GlobalResearch
Center for Research on Globalization

Redefining "Imminent": U.S. Department of Justice Makes Murder Respectable, Kills the Innocent and Jails their Defenders

By Brian Terrell
Global Research, November 18, 2014
Voices for Creative Non-Violence 17 November 2014

Region: USA
Theme: Law and Justice

Political language can be used, George Orwell said in 1946, "to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind." In order to justify its global assassination program, the Obama administration has had to stretch words beyond their natural breaking points. For instance, any male 14 years or older found dead in a drone strike zone is a "combatant" unless there is explicit intelligence posthumously proving him innocent. We are also informed that the constitutional guarantee of "due process" does not imply that the government must precede an execution with a trial. I think the one word most degraded and twisted these days, to the goriest ends, is the word "imminent."

Just what constitutes an "imminent" threat? Our government has long taken bold advantage of the American public's willingness to support lavish spending on armaments and to accept civilian casualties in military adventures abroad and depletion of domestic programs at home, when told these are necessary responses to deflect precisely such threats. The government has vastly expanded the meaning of the word "imminent." This new definition is crucial to the U.S. drone program, designed for projecting lethal force throughout the world. It provides a legal and moral pretext for the annihilation of people far away who pose no real threat to us at all.

The use of armed remotely controlled drones as the United States' favored weapon in its "war on terror" is increasing exponentially in recent years, raising many disturbing questions. Wielding 500 pound bombs and Hellfire missiles, Predator and Reaper drones are not the precise and surgical instruments of war so effusively praised by President Obama for "narrowly targeting our action against those who want to kill us and not the people they hide among." It is widely acknowledged that the majority of those killed in drone attacks are unintended, collateral victims. The deaths of the drones' intended targets and how they are chosen should be no less troubling.

Those deliberately targeted by drones are often far from conflict zones, often they are in countries with whom the U.S. is not at war and on some occasions have been U.S. citizens. They are rarely "taken out" in the heat of battle or while engaged in hostile actions and are more likely to be killed (with anyone in their vicinity) at a wedding, at a funeral, at work, hoeing in the garden, driving down the highway or enjoying a meal with family and friends. These deaths are counted as something other than murder only for the curious insistence by the government's lawyers that each of these victims represent an "imminent" threat to our

lives and safety here at home in the U.S.

In February 2013, a U.S. Department of Justice White Paper, “Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or an Associated Force,” was leaked by NBC News. This paper sheds some light on the legal justification for drone assassinations and explains the new and more flexible definition of the word “imminent.” “First,” it declares, “the condition that an operational leader present an ‘imminent’ threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.”

Before the Department of Justice lawyers got a hold of it, the meaning of the word “imminent” was unmistakably clear. Various dictionaries of the English language are all in agreement that that the word “imminent” explicitly denotes something definite and immediate, “likely to occur at any moment,” “impending,” “ready to take place,” “looming,” “pending,” “threatening,” “around the corner.” Nor has the legal definition of the word left room for ambiguity. After World War II, the Nuremberg Tribunal reaffirmed a 19th-century formulation of customary international law written by Daniel Webster, which said that the necessity for preemptive use of force in self-defense must be “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.” That was in the past. Now, any possible future threat – and any person on earth arguably might pose one – however remote, can satisfy the new definition. As far as the Justice Department is concerned, an “imminent” threat is now whomever an “informed high-level U.S. government official” determines to be such, based on evidence known to that official alone, never to be made public or reviewed by any court.

The breadth of the government’s definition of “imminent” is murderous in its enormity. It is all the more ironic that the same Department of Justice will also regularly define the word so narrowly as to convict and imprison law abiding and responsible citizens who act to defend the innocent from genuinely imminent harm by the actions of the U.S. government. On example especially relevant to the issue of killing by drone is the case of the “Creech 14.”

14 activists enter Creech Air Force Base, April, 2009

After the first act of nonviolent resistance to the lethal use of unmanned and remotely controlled drones in the United States took place at Creech Air Force Base in Nevada back in April, 2009, it took more than a year before the 14 of us accused of criminal trespass had our day in court. As this was the first opportunity for activists to "put drones on trial" at a time when few Americans were aware they even existed, we were especially diligent in preparing our case, to argue clearly and cogently, not in order to keep ourselves out of jail but for the sake of those who have died and those who live in fear of the drones. With coaching by some fine trial lawyers, our intention was to represent ourselves and drawing on humanitarian international law, to offer a strong defense of necessity, even while we were aware that there was little chance that the court would hear our arguments.

The defense of necessity, that one has not committed a crime if an act that is otherwise illegal was done to prevent a greater harm or crime from being perpetrated, is recognized by the Supreme Court as a part of the common law. It is not an exotic or even a particularly unusual defense. "The rationale behind the necessity defense is that sometimes, in a particular situation, a technical breach of the law is more advantageous to society than the consequence of strict adherence to the law," says West's *Encyclopedia of American Law* "The defense is often used successfully in cases that involve a Trespass on property to save a person's life or property." It might appear, then, that this defense is a natural one for minor infractions such as our alleged trespass, intended to stop the use of drones in a war of aggression, the crime against peace that the Nuremburg Tribunal named "the supreme international crime."

In reality, though, courts in the U.S. almost never allow the necessity defense to be raised in cases like ours. Most of us were experienced enough not to be surprised when we finally got to the Justice Court in Las Vegas in September, 2010, and Judge Jensen ruled in lockstep with his judicial colleagues. He insisted at the onset of our case that he was having none of it. "Go ahead," he said, allowing us to call our expert witnesses but sternly forbidding us from asking them any questions that matter. "Understand, it is only going to be limited to trespass, what knowledge he or she has, if any, whether you were or were not out at the base. We're not getting into international laws; that's not the issue. That's not the issue. What the government is doing wrong, that's not the issue. The issue is trespass."

