

In constitutional republics, presidents don't have 'kill lists'

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Washington routinely criticizes despotic regimes where officials exercise the power of life and death without restraint. President Barack Obama is such an official.

The U.S. has been fighting the "war on terrorism" for more than a decade. Washington has turned targeted killing — or assassination — into routine practice. The military deploys SEALs when the job needs to be close and personal, like killing Osama bin Laden. But drones are the preferred tool of choice. The administration claims to have recently used one to kill al-Qaida's number two man, Abu Yahya al-Libi, in Pakistan.

This new form of warfare raises fundamental questions for a constitutional republic. International law bars arbitrary killing. Domestic law further restricts the execution of U.S. citizens. Moreover, promiscuous assassinations move foreign policy into the shadows, reducing public debate over basic issues of war and peace.

The issue ended up in federal court in August 2010 when Nasser al-Awlaki filed suit seeking a preliminary injunction to prevent the Obama administration from executing his son, Anwar al-Awlaki. The latter had been added to the federal "kill list" for his activities in Yemen with al-Qaida in the Arabian Peninsula (AQAP). The judge dismissed the lawsuit on procedural grounds and Anwar was later killed by a Predator drone.

Limits on government are necessary to preserve a liberal democratic order and protect individual liberty. The potential for abuse is greatest where state power is most extreme. There is no more extreme power than the power to kill.

After 9/11, one could view terrorism as a form of war, but the authorization of force passed in response more than a decade ago targeted people who since have been mostly killed or captured — those who "planned, authorized, committed, or aided" the 9/11 attacks. To legitimize presidential action today, Congress should vote for a declaration of war directed against present threats to America.

Moreover, if the U.S. is fighting a war, it should be conducted by the military under the president as commander-in-chief. The CIA should develop intelligence for use by the Pentagon in targeting its weapons, in this case drones. But the military should do the shooting. Of course, civilians at the agency are as capable as uniformed personnel at the Department of Defense at directing drones. However, giving responsibility to the CIA strips the process out of its war-related context, making it easier to deploy drones in less justifiable circumstances. Some claim that Congress has secretly given the agency authority to kill. However, while operational matters are appropriately kept secret, legal authority to conduct lethal operations is not. Americans should know who is doing what in their name.

Those killed must be combatants. A leader, like al-Libi, of a hostile, violent terrorist group engaged in an ongoing campaign to harm Americans may be treated as the functional equivalent of a commander of a foreign military fighting against the U.S. Membership could count too, at least if someone is trying to kill Americans and has some potential of succeeding. But most terrorists don't make videos confirming their status. And intelligence is imperfect: In the aftermath of 9/11, many non-terrorists were arrested at home and detained overseas. Some were imprisoned and tortured.

According to a recent New York Times report, which relied on information that was likely leaked to enhance the president's national security credentials, the administration has established a regular inter-agency meeting at which administration officials debate who to kill. It is presented as rigorous and demanding, yet the president's chief political adviser, David Axelrod, reportedly attends (though he claims he does not). Supposedly members freely challenge targeting proposals, but there is no independent person to question

administration priorities or review administration actions. The article presents the president as a wise, judicious, and principled arbiter, but even if so, he should be held accountable for his decisions.

The U.S. must minimize the deaths of noncombatants. Admittedly, this is especially difficult where there is no traditional battlefield upon which most of the fighting occurs. The irregular nature of terrorism means members of threatening organizations often live and operate in the midst of civilian communities. Mistakes are easy to make.

However, concern for noncombatants should be an obvious moral imperative. Terrorism is outrageous because it targets those who have done nothing wrong. What if counter-terrorism kills the innocent, even if inadvertently? The Times story notes the possibility of “explicit intelligence posthumously proving” people to be innocent, but there is no medical procedure to posthumously unkill people — at least not yet.

The other reason to kill only real terrorists targeting Americans is prudential: Mistakes create terrorists. It doesn't take an investigative journalist to recognize that hostility toward the U.S. continues to rise in both Pakistan and Yemen along with the number of drone strikes. And that should surprise no one: Americans would react badly if another power, say China, was routinely lobbing missiles into American neighborhoods, killing people, even if it was doing so in the name of fighting terrorism. The enemies created are not limited to the nations targeted. Faisal Shahzad, a U.S. citizen, cited drone attacks as justification for attempting to set off a bomb in New York City's Times Square.

Unfortunately, the administration has yielded to temptation and expanded the kill list to include people like Baitullah Mehsud, the head of the Pakistan Taliban. The Times notes that the U.S. killed Mehsud in 2009 even though his group “mainly targeted the Pakistan government.” The administration rationalized “that he represented a threat, if not to the homeland, to American personnel in Pakistan.”

