

Chilling legal memo from Obama DOJ justifies assassination of US citizens

The president's partisan lawyers purport to vest him with the most extreme power a political leader can seize
[Glenn Greenwald](#), Tue 5 Feb 2013



The most extremist power any political leader can assert is the power to target his own citizens for execution without any charges or due process, far from any battlefield. The Obama administration has not only asserted exactly that power in theory, but has exercised it in practice. In September 2011, it killed US citizen Anwar Awlaki in a drone strike in Yemen, along with US citizen Samir Khan, and then, in circumstances that are still unexplained, two weeks later [killed Awlaki's 16-year-old American son Abdulrahman](#) with a separate drone strike in Yemen.

Since then, senior Obama officials including Attorney General Eric Holder and John Brennan, Obama's top terrorism adviser and his current nominee to lead the CIA, have explicitly argued that the president is and should be vested with this power. Meanwhile, a [Washington Post article from October](#) reported that the administration is formally institutionalizing this president's power to decide who dies under the Orwellian title "disposition matrix".

When the New York Times back in April, 2010 [first confirmed the existence](#) of Obama's hit list, it made clear just what an extremist power this is, noting: "It is extremely rare, **if not unprecedented**, for an American to be approved for targeted killing." The NYT quoted a Bush intelligence official as saying "he did not know of any American who was approved for targeted killing under the former president". When the existence of Obama's hit list was [first reported several months earlier](#) by the Washington Post's Dana Priest, she wrote that the "list includes three Americans".

What has made these actions all the more radical is the absolute secrecy with which Obama has draped all of this. Not only is the [entire process carried out solely within the Executive branch](#) - with no checks or oversight of any kind - but there is zero transparency and zero accountability. The president's underlings compile their proposed lists of who should be executed, and the president - at a charming weekly event dubbed by White House aides as "Terror Tuesday" - then chooses from "baseball cards" and decrees in total secrecy who should die. The power of accuser, prosecutor, judge, jury, and executioner are all consolidated in this one man, and those powers are exercised in the dark.

In fact, The Most Transparent Administration Ever™ has been so fixated on secrecy that they have [refused even to disclose](#) the legal memoranda prepared by Obama lawyers setting forth their legal rationale for why the president has this power. During the Bush years, when Bush refused to disclose the memoranda from his Office of Legal Counsel (OLC) that legally authorized torture, rendition, warrantless eavesdropping and the like, leading Democratic lawyers such as Dawn Johnsen (Obama's first choice to lead the OLC) [vehemently denounced](#) this practice as a grave threat, warning that "the Bush Administration's excessive reliance on 'secret law' threatens the effective functioning of American democracy" and "the withholding from Congress and the public of legal interpretations by the [OLC] upsets the system of checks and balances between the executive and legislative branches of government."

But when it comes to Obama's assassination power, this is exactly what his administration has done. It has repeatedly refused to disclose the principal legal memoranda prepared by Obama OLC lawyers that justified his kill list. It is, right now, vigorously resisting lawsuits from the New York Times and the ACLU to obtain that OLC memorandum. In sum, Obama not only claims he has the power to order US citizens killed with no transparency, but that even the documents explaining the legal rationale for this power are to be concealed. He's maintaining secret law on the most extremist power he can assert.

Last night, NBC News' Michael Isikoff released [a 16-page "white paper"](#) prepared by the Obama DOJ that purports to justify Obama's power to target even Americans for assassination without due process (the memo is embedded in full below). This is not the primary OLC memo justifying Obama's kill list - that is still concealed - but it appears to track the reasoning of that memo as [anonymously described to the New York Times](#) in October 2011.

This new memo is entitled: "Lawfulness of a Lethal Operation Directed Against a US Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force". It claims its conclusion is "reached with recognition of the extraordinary seriousness of a lethal operation by the United States against a US citizen". Yet it is every bit as chilling as the Bush OLC torture memos in how its clinical, legalistic tone completely sanitizes the radical and dangerous power it purports to authorize.

I've written many times at length about why the Obama assassination program is such an extreme and radical threat - [see here](#) for one of the most comprehensive discussions, with documentation of how completely all of this violates Obama and Holder's statements before obtaining power - and won't repeat those arguments here. Instead, there are numerous points that should be emphasized about the fundamentally misleading nature of this new memo:

1. Equating government accusations with guilt

The core distortion of the War on Terror under both Bush and Obama is the Orwellian practice of equating government **accusations** of terrorism with proof of guilt. One constantly hears US government defenders referring to "terrorists" when what they actually mean is: those accused by the government of terrorism. This entire memo is grounded in this deceit.