Our co-defendant Steve Kelly followed the judge's instructions and questioned our first witness, former U.S. Attorney General Ramsey Clark, about his firsthand knowledge of trespass laws from working at the Department of Justice during the Kennedy and Johnson administrations. Steve specifically guided the witness to speak of "the cases of trespass … of lunch counter activities where laws stated you were not to sit at certain lunch counters" in the struggle for civil rights. Ramsey Clark acknowledged that those arrested for violating these laws had not committed crimes. Steve pushed his luck with the judge and offered the classic illustration of the necessity defense: "A situation where there is a 'no trespassing' sign and there is smoke coming out of a door or a window and a person is up on the upper floor in need of help. To enter that building, in a real narrow technical sense, would be trespass. Is there a possibility, in the long run, it wouldn't be trespass to help the person upstairs?" Ramsey replied, "We would hope so, wouldn't we? To have a baby burn to death or something, because of a 'no trespass' sign would be poor public policy to put it mildly. Criminal."

Judge Jensen by this time was obviously intrigued. His ruling to limit the testimony to trespass held, but as his fascination grew, so his interpretation of his own order grew more elastic. Over the repeated objections of the prosecution team, the judge allowed limited but

powerful testimony from Ramsey and our other witnesses, retired US Army Colonel and former diplomat Ann Wright and Loyola Law School Professor Bill Quigley that put our alleged trespass into its context as an act to stop a heinous crime.

I had the honor of making the closing statement for the accused, which I ended with, “We 14 are the ones who are seeing the smoke from the burning house and we are not going to be stopped by a ‘no trespassing’ sign from going to the burning children.”

Our appreciation for a judge’s extraordinary attention to the facts of the case aside, we still expected nothing but an immediate conviction and sentencing. Judge Jensen surprised us: “I consider it more than just a plain trespass trial. A lot of serious issues are at stake here. So I’m going to take it under advisement and I will render a written decision. And it may take me two to three months to do so, because I want to make sure that I’m right on whatever I rule on.”

When we returned to Las Vegas in January, 2011, Judge Jensen read his decision that it was just a plain trespass trial, after all and we were guilty. Among several justifications for convicting us, the judge rejected what he called “the Defendants’ claim of necessity” because “first, the Defendants failed to show that their protest was designed to prevent ‘imminent’ harm.” He faulted our case for not presenting the court with “evidence that any military activities involving drones were being conducted or about to be conducted on the day of the Defendants’ arrest,” seeming to forget that he had ordered us not to submit any such evidence, even if we had it.

Judge Jensen’s verdict was amply supported by the precedents he cited, including a 1991 appellate court ruling, U.S. v Schoon, that concerned a protest aimed to “keep US tax dollars out of El Salvador” at an IRS office in Tucson. In this protest, the Ninth Circuit ruled, “the requisite imminence was lacking.” In other words, because the harm protested was taking place in El Salvador, a trespass in Tucson cannot be justified. So, Judge Jensen reasoned, burning children in a house in Afghanistan cannot excuse a trespass in Nevada.

The NBC leak of that Department of Justice White Paper wouldn’t happen for two more years (call it suppression of evidence?) and as far as Judge Jensen knew, the dictionary definition of “imminent” was still operant. Even so, had we been allowed to testify beyond the narrow

confines set at trial, we would have shown that with new satellite technology, the lethal threat we were addressing there is always imminent by any reasonable definition of the word. Although the victims of drone violence on the day of our arrest were indeed far away in Afghanistan and Iraq, those crimes were actually being committed by combatants sitting at computer screens, engaged in real-time hostilities in trailers on the base, not so far at all from where we were apprehended by Air Force police.

The government does not believe that it needs to have "clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future" to establish an imminent threat and so carry out extrajudicial executions of human beings anywhere on the planet. Citizens who act to stop killing by drones, on the other hand, are required to have specific "evidence that any military activities involving drones were being conducted or about to be conducted," in order to justify nonviolently entering into government property. The government's position on this lacks coherence, at best. Even after the publication of its White Paper, the Department of Justice continues to block defendants accused of trespass from even mentioning the fact that they were arrested while responding to an imminent threat to innocent life, and the courts obligingly accept this contradiction.

The defense of necessity does not simply justify actions that technically violate the law. "Necessity," says West's *Encyclopedia of American Law*, is "a defense asserted by a criminal or civil defendant that he or she had no choice but to break the law." As Ramsey Clark testified in a Las Vegas courtroom five years ago, "to have a baby burn to death because of a 'no trespass sign' would be poor public policy to put it mildly." In a time of burning children, the "no trespassing" signs attached to the fences that protect the crimes executed with drones and other instruments of terror hold no potency and they do not command our obedience. The courts that do not recognize this reality allow themselves to be used as instruments of governmental malfeasance.

There have been many more trials since the Creech 14 and in the meanwhile, many more children have been incinerated by missiles fired from drones. On December 10, International Human Rights Day, Georgia Walker and Kathy Kelly will go to trial in U.S. District Court in Jefferson City, Missouri, after they peacefully brought their grievance and a loaf of bread onto Whiteman Air Force Base, another in the growing number of stateside remote control killer drone centers.

Two years ago in that same court in a similar case, Judge Whitworth rejected the necessity defense offered by Ron Faust and me, subsequently sentencing Ron to five years of probation and sending me to prison for six months. It is to be hoped that Judge Whitworth will take advantage of this second chance that Kathy and Georgia courageously offer and exonerate himself and his profession.

Brian Terrell lives in Maloy, Iowa, and is a co-coordinator for Voices for Creative Nonviolence.

Articles by: Brian Terrell