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NERMEEN SHAIKH: The Obama administration's internal legal justification for assassinating U.S. citizens without charge has been revealed for the first time. According to a secret Justice Department document obtained by NBC News, the Obama administration claims it has the legal authority to target citizens who are, quote, "senior operational leaders," of al-Qaeda or "an associated force" — even if there's no intelligence indicating they are engaged in an active plot to attack the U.S.

In September 2011, a U.S. drone strike in Yemen killed two American citizens: Anwar al-Awlaki and Samir Khan. The following month, another U.S. drone strike killed al-Awlaki's 16-year-old son Abdulrahman al-Awlaki, who was born in Denver.

AMY GOODMAN: The document obtained by NBC News is described as a "white memo" that was provided to members of the Senate Intelligence and Judiciary Committees as a summary of a classified memo prepared by the Justice Department's Office of Legal Counsel. Last month, a federal judge denied a request by the American Civil Liberties Union and *The New York Times* for the Justice Department to disclose its legal justification for the targeted killing of Americans.

The Obama administration's secrecy around the drone program is expected to be a top issue at this week's confirmation hearing of White House counterterrorism adviser John Brennan to be director of the CIA. Brennan has been dubbed by critics to be Obama's "assassination czar."

Joining us now is Jameel Jaffer, deputy legal director of the ACLU and director of the ACLU's Center for Democracy.

You've looked at the white memo. This is something you've been asking for for quite some

time, Jameel. Talk about its significance. Go through it with us point by point.

JAMEEL JAFFER: Sure. Well, it's a very significant document, and it's a remarkable document, and it's something that everybody really ought to read, in the same way that everybody ought to read the torture memos from the last administration. It sets out, or professes to set out, the power that the government has to carry out the targeted killing of American citizens who are located far away from any battlefield, even when they have not been charged with a crime, even when they do not present any imminent threat in any ordinary meaning of that word. So it's a pretty sweeping power that's been set out. And the memo purports to provide a legal justification for that power and explain why the limits on that power can't be enforced in any court.

NERMEEN SHAIKH: The confidential Justice Department white paper that you're talking about, Jameel Jaffer, introduces a more expansive definition of "self-defense" or "imminent attack" than any articulated by the U.S. government before. It reads, quote: "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." Can you talk about the significance of that and how exactly "imminent" is defined in this document—

JAMEEL JAFFER: Sure.

NERMEEN SHAIKH: —or not defined?

JAMEEL JAFFER: Yeah, well, I mean, I think you—you know, you have to start with the acknowledgment that there are circumstances in which the government has the authority, and maybe even the responsibility, to use lethal force. Even if you think about it domestically—somebody is running down the street, waving a gun around, threatening civilians—the government doesn't have to go to a judge beforehand to seek a warrant to carry out that use of lethal force. But that's a situation in which the threat is imminent, in the ordinary meaning of the term: There's not time to go to a judge; there's not time for deliberation.

But the kind of imminence that the government is defining here, or the way that the government has defined the term here, is much, much broader. They're talking about situations in which the

person presents no immediate threat, there's no known plot. These people are located far away from any actual battlefield, so you're not talking about a situation in which there are battlefield exigencies that the government has to worry about. You're really talking about something that looks a lot more like a law enforcement context. And in that context, the traditional rule is the government has the authority to use lethal force only in very narrow circumstances. And this memo really redefines those circumstances entirely.

AMY GOODMAN: Let's turn to Attorney General Eric Holder, a comment he made last March when he outlined what the White House billed as the legal rationale for its claimed right to kill U.S. citizens who belong to al-Qaeda or associated forces.

ATTORNEY GENERAL ERIC HOLDER: It is an unfortunate but undeniable fact that some of the threats that 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—does not make such individuals immune from being targeted.

AMY GOODMAN: Jameel Jaffer, respond to Attorney General Eric Holder.

JAMEEL JAFFER: Well, it's not a question of immunity. This is kind of a straw man. Nobody is arguing that Americans are entirely immune from the government's use of lethal force. The question is: Under what circumstances can the government use lethal force? And again, for a very good reason, those circumstances have traditionally been defined very narrowly. Now what the government is doing is creating an extremely broad category of people who can be targeted without judicial review before the fact, without judicial assessment of the evidence after the fact. It's a very dangerous thing that the government is doing.

And I think that at some level, I think the people who have written this memo and the people who are exercising this authority in the Obama administration must be convinced of their own trustworthiness. But even if you accept that the people who are now in office are trustworthy in this sense, this power is going to be available to the next administration and the one after that, and it's going to be available in every future conflict, not just the conflict against al-Qaeda. And according to the administration, the power is available all over the world, not just on geographically cabined battlefields. So it really is a sweeping proposition.

NERMEEN SHAIKH: But what does it mean, though, that it's not an official legal memo, it's a white paper? Does that have any legal significance or implications?

