*Regarding the Legality of the Targeted Killing of American Citizens*

Anwar al-Awlaki, American citizen and confirmed member of al-Qaida, was killed by a CIA operated drone on September 30, 2011 while on Yemeni soil. The Obama Administration cited a classified 50-page memorandum drafted by the Justice Department’s Office of Legal Counsel as providing legal justification for the killing, despite the apparent contradiction presented by Executive Order 12,333--United States Intelligence Activities §2.11[[1]](#footnote-0), the prohibitions against perfidy as established in Articles 37 and 44 of Protocol I Additional to the Geneva Conventions[[2]](#footnote-1) (note that Protocol I was not ratified by the United States and is included merely as an example of applicable international law), and the protections outlined in Amendments V, VI, VII, VIII of the Bill of Rights. Without the memo to hand, it is impossible to know *exactly* how the lawyers of the JDOJC came to the conclusion that action against al-Awlaki was legally permissible, yet through a careful examination of the laws, codes, and associated literature for which the administration’s apparent flagrant disregard has given rise to such an impressive public outcry, it is apparent that no violation has occurred in this case. Taken one step further, it is apparent that the government of the United States has the legal right to carry out targeted killings so long as these killings occur under the scope of Article 51 of the U.N. Charter[[3]](#footnote-2) (provision for self-defense) and are approved by the President of the United States in his capacity as Commander in Chief of the Armed Forces as implied by E.O. 12,333.

A brief note regarding the legal difference between an assassination and a targeted killing is perhaps useful here. According to Judge Abraham Sofaer (and echoed by many other legal experts), “[a]ssassination is widely defined as murder, and is for that reason prohibited in the United States.... U.S. officials may not kill people merely because their policies are seen as detrimental to our interests.... But killings in self-defense are no more "assassinations" in international affairs than they are murders when undertaken by our police forces against domestic killers. Targeted killings in self-defense have been authoritatively determined by the federal government to fall outside the assassination prohibition,”[[4]](#footnote-3) this is an important distinction to understand moving forward. A much more detailed examination of this topic and the illegality of federally ordered assassinations can be found in “Targeting Osama Bin Laden: Examining the Legality of Assassination as a Tool of U.S. Foreign Policy” by Howard A. Wachtel.[[5]](#footnote-4) In his argument, Wachtel sets out two definitions of assassination, one for peacetime assassinations and one for wartime assassinations (both borrowed a paper by Major Harder[[6]](#footnote-5), [[7]](#footnote-6)). A peacetime assassination is “(1) a murder, (2) of a specifically targeted figure, (3) for a political purpose,” whereas a wartime assassination is elements: “the targeting of an individual [in conjunction with] the use of treacherous means.” It would appear that according to the above definition of a wartime assassination (as the United States is currently engaged in a *de-facto* declared war on terrorism *viz.* “Overseas Contingency Operations”[[8]](#footnote-7)) the government of the United States executed a *targeted killing* in the case of al-Awlaki, and *not* an assassination, as they did not violate Articles 37 and 44 of Protocol I Additional to the Geneva Conventions, the currently held international benchmark for “the use of treacherous means.”

E.O. 12,333 §2.11 states quite clearly that “No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination,” *prima facie*, this would appear to prove the point that the al-Awlaki killing was outside the realm of legality. This point is easily defeated by observing that the al-Awlaki killing was not an assassination, it was a targeted killing, something *not* prohibited by E.O. 12,333, and which can be incorporated under the scope of “special activities” (E.O. 12,333 §3.4 (h)). According to E.O. 12,333 §1.8 (e), The Central Intelligence Agency has the duty to “Conduct special activities approved by the President. No agency except the CIA (or the Armed Forces of the United States in time of war declared by Congress or during any period covered by a report from the President to the Congress under the War Powers Resolution (87 Stat. 855)1) may conduct any special activity unless the President determines that another agency is more likely to achieve a particular objective.” This shows that the President has the authority to approve “special activities” such as targeted killings and that the CIA has the authority to carry them out, which they did through the tactical application of a CIA-operated drone in the al-Awlaki case.

The question becomes whether or not the targeted killing of al-Awlaki was permissible under the Bill of Rights or the federal prohibition on murder, as it has been conclusively shown that the actions taken were permissible under the terms of E.O. 12,333. Amendment V to the Constitution of the United States runs as follows, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” It might be argued that al-Awlaki was held to answer for the crime of treason without the presentment of a Grand Jury in violation of the due-process of law, yet this is clearly a situation where the exception to the rule applies. al-Awlaki was engaged in activities which posed demonstrable danger to the public in a time of war, such as preaching to three of the terrorists involved in the 9/11 bombings, helping plan the attack of the so-called “Underwear Bomber,” and repeatedly calling for jihad against the United States as a regional commander within al-Qaeda. Due to the unpredictable nature of terrorism, it is reasonable to assume that his continued liberty posed a danger to the American public. By choosing to act in a manner inconsistent with continued public safety in addition to accepting a high-ranking position within the ranks of a terrorist entity dedicated to the destruction of American interests, al-Awlaki placed himself beyond the scope of the protections afforded to him as a citizen by the Amendment V.