Time and again, it emphasizes that the authorized assassinations are carried out "against a senior operational leader of al-Qaida or its associated forces who poses an imminent threat of violent attack against the United States." Undoubtedly fearing that this document would one day be public, Obama lawyers made certain to incorporate this deceit into the title itself: "Lawfulness of a Lethal Operation Directed Against a US Citizen Who is a Senior Operational Leader of al-Qaida or An Associated Force."

This ensures that huge numbers of citizens - those who spend little time thinking about such things and/or authoritarians who assume all government claims are true - will instinctively justify what is being done here on the ground that *we must kill the Terrorists* or *joining al-Qaida means you should be killed*. That's the "reasoning" process that has driven the War on Terror since it commenced: if the US government simply asserts without evidence or trial that someone is a terrorist, then they are assumed to be, and they can then be punished as such - with indefinite imprisonment or death.

But of course, when this memo refers to "a Senior Operational Leader of al-Qaida", what it actually means is this: someone whom the President - in total secrecy and with no due process - has **accused** of being that. Indeed, the memo itself makes this clear, as it baldly states that presidential assassinations are justified when "**an informed, high-level official of the US government has determined** that the targeted individual poses an imminent threat of violent attack against the US".

This is the crucial point: the memo isn't justifying the due-process-free execution of senior al-Qaida leaders who pose an imminent threat to the US. It is justifying the due-process-free execution of people **secretly accused by the president and his underlings, with no due process, of being that**. The distinction between (a) government accusations and (b) proof of guilt is central to every free society, by definition, yet this memo - and those who defend Obama's assassination power - willfully ignore it.

Those who justify all of this by arguing that Obama can and should kill al-Qaida leaders who are trying to kill Americans are engaged in supreme question-begging. Without any due process, transparency or oversight, there is no way to know who is a "senior al-Qaida leader" and who is posing an "imminent threat" to Americans. All that can be known is who Obama, in total secrecy, **accuses** of this.

(Indeed, membership in al-Qaida is not even required to be assassinated, as one can be a member of a group deemed to be an "associated force" of al-Qaida, whatever that might mean: a formulation so broad and ill-defined that, as Law Professor Kevin Jon Heller [argues](#), it means the memo "authorizes the use of lethal force against individuals whose targeting is, without more, prohibited by international law".)

The definition of an extreme authoritarian is one who is willing blindly to assume that government accusations are true without any evidence presented or opportunity to contest those accusations. This memo - and the entire theory justifying Obama's kill list - centrally relies on this authoritarian conflation of government accusations and valid proof of guilt.

They are not the same and never have been. Political leaders who decree guilt in secret and with no oversight inevitably succumb to error and/or abuse of power. Such unchecked accusatory decrees are inherently untrustworthy (indeed, [Yemen experts](#) have [vehemently contested](#) the claim that Awlaki himself was a senior al-Qaida leader [posing an imminent threat](#) to the US). That's why due process is guaranteed in the Constitution and why judicial review of government accusations has been a staple of western justice since the Magna Carta: because leaders can't be trusted to decree guilt and punish citizens without evidence and an adversarial process. That is the age-old basic right on which this memo, and the Obama presidency, is waging war.

2. Creating a ceiling, not a floor

The most vital fact to note about this memorandum is that it is not purporting to impose requirements on the president's power to assassinate US citizens. When it concludes that the president has the authority to assassinate "a Senior Operational Leader of al-Qaida" who "poses an imminent threat of violent attack against the US" where capture is "infeasible", it is **not** concluding that assassinations are permissible **only** in those circumstances.

To the contrary, the memo expressly makes clear that presidential assassinations may be permitted even when none of those circumstances prevail: "This paper does not attempt to determine the minimum requirements necessary to render such an operation lawful." Instead, as the last line of the memo states: "it concludes only that the stated conditions would be **sufficient** to make lawful a lethal operation" - not that such conditions are **necessary** to find these assassinations legal. The memo explicitly leaves open the possibility that presidential assassinations of US citizens may be permissible even when the target is not a senior al-Qaida leader posing an imminent threat and/or when capture is feasible.

Critically, the rationale of the memo - that the US is engaged in a global war against al-Qaida and "associated forces" - can be easily used to justify presidential assassinations of US citizens in circumstances far beyond the ones described in this memo. If you believe the president has the power to execute US citizens based on the accusation that the citizen has joined al-Qaida, what possible limiting principle can you cite as to why that shouldn't apply to a low-level al-Qaida member, including ones found in places where capture may be feasible (including US soil)? The purported limitations on this power set forth in this memo, aside from being incredibly vague, can be easily discarded once the central theory of presidential power is embraced.

