Office of the Assistant Attorney General Washington, D.C. 20530

February 19, 2010

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Lethal Operation Against Shaykh Anwar Aulaqi (b)(1) (b)(3)

(b)(5)

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 leader of Al-Qa'ida in the Arabian Peninsula.

(b)(5)

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 United States citizenship. This memorandum confirms oral advice setting forth this conclusion. (b)(1) (b)(3)

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consistent with the assassination ban in Executive Order 12333[2] killings in self-defense are not assassinations

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[2] 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).

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The question that remains is whether Aulaqi's status as a U.S. citizen imposes any constitutional limitations that would preclude the proposed lethal action (b)(1) (b)(3) (b)(5)

being a U.S. person (b)(1)
(b)(1) does not give a member of al Qa'ida a (b)(3)
(b)(3) constitutional immunity from attack. (b)(5)
(b)(5)

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,

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). (b)(1) (b)(3)

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. 259, 269-70 (1990); *see also In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 167-68 (2d Cir. 2008). 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)). (b)(1) (b)(3)

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(b)(1) (b)(3) (b)(5) the plurality in *Hamdi* stated that "[t]he parties agree that initial captures on the battlefield need not receive the process we discuss here; that process is due only when the determination is made to *continue* to hold those who have been seized," and the plurality thus found it "unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts." 542 U.S. at 534 (plurality opinion). on the battlefield, the Government's interests and burdens preclude offering a process to judge whether a detainee is truly an enemy combatant. In the case of a member, associate, or affiliate of al-Qa'ida operating abroad in circumstances where capture is infeasible, and it is known that the individual continued and imminent threat given the weight of the government's interest in using an authorized means of force to respond to an imminent threat posed by the activities of a person operating as a member, associate, or affiliate of an enemy force. (b)(1) (b)(3) (b)(5) (b)(1) (b)(3) (b)(5) (b)(1) (b)(3)

(b)(1) (b)(3) (b)(5) to the extent Fourth Amendment principles are relevant in the context of operations against a U.S. person who is a member of al-Qa'ida and whose activities pose a continued and imminent threat, the proposed lethal operation would not violate the Fourth Amendment, *Verdugo-Urquidez*, 494 U.S. at 273-74

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("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.") (b)(1) (b)(3) (b)(5) 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). (b)(1) (b)(3) (b)(5) 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.

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For these reasons, and on these understandings, we do not believe the Constitution prohibits the proposed lethal action, does not violate the assassination ban in Executive Order 12333. (b)(1) (b)(3) (b)(5)

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

David J. Barron
Acting Assistant Attorney General

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