The US Justice Department brief for the assassination of US citizens

Part one

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We publish here the first part of a two-part article providing a legal, constitutional and historical analysis of the Obama administration's "white paper" supporting its policy of drone assassinations of US citizens. Part two will be posted April 19.

In a Department of Justice "white paper" leaked to the press in February of this year, the Obama administration asserted the power of the US president to unilaterally order the assassination of US citizens anywhere in the world without any judicial process.

The 16-page memo, 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," had previously been circulated in secret to both Democratic and Republican members of Congress, including members of congressional committees on intelligence and the judiciary.

The assertion of the presidential power to unilaterally order the murder of US citizens represents an abrogation of the entire structure of constitutional principles upon which hundreds of years of democratic jurisprudence has rested. With the assertion of that power, the US government moves into new and uncharted territory.

The assassination of US citizens on orders from the president is more than an abstract, theoretical assertion of power. On September 30, 2011, the Obama administration, through its military-intelligence agencies, carried out the assassination of Muslim cleric and US citizen Anwar al-Awlaki in Yemen. After numerous assassination attempts, he was killed in a car with three other men, including US citizen Samir Khan. (See: "The legal implications of the al-Awlaki assassination") The Obama administration then murdered Anwar al-Awlaki's 16-year-old son, Abdulrahman al-Awlaki, also a US citizen, in a separate drone attack on October 14, 2011 that killed seven people. (See: "Relatives of American citizens killed in drone strikes sue US officials")

Thousands of people have already been murdered by Obama's drones. Senator Lindsey Graham recently bragged of at least 4,700 such killings. The victims include women and children, entire families, rescue workers, first responders and mourners in Pakistan, Somalia, Yemen and Afghanistan.

Since the publication of the white paper, leading figures in the US political establishment have declared that the asserted power to assassinate includes the power to kill US citizens on US soil. Attorney General Eric Holder declared last month in a letter replying to a question from Kentucky Senator Rand Paul, a member of the Senate Judiciary Committee, that the president can "authorize the military to use lethal force within the territory of the United States," based on an un-reviewable, secret presidential determination that the assassination is warranted by an "extraordinary circumstance."

John Brennan, Obama's long-time counter-terrorism advisor, now elevated to the post of CIA director, refused to respond directly during his Senate confirmation hearing earlier this year when asked whether the president could order the assassination of US citizens on US soil. (See: "Brennan refuses to rule out drone assassinations within the US") Brennan was confirmed in a bipartisan vote of Democrats and Republicans.

Virtually no one within the political establishment has called for an end to the drone assassination program, much less the impeachment of Obama and the prosecution of his accomplices. Defenders of the assassination policy include the *New York Times*, which speaks for the liberal wing of the political establishment. The *Times* editorialized on March 10, 2013 that the assassination of al-Awlaki was justified because the US Constitution only " *generally* requires judicial process before the government may kill an American." [Emphasis added].

The scattered criticisms of the Obama administration's drone program have largely been framed in terms of the lack of "public discussion" and "debate" on the policy. In fact, there is nothing to debate. From a bourgeois democratic legal standpoint, these killings constitute war crimes and the gravest of violations of US and international law. They are sufficient grounds for the indictment and prosecution of every civilian, military and intelligence official involved in the Obama drone program, and the impeachment of the president himself. In any such prosecution, the white paper would be powerfully incriminating evidence.

Background

The white paper claims that assassination is consistent with the Bill of Rights, including the Due Process Clause. "The Due Process Clause would not prohibit a lethal operation of the sort contemplated here," the white paper declares, echoing statements by Holder in March of last year that "due process" is not the same as "judicial process."

The Due Process clause of the Fifth Amendment, invoking the language of the Magna Carta, provides that no person shall be "deprived of life, liberty, or property without due process of law." On its face, it clearly prohibits extra-judicial killing. In addition, Article One of the Constitution expressly prohibits bills of attainder, a procedure for stripping a person of the right to due process.

The Constitution's framers understood that the rest of a person's democratic rights have little meaning if he or she has no right to a trial in which they can be exercised. What is left of the right to an attorney, the right to remain silent, the right to a jury, the presumption of innocence, the right to a speedy public trial, the right to be free from cruel and unusual punishment, the right to confront one's accusers, and so forth if the state

can circumvent the entire process by assassinating the person instead?

Abraham Lincoln once wrote, "If slavery is not wrong, nothing is wrong." It may likewise be said that if assassination is not illegal, nothing is illegal. If the president can kill any person, anywhere in the world—without warning, without evidence, and without a trial—then what democratic rights remain? Can the president order the establishment of concentration camps? Can the president order the liquidation of entire political parties deemed a threat to "national security?"

The Fifth Amendment, ratified in 1791, reflected the overwhelming revulsion of Enlightenment thinkers at the concept of assassination. Thomas Jefferson wrote to James Madison in 1789: "Assassination, poison, perjury… All of these were legitimate principles in the dark ages which intervened between ancient and modern civilizations, but exploded and held in just horror in the eighteenth century."

