attempt (though it appears to have happened after Blair's comments, which may be why his justification seems to focus on Hasan), and I have my doubts about whether those statements would hold up in an antagonistic court. But we know that he implicated Awlaki as part of plea negotiations, we know in April, Awlaki was officially put on a kill list, and we know that in June 2010, David Barron and Marty Lederman finished a memo authorizing Awlaki's killing. At that point, Awlaki had been tied to the UndieBomb attack 6 months earlier via both NSA intercepts and Abdulmutallab's confession (and probably reports from people infiltrated into AQAP) to support that claim. In addition, the government would eventually decrypt what they claimed to be emails between British Airways Engineer Rajib Karim and Awlaki from between January 25 and February 15, 2010, discussing potential attacks on the airline. So not "imminent," but two attacks in late 2009 and early 2010 backed by a range of evidence.

Here's what — per Charlie Savage — the June 2010 memo said about imminence.

> It also cited several other Supreme Court precedents, like a 2007 case involving a high-speed chase and a 1985 case involving the shooting of a fleeing suspect, finding that it was constitutional for the police to take actions that put a suspect in serious risk of death in order to curtail an imminent risk to innocent people.

> The document's authors argued that "imminent" risks could include those by an enemy leader who is in the business of attacking the United States whenever possible, even if he is not in the midst of launching an attack at the precise moment he is located.

Note: this imminence — at least as Savage lays out working second-hand — pertains exclusively to the domestic context. Imminence is a car chase, not international law. It was based not on the event 6 months earlier but on the premise that Awlaki was "in the business of attacking the United States whenever possible." Which, from November 2009 until February 2010, the government claimed he had been.

Then, in September 2010, Abdulmutallab fired his lawyers. At that point, there was discussion about charging Awlaki; that never, as far as we know, occurred. Perhaps the firing of his lawyers, which appears to be in part based on a disagreement about how they were pursuing a plea, made it more difficult to indict Awlaki, because it made Abdulmutallab's description of Awlaki's role weaker.

Then in October, Jabir al-Fayfi, who had been infiltrated into AQAP (and probably overlapped with Abdulmutallab) tipped the Saudis to the toner cartridge plot. As I understand it, the Arab press reported that Fayfi said others in AQAP were the organizers of this attack, not so much Awlaki. So by this point, the hopes of getting Abdulmutallab to implicate Awlaki were fading, and there was a witness who appeared to suggest Awlaki wasn't the operational leader of AQAP's external operations, as the government claimed.

The evidence of Awlaki's imminent danger was getting weaker.

Fast forward to 2011. Sometime early that year, the Saudis roll out their drone base. I suspect this allowed the US to bypass sharing

information with Ali Abdullah Saleh, who really didn't want to piss off Awlaki's powerful family. It is also understood to be a CIA base.

Those two points are important. As soon as you talk about CIA carrying out the attacks, you raise the possibility that you're using CIA because the country has not consented (or, in this case, has objected) to a particular kind of operation, which already puts you into self-defense rather than AUMF. Moreover, CIA gets you to an entirely different rationale than the AUMF, since (as Morris Davis points out) they can't operate under law of war protection.

In other words, by shifting the party that will conduct the assassination, it seems, you also shift what the justification needs to be, because the applicable laws are entirely different for the CIA than for DOD.

In March, State tried to trick Awlaki to go to the Embassy in Sanaa; ostensibly they were going to take away his passport but that, of course, is ridiculous. In May, there was another attack on Awlaki, which he narrowly avoided (suggesting he may have been tipped off). And then finally, in September, he was killed, followed two weeks later by his teenaged son (who may have been killed by JSOC and therefore would be back in the collateral damage category used with Kamal Derwish).

So by the time someone sat down to approve the operation against Awlaki in September 2011 (if they weren't already using an authorization from earlier, such as the original kill list designation in 2010), it would have been 20 months since the operations that — at least as far as we know — really implicated Awlaki. Really hard to use a car chase scenario to justify the killing, particularly given the appearance that the car had run out of gas in the interim.

Which may be why we get this language about imminence in the white paper.

> By its nature, therefore, the threat posed by al-Qa'ida and its associated forces demands a broader concept of imminence in judging when a person continually planning terror attacks presents an imminent threat, making the use of force appropriate. In this context, imminence must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans.
>
> [snip]
>
> 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. [my emphasis; see update below]

A couple of points. First, the second paragraph in this passage includes two different scenarios, each one sentence long. The first sentence seems to map to the description of imminent in Charlie Savage's rendering of the memo, above: an operational leader planning attacks with some continuity, even if there's not an immediacy. That scenario may well come directly from the June 2010 memo, if my theory

is correct, and describes what DOJ believed Awlaki to be while they still had fresh intelligence implicating him as a leader.

Note how the second scenario changes vocabulary. It is no longer about an operational leader; it refers only to al Qaeda **membership**. It requires only that this member have been involved in activities posing a threat to America; it no longer requires he be a leader or even operational! And the sheer failure to formally renounce former activities — which may have been what the March 2011 ploy was about — is all that gets this possibly low-level non-operational member of al Qaeda included for killing.

In other words, if you approach this white paper as an amalgam of different memos, variations in vocabulary and logic begin to appear. And while it's almost impossible to map what language might have been written when without knowing when the other memos were written, we can at least see how some of this language applies to Awlaki on the day they got Abdulmutallab to implicate him as the mastermind of the UndieBomb plot, and some of it applies to Awlaki after he hadn't been implicated — and certainly not in the dominant role — for many months.

