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Attorney General Eric Holder (photo: European Parliament)

(update below)

Attorney General Eric Holder delivered [a major policy speech](#) at Northwestern University in Chicago that laid out what he and the Obama Administration consider to be the legal justification for counterterrorism policies. Of particular significance were arguments justifying the use of lethal force to kill US citizens suspected of terrorism without charge or trial.

I attended the speech. I witnessed how the university sought to position Holder's speech as a moment of prestige for the university. I heard the tone in Holder's voice as he espoused his view that all the Obama Administration is doing in the "war on terror" is justified.

The speech was an act of legal and political cowardice. By going before a group of law students instead of a group of federal judges, the Obama Administration was sending a signal that the Administration does not intend to let this issue be litigated. The Administration does not want to let the issue of whether it is legal or not to target and kill US citizens abroad be decided by the courts because that may result in an outcome where one less tool was available for the "war on terrorism."

As the director for the ACLU's National Security Project [stated](#) , the speech was a "gesture towards additional transparency." The gesture was naïve, designed as a substitute for releasing information, such as legal memos, which the ACLU has been seeking through a Freedom of Information Act (FOIA) request for months now.

The Administration once again displayed an unwillingness to admit the targeted killing programs of the United States present fundamental legal and moral questions. The Administration, again, refused to concede the public should be able to see the legal memos explaining why this program is lawful.

Lethal Force Against American Terror Suspects is Legal

Holder's speech manipulatively conceded that the US must always adhere to legal principles and constitutional values. At the same time, it asserted the US has the right to employ lethal force against any person deemed a threat. While Holder said when "feasible" it is "preferable to capture suspected terrorists," the speech indicated that could easily be overridden because, in Holder's opinion, "government has the clear authority" and responsibility "to defend the United States through the appropriate and lawful use of lethal force."

What makes "lethal force" lawful? All that must be in place is a "process" of "review." This meets the constitutional requirement that all US citizens "suspected of being a senior leader of al Qaeda or associated forces" be afforded "due process." Since the "Executive Branch regularly informs the appropriate members of Congress" about "counterterrorism activities, including the legal framework," the targeted killing program is even more legal.

Additionally, the targeted killing operations are "national security operations." They are not merely law enforcement operations. They are also not simply military operations. They are a

hybrid. They are “national security operations,” which grants the Executive Branch carte blanche to tailor the law to provide cover for whatever acts a presidential administration may wish to justify.

The Executive Branch, according to Holder, is not required to capture terrorists and put them on trial in order to bring them to “justice” or kill them. This is because “military and civilian officials must often make real-time decisions that balance the need to act, the existence of alternative options, the possibility of collateral damage, and other judgments – all of which depend on expertise and immediate access to information that only the Executive Branch may possess in real time.” And so, when it comes to protecting national security, the “Constitution guarantees due process, not judicial process.”

This was the logic in the address. America is a “nation at war” against a “stateless enemy” that is “nimble and determined. That is the overriding basis for all that is legally and morally repugnant about the targeted killing programs.

In fact, Holder actually said:

“Some have called such operations “assassinations.” They are not, and the use of that loaded term is misplaced. Assassinations are unlawful killings.”

That was for the old thinkers, who have not adapted to post-9/11 era of thinking.

“A State of War is Not a Blank Check”

Holder's full explanation for why the use of deliberate and premeditated lethal force is legal consisted of the following:

"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."

The basis wholly ignores Justice Sandra Day O'Connor, who [declared](#) in the Supreme Court ruling on the *Hamdi v. Rumsfeld*

case that "a state of war is not a blank check for the president when it comes to the rights of the nation's citizens." This was important because it meant that "enemy combatants" do have rights and could challenge their treatment in courts. It was a significant blow to the Bush Administration, which thought an authorized use of military force gave them the power to overrule any legal requirements.

"Regression in Evolution of International and US Domestic Law"

The speech superficially invoked international law. The US does not care much for international law. International law constrains US superpower. It suggests the US must abide by a set of legal rules, which could very well subvert the sovereignty of America.

There is no way the targeted killing programs abide by international law. Philip Alston, former UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, [wrote a paper](#) on the CIA's use of a targeted killing program in September 2011. In it, he argued:

"Assertions by Obama administration officials, as well as by many scholars, that these operations comply with international standards are undermined by the total absence of any forms of credible transparency or verifiable accountability. The CIA's internal control mechanisms, including its Inspector-General, have had no discernible impact; executive control mechanisms have either not been activated at all or have ignored the issue; congressional oversight has given a 'free pass' to the CIA in this area; judicial review has been effectively precluded; and external oversight has been reduced to media coverage which is all too often

dependent on information leaked by the CIA itself. As a result, there is no meaningful domestic accountability for a burgeoning program of international killing. This in turn means that the United States cannot possibly satisfy its obligations under international law to ensure accountability for its use of lethal force, either under [international human rights law] or [international humanitarian law]. The result is the steady undermining of the international rule of law, and the setting of legal precedents which will inevitably come back to haunt the United States before long when invoked by other states with highly problematic agendas."

