



Written by [Joe Wolverton, II, J.D.](#) on April 23, 2014

Obama Administration Ordered to Explain Legality of Targeted Killing of Americans

On Monday a federal appeals court in New York ordered the Obama administration to release at least part of a Department of Justice memo that sets out the president's purported legal justification for his order to kill Anwar al-Awlaki, an American citizen. Awlaki was targeted by the president and later assassinated by a drone strike in 2011 while he lived in Yemen.



The *New York Times* reported that the three-judge panel “unanimously” reversed a lower court decision, insisting that the federal government forfeited its secrecy defense by making “numerous public statements” explaining why it is legal for the president to order Americans be killed.

“Whatever protection the legal analysis might once have had, has been lost by virtue of public statements of public officials at the highest levels and official disclosure of the D.O.J. White Paper,” Judge Jon O. Newman wrote for the panel of the United States Court of Appeals for the Second Circuit, as quoted in the *Times* article.

In February 2013, the White House claimed that killing Americans without due process is “legal,” “necessary,” “ethical,” and “wise.”

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In commenting on a white paper released by the Justice Department and obtained by NBC News, White House Press Secretary Jay Carney used those words to describe the targeted assassination of American citizens overseas. In other words, those marked for death by drone are those believed by the president to be collaborating (in a notably undefined manner) with “al-Qaeda and its associated forces” have no rights and can be killed at will.

In a footnote, the Justice Department explained that the “laws of war” will be used to determine whether a group is a “co-belligerent” with al-Qaeda. That is the sum of the guidance and notice given to those Americans residing overseas who might unknowingly be targets for the next Hellfire missile.

Apart from the Justice Department memo and the admissions contained in it, the judges pointed to comments made in May 2013 by Attorney General Eric Holder. As reported by Jack Kenny in [The New American](#):

Attorney General Eric Holder issued the first official acknowledgement Wednesday that the United States has killed four U.S. citizens with drone strikes, including the targeted killing of Muslim cleric Anwar al-Awlaki in Yemen in September 2011. Holder also acknowledged the killing by drone strikes of three other Americans: Samir Khan, who was killed in the same strike that killed Awlaki;



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Awlaki's 16-year-old son, Abdulrahman al-Awlaki, also killed in Yemen; and Jude Mohammed, killed in Pakistan.

Statements seemingly against interest made by John O. Brennan also attracted the court's attention.

During a televised conversation with Margaret Sanger at the Council on Foreign Relations (CFR) in August 2012, Brennan defended his boss's remote-control elimination of those suspected of posing a threat to the security of the homeland. "So long as AQAP [al-Qaeda in the Arabian Peninsula] seeks to implement its murderous agenda, we will be a close partner with Yemen in meeting this common threat," Brennan said.

When asked about the collateral deaths of innocent civilians during these attacks on "militants," Brennan said that the American "pilots" controlling the drones "make every effort" to avoid killing innocents. Said Brennan:

Today I'd simply say that all our CT [counterterrorism] efforts in Yemen are conducted in concert with the Yemeni government. When direct action is taken, every effort is made to avoid any civilian casualty. And contrary to conventional wisdom, we see little evidence that these actions are generating widespread anti-American sentiment or recruits for AQAP. In fact, we see the opposite, our Yemeni partners are more eager to work with us. Yemenese citizens who have been freed from the hellish grip of AQAP are more eager, not less, to work with the Yemeni government. In short, targeted strikes against the most senior and most dangerous AQAP terrorists are not the problem, they are part of the solution.

What special understanding of the situation in Yemen would qualify Brennan to recommend that the United States insert itself into the middle of a civil war? According an article in the Daily Beast:

Nowhere were the subtleties in Brennan's worldview more obvious than in Yemen, a country he had long personal ties to from his days as CIA station chief in Saudi Arabia. The CIA operated mostly in Pakistan, which was viewed by the administration as an extension of the Afghan theater. But the agency wasn't the only wing of the government involved in targeted killings. The military had its own lethal program, and it was operating in countries, including Yemen, where the United States was not officially at war.

There is more to this excerpt from Brennan's foreign service résumé than meets the eye.

Once again, Brennan's "respect" for the rule of law allows for the United States to be involved in undeclared, unconstitutional wars, killing people — including American citizens — without due process. And, it allows the inference that Yemen might not be the only country "where the United States was not officially at war" where the president and the CIA are killing people in the name of the United States. After all, Brennan did promote the covert drone war in Yemen as a model for future interventions.

It's unclear, however, when or how the information related to the legal rationale for the killing might be made public. As the *Times* indicates in its story, the Obama administration may appeal Monday's decision, sending the issue to the Supreme Court.

Regardless of whether the president decides to conform to the appeals court ruling or kick upstairs to the highest court, lawyers for the plaintiffs are pleased with the decision. The *Times* reported:

David E. McCraw, a lawyer for *The Times*, said: "The court declined to accept at face value the government's claims about national security and instead did a searching and independent review of the record."



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Jameel Jaffer, a lawyer with the American Civil Liberties Union, added: “This is a resounding rejection of the government’s effort to use secrecy, and selective disclosure, as a means of manipulating public opinion about the targeted killing program. The government can’t pretend that everything about its targeted killing program is a classified secret while senior officials selectively disclose information meant to paint the program in the most favorable light.”

President Obama’s nearly daily approval of drone-delivered assassinations is an effrontery to over 650 years of our Anglo-American law’s protection from autocratic decrees of death without due process of law. When any president usurps the power to place names on a kill list and then have those people summarily executed without due process, he places our Republic on a trajectory toward tyranny and government-sponsored terrorism.

Of course, it would be another matter if those targeted and executed by the president were armed enemy combatants — they were not.

If Awlaki (or any of the other Americans Barack Obama has ordered murdered) was an enemy soldier captured during wartime, he would have been afforded certain rights guaranteed to POWs.

Those slated for White House-approved assassination, however, are not allowed any rights — neither the due process rights given to those accused of crimes nor the rights of fair treatment given to enemies captured on the battlefield.

The president has assumed all power over life and death and created ex nihilo a new category of individual — one deprived of all rights altogether.

The Justice Department has made no comment on the Second Circuit Court of Appeals’ ruling.

Joe A. Wolverton, II, J.D. is a correspondent for The New American and travels nationwide speaking on nullification, the Second Amendment, the surveillance state, and other constitutional issues. Follow him on Twitter @TNAJoeWolverton and he can be reached at jwolverton@thenewamerican.com.



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