

By David Swanson

From [War Is A Crime](#) | Original Article

Attorney General Eric Holder on Monday explained why it's legal to murder people -- not to execute prisoners convicted of capital crimes, not to shoot someone in self-defense, not to fight on a battlefield in a war that is somehow legalized, but to target and kill an individual sitting on his sofa, with no charges, no arrest, no trial, no approval from a court, no approval from a legislature, no approval from we the people, and in fact no sharing of information with any institutions that are not the president. Holder's speech approached his topic in a round about manner:

"Since this country's earliest days, the American people have risen to this challenge -- and all that it demands. But, as we have seen -- and as President John F. Kennedy may have described best -- 'In the long history of the world, only a few generations have been granted the role of defending freedom in its hour of maximum danger.'"

Holder quotes that and then immediately rejects it, claiming that our generation too should act as if it is in such a moment, even if it isn't, a moment that Holder's position suggests may last forever:

"Half a century has passed since those words were spoken, but our nation today confronts grave national security threats that demand our constant attention and steadfast commitment. It is clear that, once again, we have reached an 'hour of danger.'

"We are a nation at war. And, in this war, we face a nimble and determined enemy that cannot be underestimated."

So, if I were to estimate that Al Qaeda barely exists and is no serious threat to the Homeland formerly known as the United States, I would not be underestimating it? If I were to point out

that no member of that horrifying outfit has been killed in Afghanistan this year, that fact would not contribute to an unacceptable underestimation? What fun it is to fight the most glorious of wars in the hour of maximum danger against an enemy so pitiful that it literally cannot be underestimated.

If the people of Iraq and Afghanistan hadn't risen up and defeated the trillion-dollar U.S. military with some homemade bombs and cell phones, and were Iran not threatening to fight back if attacked, this might be all fun and games. Except that Holder isn't talking about those wars that still sort of look like wars. He's talking about a war paralleling the Soviet Threat, a war that is everywhere all the time, a war that encompasses the murder of anybody anywhere as an "act of war," even if there's nothing warlike about the victim or the situation other than the fact that we are murdering him or her.

"I know that – more than a decade after the September 11th attacks; and despite our recent national security successes, including the operation that brought to justice Osama bin Laden last year – there are people currently plotting to murder Americans, who reside in distant countries as well as within our own borders. Disrupting and preventing these plots – and using every available and appropriate tool to keep the American people safe – has been, and will remain, this Administration's top priority. "

Osama bin Laden was murdered. No attempt was made to capture him. You can defend that murder, but to call it "bringing to justice" and to get away with that characterization is to win the argument before you've begun it. This speech was advertised as a legal defense of such murders, and such a defense can hardly begin and end with equating murder with justice.

Nor can promising not to spy on U.S. citizens without proper procedures satisfy concerns with the claiming of power to kill people, including U.S. citizens. Here's Holder:

"Let me give you an example. Under section 702 of the Foreign Intelligence Surveillance Act, the Attorney General and the Director of National Intelligence may authorize annually, with the approval of the Foreign Intelligence Surveillance Court, collection directed at identified categories of foreign intelligence targets, without the need for a court order for each individual subject. This ensures that the government has the flexibility and agility it needs to identify and to respond to terrorist and other foreign threats to our security. But the government may not

use this authority intentionally to target a U.S. person, here or abroad, or anyone known to be in the United States."

Nor can promising to imprison people without a fair trial justify murdering people. But Holder does not do that. He promises kangaroo courts:

"Much has been made of the distinction between our federal civilian courts and revised military commissions. The reality is that both incorporate fundamental due process and other protections that are essential to the effective administration of justice – and we should not deprive ourselves of any tool in our fight against al Qaeda. "

Even though al Qaeda cannot be underestimated! Most legal observers do not take this seriously for a minute. Here's 2008 presidential candidate Barack Obama: "As president, I will close Guantanamo, reject the Military Commissions Act, and adhere to the Geneva Conventions. Our Constitution and our Uniform Code of Military Justice provide a framework for dealing with the terrorists ... Our Constitution works. We will again set an example for the world that the law is not subject to the whims of stubborn rulers, and that justice is not arbitrary." Go Team!

Holder then explains, sensibly enough, why non-military courts work just fine (unless an extreme record of nearly 100% convictions worries you):

"Simply put, since 9/11, hundreds of individuals have been convicted of terrorism or terrorism-related offenses in Article III courts and are now serving long sentences in federal prison. Not one has ever escaped custody. No judicial district has suffered any kind of retaliatory attack."

