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## Permanent War and Obama's Worst Abuses

By John Glaser

March 11, 2013

*The New York Times* published a lengthy article <sup>[1]</sup> yesterday on the Obama administration's effort to legally justify the killing of an American citizen in its targeted killing program, namely Anwar al-Awlaki. Excerpt:

David Barron and Martin Lederman had a problem. As lawyers in the Justice Department's Office of Legal Counsel, it had fallen to them to declare whether deliberately killing Mr. Awlaki, despite his citizenship, would be lawful, assuming it was not feasible to capture him. The question raised a complex tangle of potential obstacles under both international and domestic law, and Mr. Awlaki might be located at any moment.

According to officials familiar with the deliberations, the lawyers threw themselves into the project and swiftly completed a short memorandum. It preliminarily concluded, based on the evidence available at the time, that Mr. Awlaki was a lawful target because he was participating in the war with Al Qaeda and also because he was a specific threat to the country. The overlapping reasoning justified a strike either by the Pentagon, which generally operated within the Congressional authorization to use military force against Al Qaeda, or by the C.I.A., a civilian agency which generally operated within a "national self-defense" framework deriving from a president's security powers.

So Barron and Lederman – searching desperately through legalese to tell Obama what he wanted to hear – “concluded that the wartime threat posed by Mr. Awlaki” empowered the government to “kill him without a trial.”

This is really the crux of every problem of overreach and abuse in the war on terror, from George W. Bush to Barack Obama. Since 9/11, Congress and the Executive Branch have insisted they have wartime powers not ordinarily granted to the government.

The Authorization for the Use of Military Force (AUMF), passed by Congress and signed into law three days after the 9/11 attacks, is what President Obama, like Bush before him, repeatedly uses to justify expansive powers to kill, bomb, surveil, etc. Ironically, the same day this article was published, *The New York Times* also published an editorial calling for the repeal of the AUMF <sup>[2]</sup>, arguing it has “become the basis for a perpetual, ever-expanding war that undermined the traditional constraints on government power,” resulting in “an unintelligible policy without express limits or protective walls.”

Obama, the *Times* editorial says, has “relied on the 2001 authorization to use drones to kill terrorists far from the Afghan battlefield, and to claim an unconstitutional power to kill American citizens in other countries <sup>[3]</sup> based only on suspicion that they are or might become terrorist threats, without judicial review.”

Every drone bombing, every new military incursion into far away countries, every phone tapped and email snooped, every poor soul deprived of due process – either killed or indefinitely detained, every new measure of secrecy, all of it is justified by the spirit of the AUMF, if not its actual stipulations. All of it occurs against the backdrop of the wartime powers usurped by the government in seemingly endless parameters to combat a threat that pales in comparison <sup>[4]</sup> to those faced in US wars of the 20th century.

Incidentally, a repeal of the AUMF has been proposed <sup>[5]</sup> in Congress – by the one member of that branch who dared vote against it <sup>[6]</sup>, Rep. Barbara Lee (D-CA). It has five cosponsors, and barely any support. The reason is that more power is a bipartisan aspiration, even if those currently out of power temporarily say otherwise.

As the *Times* article on the Awlaki killing says, the effort of Barron and Lederman to find legal justification for Obama’s Executive overreach played out in the shadows “of how some of their predecessors under President George W. Bush had become defined by their once-secret memos asserting a nearly unlimited view of executive authority, like that a president’s wartime powers allowed him to defy Congressional statutes limiting torture and surveillance.”

Indeed, Mr. Barron and Mr. Lederman had produced a definitive denunciation of such reasoning, co-writing a book-length, two <sup>[7]</sup>-part <sup>[8]</sup> Harvard Law Review essay in 2008 concluding that the Bush team’s theory of presidential powers that could not be checked by Congress was “an even more radical attempt to remake the constitutional law of war powers than is often recognized.” Then a senator, Mr. Obama had called the Bush theory <sup>[9]</sup> that a president could bypass a statute requiring warrants for surveillance “illegal and unconstitutional.”

Now, Mr. Barron and Mr. Lederman were being asked whether President Obama’s counterterrorism team could take its own extraordinary step, notwithstanding potential [legal] obstacles.

These extra-legal policies have become normalized in America, thanks in part to Obama's embrace of his predecessor's defiance of any constitutional restraints. And until the AUMF and the collective fear that breathes life into it are repealed, Washington will have usurped these powers indefinitely, for all posterity.

P.S. Notwithstanding the same-day publication of the *Times'* repeal-the-AUMF editorial, the article describing the effort to kill Alwaki is predictably deferential to the government line, bolstering the administration's self-serving narrative and leaving out a lot of the questions of legality that experts have been screaming about for years. Here is the ACLU's response <sup>[10]</sup> to the article:

“In anonymous assertions to *The New York Times*, current and former Obama administration officials seek to justify the killings of three U.S. citizens even as the administration fights hard to prevent any transparency or accountability for those killings in court. This is the latest in a series of one-sided, selective disclosures that prevent meaningful public debate and legal or even political accountability for the government's killing program, including its use against citizens.

“Government officials have made serious allegations against Anwar al-Aulaqi, but allegations are not evidence, and the whole point of the Constitution's due process clause is that a court must distinguish between the two. If the government has evidence that Al-Aulaqi posed an imminent threat at the time it killed him, it should present that evidence to a court. Officials now also anonymously assert that Samir Khan's killing was unintended and that the killing of 16-year-old Abdulrahman al-Aulaqi was a mistake, even though in court filings the Obama administration refuses to acknowledge any role in those killings. In court filings made just last week, the government in essence argued, wrongly, that it has the authority to kill these three Americans without ever having to justify its actions under the Constitution in any courtroom.”