3. Relies on the core Bush/Cheney theory of a global battlefield

The primary theory embraced by the Bush administration to justify its War on Terror policies was that the "battlefield" is no longer confined to identifiable geographical areas, but instead, the entire globe is now one big, unlimited "battlefield". That theory is both radical and dangerous because a president's powers are basically omnipotent on a "battlefield". There, state power is shielded from law, from courts, from constitutional guarantees, from all forms of accountability: anyone on a battlefield can be killed or imprisoned without charges. Thus, to posit the world as a battlefield is, by definition, to create an imperial, omnipotent presidency. That is the radical theory that unleashed all the rest of the controversial and lawless Bush/Cheney policies.

This "world-is-a-battlefield" theory was once highly controversial among Democrats. John Kerry [famously denounced](#) it when running for president, arguing instead that the effort against terrorism is "primarily an intelligence and law enforcement operation that requires cooperation around the world".

But this global-war theory is exactly what lies at heart of the Obama approach to Terrorism generally and this memo specifically. It is impossible to defend Obama's assassination powers without embracing it (which is why [key Obama officials have consistently done so](#)). That's because these assassinations are taking place in countries far from any war zone, such as Yemen and Somalia. You can't defend the application of "war powers" in these countries without embracing the once-very-controversial Bush/Cheney view that the whole is now a "battlefield" and the president's war powers thus exist without geographic limits.

This new memo makes clear that this Bush/Cheney worldview is at the heart of the Obama presidency. The president, it claims, "retains authority to use force against al-Qaida and associated forces **outside the area of active hostilities**". In other words: there are, subject to the entirely optional "feasibility of capture" element, no geographic limits to the president's authority to kill anyone he wants. This power applies not only to war zones, but everywhere in the world that he claims a member of al-Qaida is found. This memo embraces and institutionalizes the core Bush/Cheney theory that justified the entire panoply of policies Democrats back then pretended to find so objectionable.

4. Expanding the concept of "imminence" beyond recognition

The memo claims that the president's assassination power applies to a senior al-Qaida member who "poses an imminent threat of violent attack against the United States". That is designed to convince citizens to accept this power by leading them to believe it's similar to common and familiar domestic uses of lethal force on US soil: if, for instance, an armed criminal is in the process of robbing a bank or is about to shoot hostages, then the "imminence" of the threat he poses justifies the use of lethal force against him by the police.

But this rhetorical tactic is totally misleading. The memo is authorizing assassinations against citizens in circumstances far beyond this understanding of "imminence". Indeed, the memo expressly states that it is inventing "a broader concept of imminence" than is typically used in domestic law. Specifically, the president's assassination power "**does not require that the US have clear evidence that a specific attack . . . will take place in the immediate future**". The US routinely assassinates its targets not when they are engaged in or plotting attacks but when they are at home, with family members, riding in a car, at work, at funerals, rescuing other drone victims, etc.

Many of the early objections to this new memo have focused on this warped and incredibly broad definition of "imminence". The ACLU's Jameel Jaffer told Isikoff that the memo "redefines the word imminence in a way that deprives the word of its ordinary meaning". Law Professor Kevin Jon Heller [called Jaffer's objection](#) "an understatement", noting that the memo's understanding of "imminence" is "wildly overbroad" under international law.

Crucially, Heller points out what I noted above: once you accept the memo's reasoning - that the US is engaged in a global war, that the world is a battlefield, and the president has the power to assassinate any member of al-Qaida or associated forces - then there is no way coherent way to limit this power to places where capture is infeasible or to persons posing an "imminent" threat. The legal framework adopted by the memo means the president can kill anyone he claims is a member of al-Qaida regardless of where they are found or what they are doing.

The only reason to add these limitations of "imminence" and "feasibility of capture" is, as Heller said, purely political: to make the theories more politically palatable. But the definitions for these terms are so vague and broad that they provide no real limits on the president's assassination power. As the ACLU's Jaffer says: "This is a chilling document" because "it argues that the government has the right to carry out the extrajudicial killing of an American citizen" and the purported limits "are elastic and vaguely defined, and it's easy to see how they could be manipulated."

5. Converting Obama underlings into objective courts

This memo is not a judicial opinion. It was not written by anyone independent of the president. To the contrary, it was written by life-long partisan lackeys: lawyers whose careerist interests depend upon staying in the good graces of Obama and the Democrats, [almost certainly](#) Marty Lederman and David Barron. Treating this document as though it confers any authority on Obama is like treating the statements of one's lawyer as a judicial finding or jury verdict.

