



Six Questions for Evaluating a Justice Department Memo Authorizing the Killing of a U.S. Citizen Away from a Battlefield

The Justice Department recently made available to all senators one memo from the Justice Department's Office of Legal Counsel ("OLC") regarding the use of lethal force against a U.S. citizen. It is reportedly one of four OLC memos that specifically address the extrajudicial killing of an American citizen away from a battlefield. There are at least eleven OLC opinions related to targeted killing or drone strikes in total, according to a Senate Intelligence Committee estimate made last year. Members of the Intelligence and Judiciary committees were given access to the four OLC memos related to U.S. citizens last year, but no senators have seen any of the seven or more other OLC opinions; the full Senate has access to only one memo.

The memo reportedly sets out the Executive Branch's claims of authority to kill Americans deemed to pose a threat to national security. We understand that it also includes allegations about Anwar al-Aulaqi, an American killed in Yemen in September 2011. These allegations have not been tested in court and, whatever their merit, we emphasize that the crucial question for your consideration is whether the memo's legal interpretations are consistent with our Constitution and our laws. The memo's legal interpretations set precedent for when the Executive Branch may claim the unilateral authority to kill—precedent that will be used by future administrations and other nations. Put simply, the legal interpretations in the memo outlast one specific strike.

All senators should read the memo provided to them, with the advice of cleared staff. There are Judiciary and Intelligence Committee staff who can provide advice to senators who are not on those committees and who do not have cleared staff. We hope that this summary of key legal questions will assist in your review of the memo.

1. How does the memo interpret the concept of "imminent threat"?

The Administration has claimed authority to carry out the extrajudicial killing of an American located away from a recognized battlefield if an "informed official" first determines that the target poses an "imminent threat."¹ A key question, then, is how the memo interprets the term

¹ See U.S. Department of Justice, *Lawfulness of Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force*, Nov. 8 2011, available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf [hereinafter Justice Department White Paper].

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“imminent.” Interpreting the term too broadly could give the government sweeping power to kill individuals in response to vaguely defined threats that are not “imminent” in any ordinary sense of that word.

Interpreting the term “imminent” too broadly would also be inconsistent with the Constitution and international law. Outside of recognized battlefields, the Fourth and Fifth Amendments prohibit the use of lethal force except as a last resort in the face of a concrete, specific, and imminent threat of deadly harm.¹ Human rights law protects life with similar standards. Under the Constitution and international law, a person cannot be killed extrajudicially because of his or her past unlawful behavior. Any such killing would constitute impermissible extrajudicial punishment. A Justice Department legal interpretation focused on an individual’s “continuing” involvement in generalized “planning” would stretch the concept of “imminence” beyond its plain meaning, and create an elastic, easily manipulated standard.

Outside of armed conflict, the use of lethal force in response to an imminent threat is only permissible as a last resort, that is, where there is no other means, such as capture or non-lethal incapacitation, of preventing that threat to life. Accordingly, the feasibility of capture (as an alternative to killing) is also a central question. We urge you to closely scrutinize the memo’s analysis in this regard. If a foreign government’s refusal to consent to a capture operation is treated as the decisive factor in determining what is feasible, that could mean that a foreign government effectively decides whether a U.S. citizen lives or dies. Moreover, it is crucial to know what diplomatic efforts the government attempts before deciding that capture is “not feasible.”

2. Does the memo recognize any meaningful limit to the authority provided by the 2001 Authorization for the Use of Military Force (AUMF) and international law?

Congress passed the AUMF days after September 11, 2001 to authorize the use of force against those who planned, authorized, committed or aided the attacks, or harbored such organizations or individuals. Congress did not intend the AUMF to be a “blank check” for the use of lethal force without geographic or temporal constraints, or for the use of lethal force against actors who have no substantial connection to the September 2001 attacks.² A key question, then, is how broadly the memo interprets the authority provided by the AUMF.

¹ See *Scott v. Harris*, 550 U.S. 372, 384 (2007); *Graham v. Connor*, 490 U.S. 386 (1989); *Johnson v. Dist. of Columbia*, 528 F.3d 969, 977 n.4 (D.C. Cir. 2008); *Price v. United States*, 728 F.2d 385, 388 (6th Cir. 1984).

² See, e.g., 147 Cong. Rec. S9417 (Sen. Feingold) (AUMF is “appropriately limited to those entities involved in the attacks that occurred on September 11”) (daily ed. Sept. 14, 2001); *id.* at S9416 (Sen. Levin) (“[The AUMF] is limited to nations, organizations, or persons involved in the terrorist attacks of September 11. It is not a broad authorization for the use of military force against any nation, organization, or persons who were not involved in the September 11 terrorist attacks.”). Moreover, President Bush specifically proposed—and Congress rejected—an earlier version of the AUMF that would have authorized the President to use force to “deter and pre-empt any future acts of terrorism or aggression against the United States” that are unrelated to the September 11th attacks. Richard F. Grimmett, *Authorization for Use of Military Force in Response to the 9/11 Attacks* (P.L. 107-40): Legislative History, CRS Report for Congress (Jan. 16, 2007).

We urge you to closely scrutinize the memo's treatment of the concept of "associated forces." In other contexts, the Administration has argued that the AUMF authorizes the use of force against Al Qaeda and its "associated forces," but it has failed to say what specific organizational features or conduct would lead a group to be classified as an associated force.³ It has also claimed that the AUMF authorizes "[a]ny U.S. operation" against these groups, wherever it occurs.⁴ This is an expansive interpretation that threatens Congress' constitutionally mandated role to declare when the United States is at war, where, and against whom.