But he returns immediately to defending courts that lack basic protections, claims those protections have now been put in place, and asserts that military commissions have been successfully reformed. [Among those](#) who have not been convinced is the former chief prosecutor of the military commissions at Guantanamo, Col. Morris Davis who said in November: "a decision to use both legal settings is a mistake. It will establish a dangerous legal

double standard that gives some detainees superior rights and protections, and relegates others to the inferior rights and protections of military commissions. This will only perpetuate the perception that Guantanamo and justice are mutually exclusive." Of course the question of how bad military commissions are also does nothing to advance a case for legal murder.

Holder turns next to the presidential power to imprison people that was signed into law on New Year's Eve as part of the National "Defense" Authorization Act:

"This Administration has worked in other areas as well to ensure that counterterrorism professionals have the flexibility that they need to fulfill their critical responsibilities without diverging from our laws and our values. Last week brought the most recent step, when the President issued procedures under the National Defense Authorization Act. This legislation, which Congress passed in December, mandated that a narrow category of al Qaeda terrorist suspects be placed in temporary military custody. "

This legislation did nothing of the sort. For one thing, Obama [unconstitutionally altered](#) it in a signing statement as it applied to a huge prison full of largely non-al Qaeda prisoners in Afghanistan. In addition, there has been quite a bit of discussion of the power this bill creates to imprison U.S. citizens. The State of Virginia has forbidden state employees from assisting with that. Senator Diane Feinstein has introduced a bill to undo it. And, despite tremendous, often willful, confusion, [the history is clear](#) that Obama insisted on the power to imprison U.S. citizens and to do so outside of the military.

Three quarters of the way through a speech on the legality of murdering people, Holder begins to approach that touchy topic. Here is what he says:

"Now, I realize I have gone into considerable detail about tools we use to identify suspected terrorists and to bring captured terrorists to justice. It is preferable to capture suspected terrorists where feasible – among other reasons, so that we can gather valuable intelligence from them – but we must also recognize that there are instances where our government has the clear authority – and, I would argue, the responsibility – to defend the United States through the appropriate and lawful use of lethal force. "

By "government" Holder means the president, whether President Obama or President Romney or President Santorum or any man or woman who later becomes president, and nobody else. That one person alone is to decide what is appropriate and lawful and feasible. If the Vice President thinks it is feasible to capture someone, too bad for him. He should have gotten a better job if he wanted to be a decider. If the Chief Justice of the Supreme Court thinks preaching against the United States is not a capital offense, tough tamales. He shouldn't dress in his bathrobe if he wants to be taken seriously. If the United States Congress objects that the president's "surgical strikes" tend to kill too many random men, women, and children, well they know what they can do: Run for president! If the United Nations special rapporteur on extrajudicial killings has objections, well -- Isn't that SPECIAL? And the American people? They can shut up or vote for a racist buffoon from the bad party. Holder continues:

"This principle has long been established under both U.S. and international law. In response to the attacks perpetrated – and the continuing threat posed – by al Qaeda, the Taliban, and associated forces, Congress has authorized the President to use all necessary and appropriate force against those groups. Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law. The Constitution empowers the President to protect the nation from any imminent threat of violent attack. And international law recognizes the inherent right of national self-defense. None of this is changed by the fact that we are not in a conventional war."

In reality, the 2001 authorization to use military force violates the Kellogg-Briand Pact, the UN Charter, and the U.S. Constitution. It dates to only 10 years ago. And it is already getting old, as it is becoming harder and harder to accuse people of involvement in the attacks of September 11, 2001. No international law recognizes secret global war without limitation in time or space. There is no long established tradition of this madness. There has never been any type of violence that somebody wouldn't call "defensive," but the traditional right to national military defense applies only to nations being attacked by other nations, and not in a mystical or ideological sense, but actually attacked in the geographic area formerly known as the nation. Holder says that's old hat:

"Our legal authority is not limited to the battlefields in Afghanistan. Indeed, neither Congress nor our federal courts has limited the geographic scope of our ability to use force to the current conflict in Afghanistan. We are at war with a stateless enemy, prone to shifting operations from country to country. Over the last three years alone, al Qaeda and its associates have directed several attacks – fortunately, unsuccessful – against us from countries other than Afghanistan.

Our government has both a responsibility and a right to protect this nation and its people from such threats."

Several attacks? Against the United States? In the last three years? By al Qaeda and its associates? If Holder had been willing to take any questions after tossing out so many topics, someone might have asked for documentation of this. And if people, as opposed to media employees, had been allowed to ask questions, someone might have inquired how whatever actions Holder described were war rather than crime. If war, then they ought to be legal. Holder just said that attacks are legal if you're at war. But he also said he only wanted to kill people if they couldn't be captured, and he prefaced this with claims that everybody captured gets a fair trial. That would seem to suggest a crime for which they might be tried. But then why not try them for the crime *in absentia* and build pressure for their capture and extradition? Why not at least state what the crime is, even after murdering them? Why not at least state which murdered people were criminals and which just happened to be in the wrong place, unaware that they happened to be walking through a war?