Indeed, recall the [primary excuse used to shield](#) Bush officials from prosecution for their crimes of torture and illegal eavesdropping: namely, they got Bush-appointed lawyers in the DOJ to say that their conduct was legal, and therefore, it should be treated as such. This tactic - getting partisan lawyers and underlings of the president to say that the president's conduct is legal - was [appropriately treated with scorn](#) when invoked by Bush officials to justify their radical programs. As [Digby wrote](#) about Bush officials who pointed to the OLC memos it got its lawyers to issue about torture and eavesdropping, such a practice amounts to:

"validating the idea that obscure Justice Department officials can be granted the authority to essentially immunize officials at all levels of the government, from the president down to the lowest field officer, by issuing a secret memo. This is a very important new development in western jurisprudence and one that surely requires more study and consideration. If Richard Nixon and Ronald Reagan had known about this, they could have saved themselves a lot of trouble."

Life-long Democratic Party lawyers are not going to oppose the terrorism policies of the president who appointed them. A president can always find underlings and political appointees to endorse whatever he wants to do. That's all this memo is: the by-product of obsequious lawyers telling their Party's leader that he is (of course) free to do exactly that which he wants to do, in exactly the same way that Bush got John Yoo to tell him that torture was not torture, and that even if it were, it was legal.

That's why courts, not the president's partisan lawyers, should be making these determinations. But when the ACLU tried to obtain a judicial determination as to whether Obama is actually authorized to assassinate US citizens, the Obama DOJ [went to extreme lengths](#) to block the court from ruling on that question. They didn't want independent judges to determine the law. They wanted their own lawyers to do so.

That's all this memo is: Obama-loyal appointees telling their leader that he has the authority to do what he wants. But in the warped world of US politics, this - secret memos from partisan lackeys - has replaced judicial review as the means to determine the legality of the president's conduct.

6. Making a mockery of "due process"

The core freedom most under attack by the War on Terror is the Fifth Amendment's guarantee of due process. It [provides](#) that "no person shall be . . . deprived of life . . . without due process of law". Like putting people in cages for life on island prisons with no trial, claiming that the president has the right to assassinate US citizens far from any battlefield without any charges or trial is the supreme evisceration of this right.

The memo pays lip service to the right it is destroying: "Under the traditional due process balancing analysis . . . we recognize that there is no private interest more weighty than a person's interest in his life." But it nonetheless argues that a "balancing test" is necessary to determine the extent of the process that is due before the president can deprive someone of their life, and further argues that, as [the New York Times put it](#) when this theory was first unveiled: "while the Fifth Amendment's guarantee of due process applied, **it could be satisfied by internal deliberations in the executive branch.**"

Stephen Colbert [perfectly mocked](#) this theory when Eric Holder first unveiled it to defend the president's assassination program. At the time, Holder actually said: "due process and judicial process are not one and the same." Colbert interpreted that claim as follows:

"Trial by jury, trial by fire, rock, paper scissors, who cares? **Due process just means that there is a process that you do.** The current process is apparently, first the president meets with his advisers and decides who he can kill. Then he kills them."

It is fitting indeed that the memo expressly embraces two core Bush/Cheney theories to justify this view of what "due process" requires. First, it cites the Bush DOJ's core view, as [enunciated by John Yoo](#), that courts have no role to play in what the president does in the War on Terror because judicial review constitutes "judicial encroachment" on the "judgments by the President and his national security advisers as to when and how to use force". And then it cites the Bush DOJ's mostly successful arguments in the 2004 *Hamdi* case that the president has the authority even to imprison US citizens without trial provided that he accuses them of being a terrorist.

The reason this is so fitting is because, as I've detailed many times, it was these same early Bush/Cheney theories that made me want to begin writing about politics, all driven by my perception that the US government was becoming extremist and dangerous. During the early Bush years, the very idea that the US government asserted the power to imprison US citizens without charges and due process (or to eavesdrop on them) was so radical that, at the time, I could hardly believe they were being asserted out in the open.

Yet here we are almost a full decade later. And we have the current president asserting the power not merely to imprison or eavesdrop on US citizens without charges or trial, but to order them executed - and to do so in total secrecy, with no checks or oversight. If you believe the president has the power to order US citizens executed far from any battlefield with no charges or trial, then it's truly hard to conceive of any asserted power you would find objectionable.

DOJ white paper

[Lawfulness of a Lethal Operation Directed Against a U.S. Citizen who is a Senior Operational Leader of Al Q...](#)
by [Mike Riggs](#)