I don't think that's the only thing that would explain the craziness of this memo; I think a lot of it has to do with the different agencies that might carry out the killing and the legal requirements on them. But I strongly suspect the reason everyone is so confused about this imminence language is because they're assuming it comes from one coherent memo.

Update: While I was reading the white paper in unstamped form, I realized I mis-transcribed the passage on imminence from it above, replacing "Moreover" with "Second." I have fixed it above (note the underline). It does slightly change the logic of the passage, but the vocabulary remains distinct.

ARE WE TO BELIEVE SAMIR KHAN'S COMMUNICATIONS WERE USED AS A TRIPWIRE, BUT AWLAKI'S WEREN'T?

You should read both the AP and OregonLive accounts of yesterday's Mohamed Osman Mohamud trial for their description of the problems surrounding the FBI's account of its early investigations of the teenager (not to mention its choice, when Mohamud's drinking suggested he was abandoning his radicalism, they nudged him back into extreme views).

But for now I'd like to look at the account FBI Agent Issac DeLong gave of how they first started tracking Mohamud. From the AP.

> DeLong's testimony also revealed that FBI agents in the Charlotte, N.C., office tracking now-deceased al-Qaida operative Samir Khan were the first to identify Mohamud as a potential threat because of communication between the two.
>
> The FBI was tracking Khan — who was killed in a drone strike with then-al-Qaida leader Anwar al-Awlaki — when they came across Mohamud's emails to him in early 2009. They tracked down Mohamud's IP address to a Portland suburb and identified him. When he cropped up on the bureau's radar again, DeLong said he was able to rely on that information to identify Mohamud.
>
> DeLong also said that a team of FBI

> agents followed Mohamud during his freshman year of college, monitoring his phone calls, text messages and emails, along with video and photo surveillance.

And from OregonLive:

> Agents in Charlotte, N.C., picked up on Mohamud's name in early 2009 while intercepting email traffic of then-U.S. based al-Qaida propagandist Samir Khan.
>
> That August, FBI Special Agent Isaac DeLong was assigned to interview Mohamud's father, Osman Barre, who feared Muslim extremists were radicalizing his son. Barre had read about Somali youths from Minnesota who were heading overseas to fight, and he worried his own son was trying to fly to Yemen to fight against the West, DeLong testified.
>
> Barre agreed to speak to Mohamud and try to make sure he wouldn't fly overseas. He took his son's passport and reported back to the FBI that they had a chat.
>
> "His father said that his son was not hiding anything," DeLong said, "and there was nothing to worry about."
>
> But Barre followed up by forwarding to the FBI an email link he had received, DeLong said. It concerned a school in Yemen that his son hoped to attend. The correspondence contained the email address truthbespoken@gmail.com, which Mohamud had created in the United Kingdom, DeLong said.
>
> The agent combed through the FBI's storehouses of electronic data, finding that the address had been tied to the investigation of Samir Khan. He would learn that Mohamud had traded more than 100 emails with Khan beginning in February 2009 and that Mohamud had

> written articles for Khan under a pen name while a student at Beaverton's Westview High School.

There are things that **still** don't make sense about this narrative. At least from these accounts, it's unclear whether the Charlotte discovery led to the Portland investigation, or whether the preliminary investigation out of Charlotte just served to make Mohamud's father's concerns more alarming.

And note this account still doesn't jive with Hesham Abu Zubaydah's claim that he had been told to track Mohamud at his mosque as early as 2008 (though we're close enough in timeline that it's possible they had Hesham track Mohamud after the Khan discovery, but before the formal investigation).

Moreover, note that the FBI delayed the Khan admissions until after the US had killed him, and turned over details of DeLong's communications just weeks before the trial. The government tried to hide all of this earlier part of the narrative for a long time.

Mostly, though, I'm interested in how the FBI's treatment of emails to Khan in early 2009 compared with its treatment of emails to Anwar al-Awlaki in that same period and earlier. From the Webster report, we know the FBI wasn't prioritizing Awlaki emails in this period.

> In fact, potentially radicalized people communicating with Awlaki were only incidentally tracked until after the [Nidal Hasan] attack(s) in 2009; the wiretap on Awlaki was not considered primarily a source of leads.
>
> The report explains that when the Nidal Hasan emails were first intercepted the wiretap (which appears to have started on March 16, 2008) occasionally served as a "trip wire" identifying persons of potential interest. (Remember that bracketed comments are substitutions for

> redactions provided in the report itself.)
>
> > The Aulaqi [investigation] [redacted] also served as an occasional "trip wire" for identifying [redacted] persons of potential interest [redacted]. When SD-Agent or SD-Analyst identified such a person, their typical first step was to search DWS-EDMS [their database of intercepts] and other FBI databases for additional information [redacted]. If the [redacted] [person] was a U.S. Person or located in the U.S., SD-Agent might set a lead to the relevant FBI Field Office. If the information was believed valuable to the greater intelligence community and met one of the FBI's intelligence-collection requirements, SD-Analyst would disseminate it outside the FBI in an IIR.
> >
> > [snip]
> >
> > On December 17, 2008, Nidal Hasan tripped the wire. (40-41)
>
> But all of the "trip wire" leads that came from this wiretap up to this point were set as "Routine Discretionary Action" leads. (44) That's how Hasan's initial emails were also treated.

Now it's possible that Mohamud's emails were treated in the same way: the FBI went through the effort of identifying his IP, but once they had identified him they dropped the investigation. Though it doesn't make sense that Mohamud's writings for Khan would merit a big alarm **later** if they didn't when they were

written.

In other words, to the degree that the FBI's story about Mohamud's communication with Khan doesn't make sense, it suggests the possibility that Khan's communications were used a Tripwire in a way that Awlakis, during the same period, were not.