18 USC 1119 FOREIGN MURDER AND OBAMA TARGETED KILL WHITE PAPER

Back in February, when the "White Paper" was first "leaked", Marcy wrote a fantastic article entitled Article II or AUMF? "A High Level Official" (AKA John Brennan) Says CIA Can Murder You on the issues of Article II authority versus AUMF authority in relation to the Obama targeted killing program. First off, let me say that the the lack of recognition of the presence of *both* these these respective authorities in the targeted killing program, even among legal commentators I respect greatly, is one of, if not the, most discouraging aspects of the discussion being had. Sadly, the big filibuster by Sen. Rand Paul did not necessarily improve the understanding, and even the New York Times continues to propagate the misdirection and misinformation peddled by the Obama Administration.

I wish to discuss the interaction of the statutory law contained in 18 USC 1119, the "Foreign Murder statute", with the greater Obama Administration Targeted Killing Program, and the White Paper foundation for it. Specifically I want to point out the circular and disingenuous way in which the White Paper tries to bootstrap itself, and the Administration, around criminal liability for murder in the case of a targeted US citizen such as Anwar Awlaki. Frankly, Marcy let fly with another must read post on 18 USC 1119 and the White Paper yesterday in the wake of the New York Times sop to the Administration, and it filets both the White Paper, and the NYT, open at the seams.

The most important principle to understand about the White Paper's discussion of 18 USC 1119 is, as Marcy noted, that it is impertinent if the the law of war (formally the "Law of Armed

Conflict" or "LOAC") is truly in play. In short, if the Administration is using the AUMF – military force – in an active battle situation, there is no need for further discussion, whether Mr. Awlaki is a US citizen or not. That, of course is diametrically opposed to what the facts were at the action point with Awlaki, and that we now know.

The truth is the Administration used a civilian agency, the CIA, to kill a US citizen without judicial due process, far from the "hot battlefield" and that is why such a deliberate attempt was made in the White Paper to obfuscate the legal basis for their targeting and killing, and why such a seemingly inordinate time was spent in the White Paper on a traditional criminal law statute, 18 USC 1119.

The statutory language of 18 USC 1119 states:

> (a) Definition. – In this section, "national of the United States" has the meaning stated in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).
> (b) Offense. – A person who, being a national of the United States, kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country shall be punished as provided under sections 1111, 1112, and 1113.
> (c) Limitations on Prosecution. – (1) No prosecution may be instituted against any person under this section except upon the written approval of the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, which function of approving prosecutions may not be delegated. No prosecution shall be approved if prosecution has been previously undertaken by a foreign country for the same conduct.
> (2) No prosecution shall be approved

> under this section unless the Attorney General, in consultation with the Secretary of State, determines that the conduct took place in a country in which the person is no longer present, and the country lacks the ability to lawfully secure the person's return. A determination by the Attorney General under this paragraph is not subject to judicial review.

Hard to look at the face of 18 USC 1119 and not see why it is so germane to the targeted killing discussion. But you need not take my word for it, this is why the previously somewhat arcane statute takes up *five full pages*, nearly a third of the discussion, in the White Paper. It is also, as Marcy pointed out in back in February, why Judge Colleen McMahon of the Southern District of New York, who unlike the commentariat, has seen the classified filings, went out of her way to focus on the intersection of the targeted killing program with 18 USC 1119 when she said in her January 2, 2013 opinion:

> 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).

And, as both Judge McMahon and Marcy noted, "Presidential authorization does not and cannot legitimize covert action that violates the constitution and laws of this nation." Well, no it cannot. And that is also consistent with the "Take Care Clause" in Article II, Section 3 of the Constitution requiring a President to insure that all laws (read statutes) are "faithfully executed". That means the President cannot simply abrogate or ignore the clear language or 18 USC 1119.

So, if the target, in this case Awlaki, was killed by a US civilian action in a foreign country and away from a, as Judge McMahon put it, "hot field of battle", then the Administration has a problem. Houston, the Administration has a problem with 18 USC 1119.

Let's see how strong their justification for avoidance on 1119 is as laid out in the White Paper. In a word, it is weak sauce indeed. The White Paper relied on two commingled ideas to get around 18 USC 1119, "public authority justification" and traditional criminal law enforcement justifications (for instance self defense and necessity) as embodied in domestic case precedent. So, are those justification issues bars to prosecution for the CIA drone operators and their superiors up the food chain? No.

The NYT article described the rationale of the OLC Awlaki Kill Memos, Marty Lederman and David Barron, as follows:

> Now, Mr. Barron and Mr. Lederman were being asked whether President Obama's

> counterterrorism team could take its own extraordinary step, notwithstanding potential obstacles like the overseas-murder statute. Enacted as part of a 1994 crime bill, it makes no exception on its face for national security threats. By contrast, the main statute banning murder in ordinary, domestic contexts is far more nuanced and covers only "unlawful" killings.
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> As they researched the rarely invoked overseas-murder statute, Mr. Barron and Mr. Lederman discovered a 1997 district court decision involving a woman who was charged with killing her child in Japan. A judge ruled that the terse overseas-killing law must be interpreted as incorporating the exceptions of its domestic-murder counterpart, writing, "Congress did not intend to criminalize justifiable or excusable killings."
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> And by arguing that it is not unlawful "murder" when the government kills an enemy leader in war or national self-defense, Mr. Barron and Mr. Lederman concluded that the foreign-killing statute would not impede a strike. They had not resorted to the Bush-style theories they had once denounced of sweeping presidential war powers to disregard Congressionally imposed limitations. (emphasis added)