A related question is whether the Administration's position on the scope of armed conflict is consistent with the laws of war, which require a specific analysis of whether hostilities are against a group that is sufficiently organized and have reached a level of intensity that is distinct from sporadic acts of violence.⁵ Another question is how heavily the Administration relies on a controversial and novel theory of "co-belligerency" that purports to justify the use of lethal force against "associated forces." Federal courts have only accepted this theory in a limited way (in the detention context) and it has virtually no acceptance abroad.

The Administration has also described "the inherent right to national self-defense recognized in international law" as a basis for using force.⁶ This concept of "self-defense" relates to whether use of force on the territory of another state would violate that state's sovereignty.⁷ It cannot, on its own, tell us whether any particular killing is lawful. An overbroad interpretation of "imminent threat" in this context could lead the Administration to expansively claim self-defense, e.g., against a group based on an apparent generalized intent to attack the United States at some undefined point in the future, even without evidence of the group's planning or capacity for a specific attack.⁸

3. Does the memo correctly interpret the procedural due process requirements of the Fifth Amendment?

The Fifth Amendment requires the government to limit the risk of erroneously depriving a person of life.⁹ A key question is whether the Executive Branch's decision-making and use of lethal force process is rigorous enough to minimize the risk that the government will erroneously target and kill an American. A crucial unknown is what standard decision-makers use for testing and

³ See Jeh Johnson, "National Security Law, Lawyers and Lawyering in the Obama Administration," Yale Law School, Feb. 22, 2012 available at <http://www.cfr.org/national-security-and-defense/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448>;

⁴ Justice Department White Paper, *supra*.

⁵ For a discussion, see ACLU et al., Joint Letter to President Obama on U.S. Drone Strikes and Targeted Killings (April 11, 2013), available at <http://www.nytimes.com/interactive/2013/04/13/us/politics/rights-groups-share-concerns-over-drones.html?ref=politics>.

⁶ Justice Department White Paper, *supra*.

⁷ See UN Charter, art. 2(4), art. 51.

⁸ Eric Holder, Attorney General, Department of Justice, "Attorney General Eric Holder Speaks at Northwestern University School of Law," Northwestern University School of Law, March 5, 2012, <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>; Justice Department White Paper, *supra*.

⁹ See *Mathews v. Eldridge*, 424 U.S. 319 (1976) (requiring an assessment of, inter alia, the "risk of erroneous deprivation through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards").

verifying evidence of “imminent threat”—a standard of “beyond a reasonable doubt” (the standard for guilt in a criminal trial) or some lower standard?

4. How does the memo address statutes that on their face criminalize the killing of Americans outside of the United States?

Congress has made it a crime for any U.S. person to kill another U.S. person outside of the United States.¹⁰ It has also criminalized conspiracies whose objective is murder and that are planned and partially affected within the United States.¹¹ If the Administration interpreted these laws as inapplicable wherever the government asserts it is using force under the laws of war or self-defense,¹² it would essentially be claiming exemption from liability under federal criminal law for an off-battlefield killing. Such an interpretation would be counter to the apparent will of Congress and raise concerns about an inherent conflict of interest for the Administration.

5. Does the memo recognize the need for judicial review of the killing of a U.S. citizen after the fact?

The Administration has claimed authority to kill Americans without presenting evidence to a judge before or after the fact, or even acknowledging to the courts or to the public that this authority has been exercised. In other words, the Administration claims authority to kill Americans in secret. Judicial review is crucial to ensuring Americans can hold their government accountable if it unlawfully takes a life. Legitimate secrecy and national security concerns can be addressed by federal courts, which routinely use well-tested procedures in a variety of national security contexts. Hard scrutiny should be applied to any Justice Department claims that judicial review is infeasible or unavailable.

6. Will the memo or its reasoning apply to Americans and non-citizens who are not “senior operational leaders” of Al Qaeda or associated forces? Will it apply to future conflicts and uses of lethal force?

Even if the memo focuses on the legality of targeting a “senior operational leader” of Al Qaeda or associated forces, it may have ramifications for other individuals and for future conflicts and lethal force operations. Indeed, Senator Lindsay Graham stated last year that as many as 4,700 people had been killed by drone attacks. Only a fraction of them could plausibly be considered “senior operational leaders,” and yet it is unclear whether they were targeted based on the same Justice Department memo’s interpretations. A crucial question is whether the memo contains language expressly limiting its precedential value or applicability to other cases.

We also urge you to closely scrutinize the sections of the memo that relate to bystander casualties. The Administration has acknowledged that three U.S. citizens who were not “intentionally targeted” have nevertheless been killed in U.S. strikes.¹³ They include a 16-year-

¹⁰ See 18 U.S.C. § 1119(b).

¹¹ See 18 U.S.C. § 956(a).

¹² Justice Department White Paper, *supra* (discussing an application of the “public authority” exception to murder and manslaughter).

¹³ See Letter from Attorney General Eric Holder to Chairman Patrick J. Leahy, Committee on the Judiciary, U.S. Senate (May 22, 2013), available at <http://www.justice.gov/slideshow/AG-letter-5-22-13.pdf>.

old boy whom no one has accused of wrongdoing. It is important to consider what measures the memo states the government must take to limit or eliminate the risk of bystander casualties.

Thank you for your attention to this matter. Please do not hesitate to call ACLU legislative counsel Naureen Shah at 202-675-2327 or senior legislative counsel Chris Anders at 202-675-2308 or contact us at nshah@aclu.org or canders@aclu.org if you have any questions.