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Obama Gives Himself Permission to Kill

By Andrew P. Napolitano

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After stonewalling for more than a year federal judges and ordinary citizens who sought the revelation of its secret legal research justifying the presidential use of drones to kill persons overseas – even Americans – claiming the research was so sensitive and so secret that it could not be revealed without serious consequences, the government sent a summary of its legal memos to an NBC newsroom earlier this week.

This revelation will come as a great surprise, and not a little annoyance, to U.S. District Court Judge Colleen McMahon, who heard many hours of oral argument during which the government predicted gloom and doom if its legal research were subjected to public scrutiny. She very reluctantly agreed with the feds, but told them she felt caught in "a veritable Catch-22," because the feds have created "a thicket of laws and precedents that effectively allow the executive branch of our government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for their conclusion a secret."

She was writing about President Obama killing Americans and refusing to divulge the legal basis for claiming the right to do so. Now we know that basis.

The undated and unsigned 16-page document leaked to NBC refers to itself as a Department of Justice white paper. Its logic is flawed, its premises are bereft of any appreciation for the values of the Declaration of Independence and the supremacy of the Constitution, and its rationale could be used to justify any breaking of any law by any "informed, high-level official of the U.S. government."

The quoted phrase is extracted from the memo, which claims that the law reposes into the hands of any unnamed "high-level official," not necessarily the president, the lawful power to decide when to suspend constitutional protections guaranteed to all persons and kill them without any due process whatsoever. This is the power claimed by kings and tyrants. It is the power most repugnant to American values. It is the power we have arguably fought countless wars to prevent from arriving here. Now, under Obama, it is here.

This came to a boiling point when Obama dispatched CIA drones to kill New Mexico-born and al-Qaida-affiliated Anwar al-Awlaki while he was riding in a car in a desert in Yemen in September 2011. A follow-up drone, also dispatched by Obama, killed Awlaki's 16-year-old Colorado-born son and his American friend. Awlaki's American father sued the president in federal court in Washington, D.C., trying to prevent the killing. Justice Department lawyers persuaded a judge that the president always follows the law, and besides, without any evidence of presidential law breaking, the elder Awlaki had no case against the president. Within three months of that ruling, the president dispatched his drones and the Awlakis were dead. This spawned follow-up lawsuits, in one of which McMahon gave her reluctant ruling.

Then the white paper appeared. It claims that if an American is likely to trigger the use of force 10,000 miles from here, and he can't easily be arrested, he can be murdered with impunity. This notwithstanding state and federal laws that expressly prohibit non-judicial killing, an executive order signed by every president from Gerald Ford to Obama prohibiting American officials from participating in assassinations, the absence of a declaration of war against Yemen, treaties expressly prohibiting this type of killing, and the language of the Declaration, which guarantees the right to live, and the Constitution, which requires a jury trial before the government can deny that right.

The president cannot lawfully order the killing of anyone, except according to the Constitution and federal law. Under the Constitution, he can only order killing using the military when the U.S. has been attacked or when an attack is so imminent that delay would cost innocent lives. He can also order killing using the military in pursuit of a declaration of war enacted by Congress.

Unless Obama knows that an attack from Yemen on our shores is imminent, he'd be hard-pressed to argue that a guy in a car in the desert 10,000 miles from here – no matter his intentions – poses a threat so imminent to the U.S. that he needs to be killed on the spot in order to save the lives of Americans who would surely die during the time it would take to declare war on the country that harbors him, or during the time it would take to arrest him. Under no lawful circumstances may he use CIA agents for killing. Surely, CIA agents can use deadly force defensively to protect themselves and their assets, but they may not use it offensively. Federal laws against murder apply to the president and to all federal agents and personnel in their official capacities, wherever they go on the planet.

Obama has argued that he can kill Americans whose deaths he believes will keep us all safer, without any due process whatsoever. No law authorizes that. His attorney general has argued that the president's careful consideration of each target and the narrow use of deadly force are an adequate and constitutional substitute for due process. No court has ever approved that. And his national security adviser has argued that the use of drones is humane since they are "surgical" and only kill their targets. We know that is incorrect, as the folks who monitor all this say that 11 percent to 17 percent of the 2,300 drone-caused deaths have been those of innocent bystanders.

Did you consent to a government that can kill whom it wishes? How about one that plays tricks on federal judges? How long will it be before the presidential killing comes home?