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DAILY COMMENT

THE LAWYER AND THE KILL-LIST MEMO



By Ryan Lizza May 22, 2014



On July 16, 2010, David J. Barron, a lawyer at the Department of Justice, sent Eric Holder, the Attorney General, a lengthy memorandum. Barron, who had celebrated his forty-third birthday earlier that month, was a professor at Harvard Law School, on leave for a couple years to work for President Barack Obama. Barron, like many young lawyers who arrived in Washington with the new Administration in 2009, had impeccable liberal credentials. As a Harvard undergraduate on the *Crimson*, the campus newspaper, he wrote sympathetic pieces about Jesse Jackson's 1988 Presidential campaign. During the summer of 1993, before his third year at Harvard Law School, he interned with the N.A.A.C.P. in Washington. After graduating, he clerked for Supreme Court Justice John Paul Stevens, a leader of the court's liberal wing, and then worked in the Clinton Justice Department. During the Bush years, he was a relatively prominent critic of the Administration's national-security policies, especially its embrace of torture.

In 2006, while Bush's Justice Department lawyers were tweaking a new legal regime allowing for bulk-collection surveillance and what they called "enhanced interrogation," Barron helped review the bylaws of the Botanic Gardens Children's Center. As a professor in Cambridge, he raised money for the campaign of Deval Patrick, who has been governor of Massachusetts since 2007. That same year, 2007, he even attended the YearlyKos convention, a sort of South by Southwest for left-leaning

bloggers and activists trying to push the Democratic Party in a more unabashedly progressive direction. During his legal career, he has signed amicus-curiae briefs in several highly political cases, including one defending a living-wage ordinance in Santa Fe, New Mexico, and another defending a major campaign-finance reform law. In 2008, during an NPR interview, he mused that articles of impeachment could be justified against a President who purposely misled the country into war.

At the Justice Department, in his capacity as the lead attorney in the Office of Legal Counsel, Barron had sent many memoranda that, like the one he sent to Holder in July, 2010, touched on the most serious questions of national security and civil liberties. Early in his tenure, he drafted an opinion that withdrew the Bush-era legal guidance—the so-called torture memos—governing C.I.A. interrogations.

But, like any government lawyer, much of Barron's work at OLC was pedestrian. One of his opinions concerned removing "the federal coordinator for Alaska natural gas transportation projects." Another dealt with the "constitutionality of mandatory registration of credit rating agencies."

His July, 2010, missive, which was one of the last that he wrote during his eighteen months running O.L.C., was historic and—to many—troubling: yes, Barron argued, the President of the United States could kill an American citizen named Anwar al-Awlaki. And, as a rule, the memo argued, the President could kill any American citizen abroad connected to Al Qaeda or an associated group—without a trial or other legal proceedings—if he deemed that person an imminent threat.

Awlaki, who was four years younger than Barron, was born in Las Cruces, New Mexico, in 1971. His father, a Yemeni, was a Fulbright scholar studying agriculture and, when Awlaki was eleven, his father moved the family back to Yemen, where he became a senior government official. Awlaki returned to the United States for college, in 1991, and studied at Colorado State University, where he was the president of the Muslim Student Association. For a brief period after 9/11, Awlaki, who was then a

cleric preaching in Northern Virginia, was known as a voice of moderate Islam. He even attended a luncheon at the Pentagon in early 2002.

But, by the time Barron joined the Obama Administration, Awlaki had become radicalized and was hiding in Yemen, a key figure in Al Qaeda in the Arabian Peninsula and a crucial link between AQAP and ambitious terrorists in increasingly lawless havens like Somalia. In December, 2009, after Umar Farouk Abdulmutallab tried to blow up a plane as it landed in Detroit, the Obama Administration accused Awlaki of helping to train Abdulmutallab. Obama added Awlaki to a list of terrorists targeted for death. According to "Kill or Capture," Daniel Klaidman's scrupulously reported 2012 book, Obama was personally consumed with getting Awlaki, telling "his counterterrorism advisers that Awlaki was his top priority, even over Ayman al-Zawahiri," Osama bin Laden's longtime deputy.

Barron's memo providing the legal case for killing Awlaki was written seven months after Obama placed him on the kill list. In late September of 2011, Barron was back at Harvard, and Awlaki was on the run in Yemen, when a missile from a C.I.A. drone struck him as he returned to his vehicle after eating breakfast in the desert near the Saudi border.

For several years now, Barron's classified memo justifying this extrajudicial execution has been the white whale of national-security reporters and civil libertarians. In January, Obama nominated Barron to the U.S. Court of Appeals for the First Circuit, in Boston, and those hunting the memo finally had the leverage they needed to extract it from the Justice Department. An odd coalition of Rand Paul, the politician most vigorously opposed to Obama's assertion of the right to smite Americans abroad; several right-wing senators who oppose Barron on purely ideological grounds; and several Democrats who believe that, whatever one's views on the legal underpinnings of Obama's drone policy, at the very least the Barron opinion should be available for public inspection, united to force the Administration to release the document.

Holder and several other officials have made speeches about the legal

case for putting an American on the President's kill list, and an unclassified white paper describing in general terms that legal rationale has been leaked to the press. But last month, a court ruled that the Administration had to release a redacted version of the original legal opinion in order to satisfy a Freedom of Information request by the *Times* and the A.C.L.U. As the Justice Department contemplated appealing that ruling, Paul and his Senate allies threatened to hold Barron's nomination hostage unless the Administration relented, which it did earlier this week. The White House now says that the infamous memo will be released in a matter of weeks. On Thursday, Barron was confirmed by a vote of 53-45.

Somewhat overlooked in the coverage of Awlaki is how much of a threat he was to the United States. Klaidman reports that, in addition to his links to Abdulmutallab, the so-called underwear bomber, and Al Shabaab, the Somali terrorist group, and the killer at Fort Hood, intelligence linked Awlaki to "multiple plots to kill Americans and Europeans" that he was "deeply involved in at an operational level," including "plans to poison Western water and food supplies with botulinum toxin, as well as attack Americans with ricin and cyanide."

Whether or not one believes these alleged plots allowed the President to strip Awlaki of his constitutional rights as an American citizen, it is shameful that the White House has worked for several years to conceal the secret legal opinion making that case. The final outcome of the hunt for this document and Barron's nomination did not please everyone. Paul believes that Barron's legal opinion showed that Barron was unqualified to serve on the federal bench. But the end result is a decent compromise, the kind lacking in Washington these days: the President gets his nominee and the rest of us finally get to see the Barron memo.

More: On this week's Political Scene podcast, Ryan Lizza, Jeffrey Toobin, and Dorothy Wickenden discuss the Obama Administration's use of drones.

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