Amendment VI states that “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence,” and it could be argued that al-Awlaki was not afforded his right to a speedy and public trial for his alleged crimes, but was instead summarily executed out of keeping with the law. al-Awlaki was not charged with a crime, nor was he subject to criminal prosecution, and his right to due-process was waived pursuant to the conditions outlined in the preceding section. As such, Amendment VI does not apply in this instance, as the action taken was not a criminal prosecution but a military response to a public danger in time of war. An analogous situation for the sake of clarity is a case where a person suspected of committing a murder is shot and killed while fleeing the scene of the murder; he was presumed to be operating in a manner not conducive to the public safety under Amendment V and killed without ever arriving at the protections afforded by Amendment VI. Amendment VII (right to a trial by jury) is also ignored in this case as no trial point is ever reached.

Was al-Awlaki’s killing a “cruel and unusual punishment,” then? Amendment VIII prohibits cruel and unusual punishments along with excessive bail and excessive fines. Under the current judicial application of the law, a punishment must pass the following test or be deemed cruel and unusual[[9]](#footnote-8):  
 “A punishment must not by its severity be degrading to human dignity.”

“A severe punishment [must not be] obviously inflicted in wholly arbitrary fashion.”

“A severe punishment [must not be] clearly and totally rejected throughout society.”

“A severe punishment [must not be] patently unnecessary.”

The first test is generally held to apply primarily to cases of torture, and it is not the case that al-Awlaki’s death was inflicted by torture, as it was inflicted by Hellfire missiles, which would suggest a quick and relatively painless demise. al-Awlaki’s death also passes the second test, as the government had a good reason for killing him, namely continued national security. The penalty of death is not clearly and totally rejected throughout society, as it is a common punishment for murder and other heinous crimes throughout the United States, so the al-Awlaki scenario passes the third test. It is also clear that the punishment was not “patently unnecessary” as it is common practice for a nation to try and stop people from doing harm to its people and/or interests by neutralizing the threat (al-Awlaki was also a person who posed a significant continuing threat to the United States that if tried and convicted of his crimes in time of peace would have had a reasonable expectation of receiving the death penalty).

In light of the preceding arguments, it is clear that under the law, the killing of al-Awlaki on the orders of the President was in fact in keeping with the current law, both national and international, acting upon the United States and the President; furthermore, it is clear that should another case arise under similar circumstances, the targeted killing would be permissible provided that it did not violate the laws and tests outlined above.

1. "Executive Order 123333- United States Intelligence Activities." *National archives*. The U.S. National Archives and Records Administration, 1981. Web. 8 Jun 2012. <http://www.archives.gov/federal-register/codification/executive-order/12333.html>. [↑](#footnote-ref-0)
2. "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 Article 48, Section I." International humanitarian law - treaties & documents. United Nations, 1977. Web. 8 Jun 2012. <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>. [↑](#footnote-ref-1)
3. "Chapter VII: Action With Respect To Threats To The Peace, Breaches Of The Peace, And Acts Of Aggression." *Charter of the United Nations*. United Nations, 1945. Web. 8 Jun 2012. <http://www.un.org/en/documents/charter/chapter7.shtml>. [↑](#footnote-ref-2)
4. Abraham D. Sofaer (March 26, 2004). "Responses to Terrorism / Targeted killing is a necessary option". The San Francisco Chronicle. Web. 8 Jun 2010. [↑](#footnote-ref-3)
5. Howard A. Wachtel, Duke Law Journal , Vol. 55, No. 3 (Dec., 2005), pp. 677-710 Published by: Duke University School of Law Article Stable URL: http://www.jstor.org/stable/40040528 [↑](#footnote-ref-4)
6. Major Tyler J. Harder, Time to Repeal the Assassination Ban of Executive Order 12,333: A Small Step in Clarifying Current Law, 172 Military Law Review. 1, 2 (2002). [↑](#footnote-ref-5)
7. Harder, *supra* note 6 ((citing Michael N. Schmitt, State Sponsored Assassination in International and Domestic Law, 17 Yale Journal of International Law. 609, 632 n.109 (1992)). [↑](#footnote-ref-6)
8. "Overseas Contigency Operations." Whitehouse.gov. The White House, 2012. Web. 8 Jun 2012. <http://m.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/overseas.pdf>. [↑](#footnote-ref-7)
9. *Furman v. Georgia, 408 U.S. 239* (1972) [↑](#footnote-ref-8)