February 19, 2010

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Lethal Operation Against Shaykh Anwar Aulaqi

The Office of Legal Counsel has asked for your views on the legality of the Central Intelligence Agency's ("CIA") proposed use of lethal force in Yemen against Shaykh Anwar Aulaqi, a U.S. citizen who the CIA assesses is a senior member of Al-Qa'ida in the Arabian Peninsula.

Under the conditions and factual predicates as represented by the CIA and in the materials provided to us from the Intelligence Community, we believe that a decisionmaker, on the basis of such information, could reasonably conclude that the use of lethal force against Aulaqi would not violate the assassination ban in Executive Order 12333 or any applicable constitutional limitations due to Aulaqi's U.S. citizenship. This memorandum confirms oral advice setting forth this conclusion.

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Section 2.11 of Executive Order 12333 provides that "[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination." 46 Fed. Reg. 59941 (Dec. 4, 1981).
The question that remains is whether Arora's status as a U.S. citizen imposes any constitutional limitations that would preclude the proposed lethal action.

This conclusion finds support in Supreme Court case law addressing whether a U.S. citizen who acts as an enemy combatant may be subject to the use of certain types of military force. See Hamdi v. Rumsfeld, 542 U.S. 507, 521-24 (2004) (plurality opinion); cf. also Ex parte Quirin, 317 U.S. 1, 37-38 (1942) ("[c]itizens who associate themselves with the military arm of the enemy government, 

(b)(1) 
(b)(3) 
(b)(5) 
(b)(1) 
(b)(3) 
(b)(5)
and with its aid, guidance and direction enter [the United States] bent on hostile acts," may be treated as "enemy belligerents" under the law of war). 

Because Aulaqi is a U.S. citizen, the Fifth Amendment's Due Process Clause, as well as the Fourth Amendment, likely applies in some respects, even while he is abroad (in this case, in Yemen). See Reid v. Covert, 354 U.S. 1, 5-6 (1957) (plurality opinion); United States v. Verdugo-Urquidez, 494 U.S. 250, 269-70 (1990); see also In re Terrorist Bombings of U.S. Embassies in East Africa, 352 F.3d 157, 167-68 (2d Cir. 2003). In Hamdi, a plurality of the Supreme Court used the Mathews v. Eldridge balancing test to outline the due process rights of a U.S. citizen captured on the battlefield in Afghanistan and detained in the United States, explaining that "the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action,' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." Hamdi, 542 U.S. at 529 (plurality opinion) (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).
("Application of the Fourth Amendment to these circumstances [i.e., foreign policy operations] could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest.")

This conclusion draws further support from the fact that, even in domestic law enforcement operations, the Supreme Court has noted that "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape and if, where feasible, some warning has been given." Tennessee v. Garner, 471 U.S. 1, 11-12 (1985).

where a capture operation is infeasible and the targeted person is part of a dangerous enemy force and poses a continued and imminent threat to U.S. persons or interests. the use of lethal force would not violate the Fourth Amendment.

For these reasons, and on these understandings, we do not believe the Constitution prohibits the proposed lethal action.

Please let us know if we can be of further assistance. (U)

David J. Barron
Acting Assistant Attorney General