Holder goes on to explain that the president will only murder someone in a foreign country if he's decided that that country won't do it for him. This, Holder says, constitutes "respect for another nation's sovereignty."

Moreover, says Holder, we murdered important Japanese officers during World War II. Of course, the United States was at war with Japan at the time, and Congress had declared that war. The United States also committed numerous hideous crimes during that war, including the lawless imprisonment of Japanese-Americans that created the laws Holder tossed out during the first part of his speech. Holder explains that murder is not assassination when the president does it, because he only murders people he declares to constitute an imminent threat:

"Some have called such operations 'assassinations.' They are not, and the use of that loaded term is misplaced. Assassinations are unlawful killings. Here, for the reasons I have given, the U.S. government's use of lethal force in self defense against a leader of al Qaeda or an associated force who presents an imminent threat of violent attack would not be unlawful — and therefore would not violate the Executive Order banning assassination or criminal statutes."

But Obama has not so much as claimed that each person he killed constituted an imminent threat, much less convinced any independent body (sorry, Eric, you don't count) of this.

I think the speech could have ended there. But many in the United States believe such flimsy justifications for presidential killings only fall apart when U.S. citizens are the victims. So, Holder goes on to argue that U.S. citizens are fair game. The protest of this outrage, were Obama a Republican, is one for the record books in some alternative universe!

"Now, it is an unfortunate but undeniable fact that some of the threats we face come from a small number of United States citizens who have decided to commit violent attacks against their own country from abroad. Based on generations-old legal principles and Supreme Court decisions handed down during World War II, as well as during this current conflict, it's clear that United States citizenship alone does not make such individuals immune from being targeted. But it does mean that the government must take into account all relevant constitutional considerations with respect to United States citizens – even those who are leading efforts to kill innocent Americans. Of these, the most relevant is the Fifth Amendment's Due Process Clause, which says that the government may not deprive a citizen of his or her life without due process of law.

"The Supreme Court has made clear that the Due Process Clause does not impose one-size-fits-all requirements, but instead mandates procedural safeguards that depend on specific circumstances. In cases arising under the Due Process Clause – including in a case involving a U.S. citizen captured in the conflict against al Qaeda – the Court has applied a balancing approach, weighing the private interest that will be affected against the interest the government is trying to protect, and the burdens the government would face in providing additional process. Where national security operations are at stake, due process takes into account the realities of combat. . . .

"Let me be clear: an operation using lethal force in a foreign country, targeted against a U.S. citizen who is a senior operational leader of al Qaeda or associated forces, and who is actively engaged in planning to kill Americans, would be lawful at least in the following circumstances: First, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles."

How are we supposed to know that Awlaki was a senior operational leader of al Qaeda? And his teenage son? Was he that too? By "government" Holder means Obama. Obama determined these things.

"The evaluation of whether an individual presents an 'imminent threat' incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States. As we learned on 9/11, al Qaeda has demonstrated the ability to strike with little or no notice – and to cause devastating casualties. Its leaders are continually planning attacks against the United States, and they do not behave like a traditional military – wearing uniforms, carrying arms openly, or massing forces in preparation for an attack. Given these facts, the Constitution does not require the President to delay action until some theoretical end-stage of planning – when the precise time, place, and manner of an attack become clear. Such a requirement would create an unacceptably high risk that our efforts would fail, and that Americans would be killed."

The Constitution doesn't describe this sort of madness at all, so how could it possibly include such a requirement? The appeal to "defensive war" cited by Holder above itself requires more than awaiting the moment an attack becomes clear. It requires awaiting an actual attack. Law enforcement does not require that. Diplomacy does not require that. Ceasing to occupy, bomb, and pillage people's countries, motivating hostile terrorism, doesn't require that. But defensive war does.

"Some have argued that the President is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of al Qaeda or associated forces. This is simply not accurate. 'Due process' and 'judicial process' are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process."

The president alone can give you due process without ever explaining it to anybody else. Who knew?

"That is not to say that the Executive Branch has – or should ever have – the ability to target any such individuals without robust oversight. Which is why, in keeping with the law and our constitutional system of checks and balances, the Executive Branch regularly informs the appropriate members of Congress about our counterterrorism activities, including the legal framework, and would of course follow the same practice where lethal force is used against

United States citizens. "

Why "would"? This is not theoretical. Informing a handful of Congress members, and no doubt forbidding them to repeat what they are told, does not create Congressional oversight. It just creates a Bush-era excuse for lawlessness.

Holder planned to take no questions following his remarks. I wonder why.