JAMEEL JAFFER: Well, you know, some people have been saying that this is a kind of transparency that the administration, through these kinds of leaks, is giving the public the ability to assess the strength of the administration's legal arguments. And the truth is that this is really just a briefing document, it's not a legal memo. It does tell us a little bit about the authority that the government is claiming, but the actual legal memos are still secret. We've been litigating for those memos now for 18 months or two years. The administration has refused to release them. We have just appealed one case to the 2nd Circuit here in New York, to the appeals court here in New York.

NERMEEN SHAIKH: Can you explain the case? What is the case that your organization, the ACLU, is—

JAMEEL JAFFER: So, there are two—there are two Freedom of Information Act cases that we're litigating right now. One is—one is here in New York, and the other one is in D.C. One of them is an effort to get the legal memos. We're litigating that case with *The New York Times*; they have a parallel request. The other case, which is in D.C., is about, principally, civilian casualties, the question of who has been killed in these—in these drone strikes, because the administration has not released numbers. And we're reliant on the work of very good organizations outside the administration to do that kind of work. We think that the administration should release its own numbers. So—

NERMEEN SHAIKH: And "who has been killed," you mean U.S. citizens and non-U.S. citizen who have been killed.

JAMEEL JAFFER: Right, absolutely. So, most of the people who are being killed in these drone strikes aren't U.S. citizens, right? There have only been four U.S. citizens—three in 2011, one in 2002. The rest have been noncitizens killed, some of them in Pakistan, some of them in Yemen, some of them in Somalia. According to the figures of the Bureau of Investigative Journalism in the U.K., we're now talking about somewhere on the order of 4,000

people who have been killed with these drones.

And the administration still hasn't released the legal memos that purport to justify that program. So, one of the cases that we're litigating, the one here in New York, is the effort to get that justification. This memo, this briefing paper, provides us a little more information about that justification, but it's not the justification itself. For the same reasons that the government was right in 2009 to release the torture memos, we think the government should release the targeted killing memo.

AMY GOODMAN: Let's get specific. I saw you in Sundance at one of the premieres of Jeremy Scahill and Rick Rowley's film called *Dirty Wars: The World is a Battlefield*. And it tells the story, among others, of Abdulrahman al-Awlaki, 16-year-old kid born in Denver, killed in a drone strike two weeks after his father was killed in a drone strike in Yemen. Talk about his case and how this relates.

JAMEEL JAFFER: Right.

AMY GOODMAN: When does the U.S. stop? What is the justification for killing this 16-year-old boy?

JAMEEL JAFFER: Well, so two things about that. First, I think one of the most chilling aspects of the power that the government is claiming here is that they're claiming the authority to do all of this in secret, not just keep it secret from the courts or keep their justification secret from the courts, but keep the exercise of this power secret, so they can carry out these killings of American citizens, among many others, without even acknowledging to the public or to any court that they have exercised that authority. And that really is a chilling proposition. But that's one thing, and that's one of the things that they've done in the Abdulrahman case: They have failed to acknowledge that they actually carried out this killing, although everybody knows it to be true.

But we have other litigation which we're doing with the Center for Constitutional Rights. It's a constitutional case on behalf of the three U.S. citizens who were killed in 2011, including Abdulrahman, the 16-year-old. And that's a case in which we are raising claims under the Fourth Amendment and the Fifth Amendment, the due process clause, arguing that the

government does not have the right, again, except in these extremely narrow circumstances, to carry out targeted killings without judicial review. And the government's response to that lawsuit has not been to defend their authority on the merits. They're not actually saying, "We have the right to do this." They haven't actually filed any of those arguments in court. Instead what they're arguing is: This question of whether the government acted lawfully or not is a political question committed to the political branches, and the judges have no role to play, no role whatsoever to play, in assessing whether the killing of an American citizen was lawful or not.

AMY GOODMAN: How does it stop? Where does it stop? You kill them in Yemen, American citizens and others—no trial, no charge. What about in the United States?

JAMEEL JAFFER: There's no line. You know, if you look at the memo, the briefing paper that was released yesterday, there's no geographic line. And you can remember how most of the country reacted when President Bush declared the authority to hold American citizens detained in the United States: Most of the country said, "You can't be serious. You're going to treat the United States as part of the battlefield. You're going to detain American citizens inside the United States as enemy combatants." And now, the Obama administration—you know, if you accept the memo on its face, you accept the briefing paper on its face, the Obama administration is making, in some ways, a greater claim of authority. They're arguing that the authority to kill American citizens has no geographic limit.

NERMEEN SHAIKH: I want to turn to comments made by John Brennan, John Brennan who is Obama's counterterrorism adviser and now his pick for CIA director. He made these comments last May and publicly confirmed that the United States has used drones to conduct targeted killings overseas.

