



This copy is for your personal, noncommercial use only. You can order presentation-ready copies for distribution to your colleagues, clients or customers [here](#) or use the "Reprints" tool that appears next to any article. Visit [www.nytreprints.com](http://www.nytreprints.com) for samples and additional information. [Order a reprint of this article now.](#)



October 8, 2011

# Secret U.S. Memo Made Legal Case to Kill a Citizen

By **CHARLIE SAVAGE**

WASHINGTON — The Obama administration's secret legal memorandum that opened the door to the killing of [Anwar al-Awlaki](#), the American-born radical Muslim cleric hiding in [Yemen](#), found that it would be lawful only if it were not feasible to take him alive, according to people who have read the document.

The memo, written last year, followed months of extensive interagency deliberations and offers a glimpse into the legal debate that led to one of the most significant decisions made by [President Obama](#) — to move ahead with the killing of an American citizen without a trial.

The secret document provided the justification for acting despite an executive order banning assassinations, a federal law against murder, protections in the Bill of Rights and various strictures of the international laws of war, according to people familiar with the analysis. The memo, however, was narrowly drawn to the specifics of Mr. Awlaki's case and did not establish a broad new legal doctrine to permit the targeted killing of any Americans believed to pose a terrorist threat.

The Obama administration has refused to acknowledge or discuss its role in the drone strike that killed Mr. Awlaki last month and that technically remains a covert operation. The government has also resisted [growing calls that](#) it provide a detailed public explanation of why officials deemed it lawful to kill an American citizen, setting a precedent that scholars, rights activists and others say has raised concerns about the rule of law and civil liberties.

But the document that laid out the administration's justification — a roughly 50-page memorandum by the Justice Department's Office of Legal Counsel, completed around June 2010 — was described on the condition of anonymity by people who have read it.

The legal analysis, in essence, concluded that Mr. Awlaki could be legally killed, if it was not feasible to capture him, because intelligence agencies said he was taking part in the war between the United States and Al Qaeda and posed a significant threat to Americans, as well as because Yemeni authorities were unable or unwilling to stop him.

The memorandum, which was written more than a year before Mr. Awlaki was killed, does not independently analyze the quality of the evidence against him.

The administration did not respond to requests for comment on this article.

The deliberations to craft the memo included meetings in the White House Situation Room involving top lawyers for the Pentagon, State Department, National Security Council and intelligence agencies.

It was principally drafted by David Barron and Martin Lederman, who were both lawyers in the Office of Legal Counsel at the time, and was signed by Mr. Barron. The office may have given oral approval for an attack on Mr. Awlaki before completing its detailed memorandum. Several [news reports](#) before June 2010 quoted anonymous counterterrorism officials as saying that Mr. Awlaki had been placed on a kill-or-capture list around the time of the attempted bombing of a Detroit-bound airliner on Dec. 25, 2009. Mr. Awlaki was [accused](#) of helping to recruit the attacker for that operation.

Mr. Awlaki, who was born in New Mexico, was also accused of playing a role in a failed plot to bomb two cargo planes last year, part of a pattern of activities that counterterrorism officials have said showed that he had evolved from merely being a propagandist — in sermons justifying violence by Muslims against the United States — to playing an operational role in [Al Qaeda in the Arabian Peninsula](#)'s continuing efforts to carry out terrorist attacks.

Other assertions about Mr. Awlaki included that he was a leader of the group, which had become a “cobelligerent” with Al Qaeda, and he was pushing it to focus on trying to attack the United States again. The lawyers were also told that capturing him alive among hostile armed allies might not be feasible if and when he were located.

Based on those premises, the Justice Department concluded that Mr. Awlaki was covered by the authorization to use military force against Al Qaeda that Congress enacted shortly after the terrorist attacks of Sept. 11, 2001 — meaning that he was a lawful target in the armed conflict unless some other legal prohibition trumped that authority.

It then considered possible obstacles and rejected each in turn.

Among them was an executive order that bans assassinations. That order, the lawyers found, blocked unlawful killings of political leaders outside of war, but not the killing of a lawful target in an armed conflict.

A [federal statute](#) that prohibits Americans from murdering other Americans abroad, the lawyers wrote, did not apply either, because it is not “murder” to kill a wartime enemy in compliance with the laws of war.

But that raised another pressing question: would it comply with the laws of war if the drone operator who fired the missile was a Central Intelligence Agency official, who, unlike a soldier, wore no uniform? The memorandum concluded that [such a case](#) would not be a war crime, although the operator might be in theoretical jeopardy of being prosecuted in a Yemeni court for violating Yemen’s domestic laws against murder, a highly unlikely possibility.

Then there was the Bill of Rights: the [Fourth Amendment](#)’s guarantee that a “person” cannot be seized by the government unreasonably, and the [Fifth Amendment](#)’s guarantee that the government may not deprive a person of life “without due process of law.”

The memo concluded that what was reasonable, and the process that was due, was different for Mr. Awlaki than for an ordinary criminal. It cited court cases allowing American citizens who had joined an enemy’s forces to be [detained](#) or [prosecuted in a military court](#) just like noncitizen enemies.

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.

There remained, however, the question of whether — when the target is known to be a citizen — it was permissible to kill him if capturing him instead were a feasible way of suppressing the threat.

Killed in the strike alongside Mr. Awlaki was another American citizen, Samir Khan, who had produced a [magazine for Al Qaeda in the Arabian Peninsula](#) promoting terrorism. He was apparently not on the targeting list, making his death collateral damage. His family has issued a statement citing the Fifth Amendment and asking whether it was necessary for the government to have “assassinated two of its citizens.”

“Was this style of execution the only solution?” the Khan family asked in its statement. “Why couldn’t there have been a capture and trial?”

Last month, President Obama’s top counterterrorism adviser, [John O. Brennan](#), delivered a [speech](#) in which he strongly denied the accusation that the administration had sometimes chosen to kill militants when capturing them was possible, saying the policy preference is to interrogate them for intelligence.

The memorandum is said to declare that in the case of a citizen, it is legally required to capture the militant if feasible — raising a question: was capturing Mr. Awlaki in fact feasible?

It is possible that officials decided last month that it was not feasible to attempt to capture him because of factors like the risk it could pose to American commandos and the diplomatic problems that could arise from putting ground forces on Yemeni soil. Still, the raid on Osama bin Laden’s compound in Pakistan demonstrates that officials have deemed such operations feasible at times.

Last year, Yemeni commandos surrounded a village in which Mr. Awlaki was believed to be hiding, but he managed to slip away.

The administration had already expressed in public some of the arguments about issues of international law addressed by the memo, in a [speech](#) delivered in March 2010 by Harold Hongju Koh, the top State Department lawyer.

The memorandum examined whether it was relevant that Mr. Awlaki was in Yemen, far from Afghanistan. It concluded that Mr. Awlaki’s geographical distance from the so-called hot battlefield did not preclude him from the armed conflict; given his presumed circumstances, the United States still had a right to use force to defend itself against him.

As to whether it would violate Yemen’s sovereignty to fire a missile at someone on Yemeni soil, [Yemen’s president secretly granted the United States that permission](#), as secret diplomatic cables obtained by WikiLeaks have revealed.

The memorandum did assert that other limitations on the use of force under the laws of war — like avoiding the use of disproportionate force that would increase the possibility of civilian deaths — would constrain any operation against Mr. Awlaki.

That apparently constrained the attack when it finally came. Details about Mr. Awlaki’s location surfaced about a month ago, American officials have said, but his hunters delayed the strike until he left a village and was on a road away from populated areas.