So, Lederman and Barron found justifications and then boot strapped those into their pre-desired result. First, let's look at the "public authority justification" component. Again, that would have solid weight if it were a military strike, but the CIA stands in different shoes. Kevin Jon Heller (who wrote that first pesky 2010 blog post on 18 USC 1119 that caused Lederman and Barron such "uneasiness"), also weighed in yesterday on the nonsense pitched by Mazzetti, Savage and Shane in the NYT. Here is the key take from Professor Heller on the

"public authority justification" claim:

> The CIA is obviously not an "organized armed force, group, or unit" that is under the command of the US military; the CIA is, in its own words, "an independent US Government agency responsible for providing national security intelligence to senior US policymakers." Nor are the CIA's drone strikes controlled by the military (which would not satisfy Art. 43 anyway). The interesting provision is paragraph 3. The CIA may be an "armed law enforcement agency," but it still does not satisfy Art. 43(3): first, it has not been "incorporated" into the US's armed forces, because incorporation requires national legislation subjecting the agency to military control (see the ICRC Commentary to AP I, para. 1682); and second, the US has never even formally acknowledged that the CIA drone program exists.
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> In an IAC, then, CIA drone operators would not have the right under IHL to kill anyone. And it is difficult to see how the situation could be any different in a NIAC. Arguing that the rules of IAC apply analogically in NIAC, as the US often does – it borrows the concept of an al-Qaeda "associated force," for example, from the IAC concept of co-belligerency – is no help, for all the reasons just mentioned. So the US would have to argue that the category of privileged combatants in NIAC is somehow actually wider in NIAC than in IAC, an idea for which there is no precedent in state practice and little if any support in conventional international law. (An excellent Australian scholar, Ian Henderson, has argued that a state can

> authorize anyone it wants to use lethal force in a NIAC. I don't find his argument persuasive, particularly in the context of a transnational NIAC where a state is using force on the territory of many other states, but interested readers should check out his article.)
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> This is a critical conclusion. If a CIA drone operator does not possess the combatant's privilege in the US's "NIAC" with al-Qaeda and its associated forces, the US cannot plausibly argue that – to quote another paragraph in the White Paper (p. 15) – killing someone like al-Awlaki "would constitute a lawful killing under the public authority doctrine" because it was "conducted in a manner consistent with the fundamental law of war principles governing the use of force in a non-international armed conflict." Such a killing would not be "consistent with the "the fundamental law of war principles governing the use of force," because the absence of combatant's privilege means that a CIA drone operator has no right under IHL to use any force at all. As a result, a CIA drone operator prosecuted for violating the foreign-murder statute would not be entitled to a public-authority defense – at least insofar as the US purports to base his or her public authority from IHL's recognition of the right of privileged combatants to kill.

Now that is a fairly long segment I borrowed from Kevin, but there is much more at his superb post, please do go digest all of it. Suffice it to say, for the reasons stated, the "public authority justification" just does not hold up as described in the White Paper and the New York Times paean to Lederman, Barron and the Administration.

But what about that linchpin "1997 district court decision involving a woman who was charged

with killing her child in Japan" they found that permitted "excusable killings" that I bolded above? The official name and cite of the case is *United States v. White*, 51 F.Supp 2d 1008 (EDCA 1997), and it is mentioned a grand total of twice, as a secondary back up citation, in the White Paper. But the NYT pitched the spiel that discovery of this little known, impossible to find online, non-binding case from the Eastern District of California makes everything copacetic. Maybe the NYT did not read the case, as they did not mention or cite its name in their article, but I have read *US v. White*, and it does nothing of the sort claimed by the NYT and the Administration.

In fact, if anything, *White* stands for the fact that 18 USC is constitutional on its face, there are no Due Process denials occasioned by the statute, and that it properly encompasses the traditional federal homicide statutes contained in 18 USC 1111, 1112, and 1113 respectively. If anything, *White* supports the proposition that the Administration has a big problem with 18 USC 1119. As evidence, I am attaching a pdf copy of the *US v. White* decision so that one and all, who may not have ready access to dusty old reporters in a law library, may see it in all its glory (actually quite lack thereof). [UPDATE: Kevin Jon Heller just sent this link for *White* online. It is easier to read than my scan.]

I would like to make one last point, and it is a pretty important one. All these justifications, defenses, excuses – whatever term the Administration bandies about (and they have used all three of those) – as used in the White Paper and NYT article, even the "public authority justification", are what are known in criminal law as "affirmative defenses". But affirmative defenses are not a bar to prosecution or criminal culpability in the least; they have to be pled by the criminal defendant once charged, and then established to the jury at trial. And ask any practicing criminal defense attorney, juries are pretty skeptical of such affirmative

defenses generally.

Now, in closing, I think we ought to be honest about the nature of this discussion. Fact is, the Obama Administration is never going to actually charge their own people, it is not about that; it is about the root legality of the activity. And the problem is, at root, there is no way to say that CIA performed extrajudicial execution of American citizens away from the hot battlefield is legal in the face of 18 USC 1119. The Obama Administration is trying to baffle the public with legalistic bull, and is trying to hide their illegal pea under a moving set of inapplicable and inapposite legal shells. But, in the end, it does simply does not hold water.