A 1758 international law treatise by seminal Swiss legal theorist Emmerich de Vattel includes the following appraisal of the legitimacy of assassination under international law: "I give, then, the name of assassination to treacherous murder… and such an attempt, I say, is infamous and execrable, both to him who executes it and in him who commands it… The sovereign who makes use of such execrable means should be regarded as an enemy of the human race, and all Nations are called upon, in the interests of the common safety of mankind, to join forces and unite to punish him."[1]

It is notable that throughout the American Civil War, President Lincoln did not once assert the right to assassinate an American citizen without due process of law. While hundreds of thousands were killed on American battlefields, Lincoln did not—and could not—order the summary execution of alleged Southern sympathizers in New York or Paris, which is the legal equivalent of what the Obama administration asserts the right to do.

Where the writ of habeas corpus was suspended during the US Civil War—which, according to the US Constitution, may occur in cases of "rebellion and invasion"—it was done in limited circumstances, such as to effectuate a blockade against Southern cotton exports to Europe, or arrest Southern instigators of anti-black and anti-Republican riots in the North in the wake of the military disaster at Fredericksburg in December 1862. It goes without saying that those targeted were arrested and not summarily executed. Indeed, many of those arrested were subsequently released during the war.

Any analogy between the contemporary "war on terror" and the US Civil War must be rejected with contempt. The Civil War developed into a revolutionary struggle against an incompatible and antagonistic society based on human chattel slavery. Even in the bloodiest moments of the war, Lincoln himself displayed an extraordinary sensitivity to democratic ideals and legal precedents. The phony "war on terror" and the Obama administration's dirty "kill lists" are in an entirely different historical category.

There is no precedent for assassinations of US citizens on the orders of the president. While the US government certainly participated in assassinations throughout the 20th century, it was not until the Obama presidency in the 21st century that a case was made for their legality.

As recently as 1975, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, headed by Idaho Senator Frank Church, which investigated CIA assassination plots ranging from Cuba to the Congo, declared that assassination "violates moral precepts fundamental to our way of life… [and] traditional American notions of fair play."

In 1981, Republican President Ronald Reagan issued Executive Order 12333, which states: "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination." This order is still nominally in effect.

The "legal case" for assassination

The media describes the white paper as making the "legal case" for assassination. NBC News, for example, headlined an article: "Justice Department memo reveals legal case for drone strikes on Americans." This is a contradiction in terms. There can be no "legal case" for a practice that is on its face illegal under international law and in violation of the US Constitution.

The white paper does not actually present a "legal case." It cites no case, statute, constitutional provision or treaty giving the US president the power to assassinate US citizens. Nor could it do so, as no such legal authorities exist.

Unable to cite to a single legal authority for the proposition that the US president may assassinate US citizens without charges or trial, the white paper resorts to numerous citations of articles written by military lawyers or published in academic law reviews, as well as speeches given by various individuals to legal symposiums, as supposed evidence that the assassination of Americans is legal.

For example, the white paper cites a speech given by Harold Hongju Koh to an annual meeting of the American Society of International Law in 2010 and a speech by John Brennan at Harvard University in 2011. A legitimate response to citations of the opinions of Koh and Brennan would be, "Who cares?" The opinions of these individuals have no legal standing and cannot change something that is illegal into something that is legal.

The "legal case" presented by the Obama administration in the white paper is remarkable for its unwillingness to concede any limits whatsoever to the asserted power of the executive to kill US citizens. For example, after an extended argument for the legality of killing individuals who present an "imminent" threat to national security, and an extended discussion regarding the concept of "imminence" in which the term is defined so broadly as to permit virtually anything, the administration declares that it may assassinate even when there is no "imminent" threat. The white paper states: "Delaying action against individuals continually planning to kill Americans until some theoretical end stage of planning for a particular plot would create an unacceptably high risk that the action would fail and that American casualties would result."

In other words, the Obama administration can kill individuals whether or not they present what it deems an "imminent" threat.

Justice Thomas and *Hamdi v. Rumsfeld*

A careful reading of the white paper reveals, on page 15, an approving citation by the Obama administration lawyers of the neo-fascistic lone dissenting opinion penned by Supreme Court Justice Clarence Thomas in the case *Hamdi v. Rumsfeld* (2004). In *Hamdi*, over Thomas' dissent, the Supreme Court ruled that military commissions instituted by the Bush administration to try Guantanamo detainees were unconstitutional and violated due process.

The administration's citation of what was then considered a fringe position in *Hamdi* is highly significant. Thomas' dissent contains a brazen endorsement of authoritarian legal doctrines, including the "unitary executive" theory, according to which the president has unlimited and unreviewable "wartime" powers that he may exercise without judicial review, without the consent of Congress, and without consideration of the rights guaranteed by the Constitution. At the time of the *Hamdi* ruling, the *World Socialist Web Site* noted that Thomas' dissent "reflects the attitude of those within the ruling elite who openly espouse the virtues of police

state rule." (See: "The meaning of the US Supreme Court rulings on 'enemy combatants'") The Obama administration is now among this element.

