

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.