

Obama's Secret Killing Court

by Judge Andrew P. Napolitano via clark - ICH *Friday, Feb 15 2013, 7:17am*

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President Obama willingly admits he dispatched CIA agents to kill an American and his teenage son and the son's American friend while they were in a desert in Yemen in 2011. He says he did so because the adult had encouraged folks to wage war on the United States and the children were just "collateral damage." He says further that he'll do this again when he is convinced that killing Americans will keep America safe. He says he knows the adult encouraged evil, and his encouragement caused the deaths of innocents. The adult was never charged with a crime or indicted by a grand jury; he was just targeted for death by the president himself and executed by a CIA drone.

International law and the law of war, to both of which the U.S. is bound by treaty, as well as federal law and the Judeo-Christian values that underlie the Declaration of Independence (which guarantees the right to live) and the Constitution (which permits governmental interference with that right only after a congressional declaration of war or individual due process) all provide that the certainty of the identity of a human target, the sincerity of the wish for his death, the perception of his guilt and imminent danger are insufficient to justify the government's use of lethal force against him. The president may only lawfully kill after due process, in self-defense or under a declaration of war.

The reasons for the constitutional requirement of a congressional declaration of war are to provide a check on the president's lust for war by forcing him to obtain formal congressional approval, to isolate and identify the object of war so the president cannot kill whomever he pleases, to confine the warfare to the places where the object's military forces are located so the president cannot invade wherever he wishes, and to assure termination of the hostilities when the object of the war surrenders so the president cannot wage war without end.

But when war is waged, only belligerents may be targeted, and advocating violence against the U.S. is not an act of wartime violence and does not make one a belligerent. Were this not so, then nothing would lawfully prevent the U.S. from killing Americans who spoke out in favor of al-Qaida, and then killing Americans who spoke out against war and killing, and then killing Americans whose words became an obstacle to killing.

That's the reason the enabling federal legislation enacted in support of the 2001 Authorization for Use of Military Force specifically exempts expressive conduct from the ambit of prohibited criminal or warlike behavior that can provide the basis for any government prosecution or military belligerence. So, the feds can shoot at a guy with a bomb in his hands when he is about to explode it, but not at a guy with a megaphone in his hands when he is about to speak through it.

Thus, if New Mexico-born Anwar al-Awlaki had been shooting at American troops at the time the government took aim at him, naturally, the troops can shoot back.

But when he merely encourages others to shoot, his behavior is protected by the natural law, the First Amendment and numerous federal statutes. As well, he was 10,000 miles from the U.S., never known to have engaged in violent acts, and having a private conversation at a roadside cafe in a desert when he was killed. No law or legal principle justifies the U.S. government killing him then

and there; in fact, numerous laws prohibit it.

The president's use of the CIA for offensive killing also violates federal law. Intelligence agents may only lawfully kill in self-defense, not offensively. Only the military may lawfully kill offensively. In the al-Awlaki case, intelligence sources have confirmed to Fox News that a team of American and Yemeni intelligence agents had followed al-Awlaki and had him under continuous observation at the time of his killing and for the preceding 48 hours. They easily could have arrested him — had he been charged with a civilian crime or a war crime, which he wasn't.

Of course, the murder of his Colorado-born son and the son's American friend are not even arguably defensible, and the president's spokesman who suggested that the young al-Awlaki should have "chosen a different father" shows a seriously defective thought process and an utter antipathy for the rule of law in places of power.

We now confront the truly unthinkable: a proposal to establish yet another secret court, this one with the authority to authorize the president and his designees to kill Americans. This proposal has come from Congress, which seems more interested in getting in on the killing than in upholding the Constitution. The federal government only has the lawful powers the states delegated to it. As the states cannot kill Americans without due process, neither can the feds. Congress cannot create this killing court, and no judge on such a Stalinesque court can authorize the president to kill.

The president has made a political calculation that it will be easier for him to justify killing folks he can demonize than it will be to afford them due process, by capturing, housing and trying them. Now, he has come to believe that it will be easier still if unnamed federal judges meeting in secret take the heat. Politically, the president may be correct. But he has taken an oath to uphold the Constitution, and he lacks the moral and legal basis to reject that in favor of killing.

When he kills without due process, he disobeys the laws he has sworn to uphold, no matter who agrees with him. When we talk about killing as if it were golf, we debase ourselves. And when the government kills and we put our heads in the sand, woe to us when there is no place to hide.

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