Alston found the targeted killing program represented a "fundamental regression in evolution of both international law and domestic law." It also "provided legitimacy to the increasingly vocal calls by some officials, commentators and scholars" who advocated "that the United States should formally adopt a policy of extraterritorial targeted killings that would go well beyond what is currently permitted by international law."

If Targeted Killings Are Justified, What Can't Be Justified?

This argument of legal justification essentially moves the practice of targeted killings one step closer to being fully institutionalized and subsequently makes it possible to justify numerous other practices regarded as clear violations of civil liberties, human rights and the law.

For example, [here](#) is Marc Thiessen of the American Enterprise Institute:

"...notwithstanding the heated objections of the ACLU and the professional Left, a solid majority of American liberals support the targeted killing of terrorists—even if they are American citizens. **(Of course, a majority of liberals oppose capturing terrorists alive and waterboarding them. But blowing them up with drones from the air is just fine. Go figure.)** [emphasis added]...."

And, here's Bush "torture memo" author Steven Bradbury [arguing against legislation](#) that would explicitly ban the indefinite detention of Americans:

"If the president says we can kill an American citizen in Yemen through the Executive Branch decision you're an enemy combatant—I support that—**why in the world couldn't we hold them [indefinitely] for intelligence gathering?**

It makes no sense to give the executive power to assassinate somebody helping the enemy abroad and if they're lucky enough to make it to the homeland all of a sudden that's a common crime. [emphasis added]"

With targeted killings, one can argue against those who have condemned previous abuses of power. One can also argue against expansions of civil liberties protections.

The bottom line is the Obama Administration has the support of the two dominant political parties in America. This further solidified the bipartisan national security consensus.

The Obama Administration has the [support](#) of US citizens. That's why the speech was given at a law school and not on primetime television.

The Obama Administration wanted to send a message to one of the few factions of the population willing to be outspoken no matter the political cost: civil liberties groups, law professors, lawyers and other members of the justice community.

It wanted this faction to stop questioning the unprecedented use of lethal force to bring individuals to justice. It may not have worked though because the speech simply [renews interest in getting the memo](#) that says it is legal to kill Americans without charge or trial released.

Update

The ACLU's Hina Shamsi on *Democracy Now!* [this morning](#) :

"Problem here is that while Attorney General Holder acknowledges that the Constitution requires due process before the government takes the life of one of its own citizens, he says it is up to the executive branch alone, without judicial review, to determine what process is due and to make that decision without any oversight. And that's simply not the case in our constitutional system of checks and balances. The public deserves a right to know what standards, evidence and criteria are used when the administration seeks to kill one of its own citizens, and the legal basis for that exercise of authority needs to be reviewed by the court because of the significant constitutional questions that are raised."

Update 2

This response to Holder's speech from Peter van Buren, author of *We Meant Well*, is one of the best concise and pointed takes on the speech that I have read today. Titled "

[We Take Care of Our Own: Eric Holder and the End of Rights](#)

," Van Buren writes:

"Historians of the future, if they are not imprisoned for saying so, will trace the end of America's democratic experiment to the fearful days immediately after 9/11, what Bruce Springsteen called the days of the empty sky, when frightened, small men named Bush and Cheney made the first decisions to abandon the Constitution in the name of freedom and created a new version of the security state with the Patriot Act, Guantanamo, secret prisons and sanctioned torture by the US government. They proceeded carefully, making sure that lawyers in their employ sanctioned each dark act, much as kings in old Europe used the church to justify their own actions.

Those same historians will remark from exile on the irony that such horrendous policies were not only upheld by Obama, a Nobel Peace Prize winner and professor of Constitutional law, but added to until we came to the place we sadly occupy today: the Attorney General of the United States, Eric Holder, publicly stating that the American Government may murder one of its own citizens when it wishes to do so, and that the requirements of due process enshrined in the Constitution's Fifth Amendment, itself drawn from the Magna Carta that was the first reflowering of basic human rights since the Greeks, can be satisfied simply by a decision by that same President.

Today will thus be remembered as the day we gave up. No more clever wordplay (enhanced interrogations, "patriot" act, targeted killing, kinetic operations) but a simple declaration that the US Government will kill its own citizens when it wishes to, via a secret process we, and our victims, are not allowed to know or contest."

The use of the title of Bruce Springsteen's new song may be ironic and a bit twisted but it is appropriate. Indeed, after yesterday's speech, America will "take care" of its own if necessary.