JOHN BRENNAN: President Obama believes that, done carefully, deliberately and responsibly, we can be more transparent and still ensure our nation's security. So let me say it as simply as I can: Yes, in full accordance with the law, and in order to prevent terrorist attacks on the United States and to save American lives, the United States government conducts targeted strikes against specific al-Qaeda terrorists, sometimes using remotely piloted aircraft often referred to publicly as "drones." And I'm here today because President Obama has instructed us to be more open with the American people about these efforts.

NERMEEN SHAIKH: That was Obama's nominee for CIA director, John Brennan, speaking

last May. Jameel Jaffer, your comments on what he said about drone attacks?

JAMEEL JAFFER: Well, this is—this is, I think, you know, in some ways, good timing for the release of this briefing paper, because, you know, as you mentioned, John Brennan has been nominated to head the CIA. There's going to be a vote on his nomination later this week. And some senators have said that the nomination should not go forward unless the administration is more forthcoming with its legal analysis, unless they release the OLC memo. And I think that's exactly right. The administration should release that memo. There are also open questions about the role that Brennan played in the torture program, and those questions, too, ought to be answered before the vote goes forward. So, you know, I think it's good timing. There are some very serious questions that ought to be asked by—

AMY GOODMAN: Do you think the Democrats will be asking these questions of a Democratic administration?

JAMEEL JAFFER: Well, you know, there were a group of senators yesterday that wrote to the administration asking for the release of the legal memo and seeming to connect the release of the legal memo to—to these votes, to the Hagel vote and to the Brennan vote. And I think that that's an important thing. And it was a group led by Senator Wyden. So I think that there—you know, there are definitely senators who think this is important. And if people can make it known to their senators that they think it's important, I think that would be a very good thing.

AMY GOODMAN: And your thoughts on John Brennan being the CIA pick? Already, four years ago, when President Obama wanted to do it the first time around, he was forced to withdraw his name because there was such outcry.

JAMEEL JAFFER: Well, right. I mean, I definitely have reservations about it. I think that there are these questions, these important questions about his role in the torture program. And also, you know, people have said that John Brennan is an advocate for transparency about the drone program. If that's true, now is the right time to release the OLC memo, the legal counsel memo. And I think that the debate about his nomination should be informed by whatever's in that memo.

AMY GOODMAN: We had a report in headlines about Open Society Justice Initiative—and you're a fellow at the Open Society right now, on leave from the ACLU—putting out a new [report](#) that's revealed a detailed look at global involvement in the CIA's secret program of prisons, rendition and torture since 9/11. The initiative says 54 countries aided the CIA until President Obama stopped the program in 2009. It's called "Globalizing Torture," also reveals at least 136 people were held by the CIA during those years—the largest tally to date. How significant is this?

JAMEEL JAFFER: I think it's a hugely significant report. I think it's the most comprehensive report thus far about the people who are held by the CIA and what happened to them, and also the complicity of other countries in the CIA's program. Some of those other countries have begun to grapple with the question of accountability for their role in that program. As you know, the United States has not. The Obama administration has interfered with civil suits that seek to hold officials accountable for their role in that program, and it has failed to bring criminal charges against senior officials who supervised the program. But I think it's a very important thing, what the Open Society Justice Initiative has done here, and I think that it will create pressure not just on other countries to begin to grapple with that question of accountability, but on the United States, as well.

AMY GOODMAN: Final question on this issue of targeted killings: Is this President Obama's answer to attempting to close Guantánamo? You don't need prisons if you kill people before they go to prison.

JAMEEL JAFFER: I hope not. You know, without more information about who it is that the administration is killing and on what basis, it's difficult to make—to draw a conclusion on that question. But I think when you see the kinds of authority that the government is claiming in briefing papers like this, it certainly raises the question about to what extent this program, the drone program, is in fact a substitute for detention.

AMY GOODMAN: And as you said, don't they say—don't the documents say that they will kill someone if it puts U.S. personnel at risk?

JAMEEL JAFFER: That's right. I mean, I think that one of the—you know, one of the really

troubling things about the document is the way that it defines this phrase, "Capture is infeasible," because once you see that phrase in the first paragraph, "Capture is infeasible," it sounds like a real restriction on the government's authority to use lethal force. But halfway through the memo, they redefine the phrase, "Capture is infeasible," to mean something more like: "Capture is inconvenient." And once you redefine the phrase in that way, then you've opened up the possibility of the use of lethal force much more broadly. And again, it does raise the question of whether they are using the use of lethal force as a substitute for detention, and even if they're not, whether that possibility is open for another administration in the future.

AMY GOODMAN: Jameel Jaffer, I want to thank you for being with us, deputy legal director of the ACLU, director of the ACLU's Center for Democracy. Coming up later in the broadcast, we'll speak with Dan Ellsberg, famous whistleblower for the Pentagon Papers. We'll also speak with Jacob Appelbaum, who just lost a case. He does not have the right, says a federal court, to know when the government is taking his Twitter information or email information. But next up, the controversy in the Boy Scouts. Will the Boy Scouts of America allow gay leaders, gay members? Stay with us.