Thomas' dissent, in turn, relies on *Moyer v. Peabody* (1909), which arose from the Colorado Labor Wars of 1903-04. These bloody struggles culminated in a reign of terror during which striking miners were brutally suppressed by the mine owners in concert with mercenary thugs, the police, the governor and the National Guard. The Supreme Court infamously ruled that the governor of Colorado and officers of the National Guard could round up hundreds of strikers from the Western Federation of Miners and jail them without due process.

The working class should take Thomas' favorable citation of *Peabody*, long considered by many legal analysts to be a dead letter—and the Obama Justice Department's citation of the Thomas opinion—as a dire warning.

The white paper cites other cherry-picked passages of *Hamdi* in support of its illegal assassination campaign. These citations further expose the flimsy and dishonest character of the whole "legal case" for assassination. In *Hamdi*, the Supreme Court actually ruled 8 to 1 *against* the Bush administration's asserted right to detain people without trial or due process. The Obama administration's drone assassination program goes beyond incommunicado detention to outright murder.

The AUMF

The white paper cites as further support for the legality of the assassination of US citizens the Authorization for Use of Military Force (AUMF), which was signed into law days after the attacks of September 11, 2001.

The AUMF declares that "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

Section I of the white paper opens with the following argument: "The United States is in an armed conflict with al-Qa'ida and its associated forces, and Congress has authorized the President to use all necessary and appropriate force against those entities." The white paper then cites the AUMF.

According to the Obama administration's interpretation of the AUMF, the resolution created a permanent state of "armed conflict" against terrorism during which the president exercises unlimited "wartime" powers.

Citing the *Peabody* decision discussed above, Justice Thomas claimed in *Hamdi* that the AUMF authorizes the president to "make the ordinary use of the soldiers…; that he may kill persons who resist, and, of course, that he may use the milder measure of seizing [and detaining] the bodies of those whom he considers to stand in the way of restoring peace."

According to Thomas, the constitutional guarantee of due process simply does not apply to persons designated as "enemies" in wartime. Thomas denounced the other eight justices whose decision, he said, would require that due process be given to enemies before a bomb could be dropped. "Because a decision to bomb a particular target might extinguish life interests, the plurality's analysis seems to require notice to potential targets," Thomas wrote.

"It could be argued that bombings and missile strikes are an inherent part of war," Thomas continued, "and as long as our forces do not violate the laws of war, it is of no constitutional moment that civilians might be killed." In other words, according to Thomas, a president's "wartime" powers include not just the power to imprison individuals without trial, but to kill individuals outright, including innocent civilians. With the "battleground" of the so-called "war on terror" defined as the entire surface of the globe, the logical result of this argument is presidential dictatorship.

The parallels to fascist jurisprudence are striking. "Of all the cares or concerns of government, the direction of war most peculiarly demands *those qualities which distinguish the exercise of power by a single hand,"* Thomas wrote in *Hamdi*, quoting a sentence from the Federalist Papers. [Emphasis added]

On February 28, 1933, German President Hindenburg, at the behest of Hitler, signed into law the Decree of the Reich President for the Protection of the People and the State, also known as the Reichstag Fire Decree. Purportedly in response to a "terrorist" act, the decree authorized the president to take unilateral and otherwise unconstitutional measures to defend national security. It declared "suspended until further notice" basic democratic rights, including the free use of communications, protection from warrantless search and seizure, the right of assembly, and other rights enumerated in the Weimar constitution.

Accompanied by Hitler's calls for a "ruthless confrontation with the KPD (German Communist Party)" the decree provided the impetus for a frame-up campaign that resulted in the abolition of the KPD and the mass arrests of hundreds of KPD officials and members. Less than a month later, on March 23, the Diet passed the "Law to Remedy the Distress of the People and Reich" (the Enabling Act), elevating Hitler to the position of dictator.

The AUMF, presented at the time as a temporary and limited measure of self-defense against those who committed acts over 12 years ago, is well on its way to being transformed into something akin to the Reichstag Fire Decree or the Enabling Act—an all-purpose pseudo-legal rationalization for police state measures and unfettered executive power for the indefinite future.

Since 2001, it has been repeatedly argued that the AUMF overrides existing democratic legal protections. In *Hamdi*, it was argued that the AUMF suspended habeas corpus and permitted the government to establish military commissions. In other cases, it was argued to have overridden the Foreign Intelligence Surveillance Act of 1978, which prohibits warrantless surveillance. The Obama administration takes these arguments further still, arguing in essence that the AUMF authorizes the president to order the killing of American citizens.

The "war on terror" supposedly inaugurated by the AUMF is a fraud. Never declared by Congress, it has no articulable content, no objectives, and no identifiable enemy. Instead, after more than a decade and with no end in sight, it justifies a permanent status of war footing in which the basic democratic rights of the population are under permanent siege.

Footnotes:

[1] Vattel, Le droit des gens, p. 289; quoted in Thomas, Ward, "Norms and Security: The Case of International Assassination," *International Security*, Vol. 25, No. 1 (Summer 2000), pp. 105-133.

To be continued.