U.S. officials also admit that they were played by former president Ali Abdullah Saleh of Yemen: “There were times when we were intentionally misled, presumably by Saleh, to get rid of people he wanted to get rid of,” one unnamed official told The Washington Post. Yet the U.S. campaign in Yemen recently has been broadened to operatives who supposedly pose a threat not to Americans in America, but Americans in Yemen. Reported The Post: “A growing number of attacks have been aimed at lower-level figures who are suspected of having links to terrorism operatives but are seen mainly as leaders of factions focused on gaining territory in Yemen's internal struggle.”

No provision of the U.S. Constitution or law — at least, that is publicly known — authorizes the president to kill as a favor for other governments. Moreover, treating others as enemies naturally turns them into enemies.

There are lots of bad people in the world, but even if they don't like America they might not plan on doing Americans ill. However, if the U.S. starts dropping drones on them, they likely will change their plans to include the U.S. Which in turn will be used by Washington to justify dropping even more drones on them. The administration claims to operate on narrow criteria, but if so, the rising use of drones suggests that the administration is doing something very wrong to generate so many new terrorists. Shahzad approached the Pakistan Taliban rather than al-Qaida for assistance — and it obliged. As my Cato Institute colleague Malou Innocent has pointed out, the estimated number of members of AQAP has more than doubled over the last three years — despite supposedly killing many of them through drone strikes. Notes The Times: “Drones have replaced Guantanamo as the recruiting tool of choice for militants.”

In short, Washington intervenes and creates enemies in other nations, which it uses to intervene again to kill those new enemies in other nations. And so the process continues, in a potentially infinite cycle.

Worse, though, from both a moral and practical standpoint, is the killing of noncombatants. The administration has variously claimed that none recently have been killed or that the number is very low. But as The Times reports, “In Pakistan, Mr. Obama had approved not only personality strikes aimed at named, high-value terrorists, but signature strikes that targeted training camps and suspicious compounds in areas controlled by militants.” It seems that the administration equates living in a “suspicious compound” with planning an attack on America.

Analysts with the New America Foundation and the London-based Bureau for Investigative Journalism figure that hundreds of innocents have died. Even administration officials admit that earlier strikes have gone awry, but they argue that such inaccuracies are a thing of the past. While it is widely agreed that fewer civilians are being killed now than were a few years ago, residents of targeted areas respond with incredulity to the administration's claim of immaculate assassination.

In fact, Washington's asserted accuracy appears to be by definition. According to The Times, the administration "in effect counts all military-age males in a strike zone as combatants, according to several administration officials, unless there is explicit intelligence posthumously proving them innocent. Counterterrorism officials insist this approach is one of simple logic: People in an area of known terrorist activity, or found with a top al-Qaida operative, are probably up to no good." So living next to or talking with a possible terrorist now is a death sentence?

Drones can be highly effective, as reflected in al-Libi's killing, and may be the best among bad alternatives. Certainly launching drones is better than launching invasions. However, law, morality, and prudence all require that drone use be strictly limited and controlled.

The problem with executive execution is even greater when those targeted are American citizens. The U.S. government can kill Americans — the police do so every day. However, officers must act under lawful authority against an imminent threat and kill as a last resort. Such actions must be subject to "strict scrutiny," as the courts put it. Similar criteria should apply when dealing with Americans overseas. The president has no authority to kill his fellow citizens for the convenience of foreign leaders or because they are criticizing Washington rather than threatening Americans.

Anwar al-Awlaki is the most celebrated case. But The Times reports that several Americans, including teenagers, also are on the U.S. kill list.

The administration apparently produced a 50-page memo on al-Awlaki's alleged terrorist role, but refused to release the document even after his death. Allowing the president and his aides to compile kill lists in secret with no charges filed, no outside review of evidence, and no oversight of decisions should concern every American. Unreviewable and unaccountable power is inconsistent with a constitutional republic.

At the very least the administration should create a formal process with internal checks and balances. However honest such an internal review might be, it still would not be enough.

The nation's founders created a system to constrain government irrespective of who was in office. Electronic surveillance of foreign powers and their agents, which could include Americans, posed a similar challenge, causing Congress to approve the Foreign Intelligence Surveillance Act. FISA allows surveillance of foreign parties without a court order, but requires a warrant, granted by a special court, for Americans.

Congress could create a similar process for targeted killings. Legislators should establish special national security courts to grant formal assassination warrants. The government would have to demonstrate that a serious threat to life was imminent and there was no reasonable alternative to execution. Judges would be trained to assess intelligence claims. A warrant would allow the government to place a name on an official kill list for a set period of time; renewal would require a return trip to court. Such a process would be an ugly second best, but far better than today's system of unfettered executive discretion.

More fundamentally, Americans should reconsider Washington's promiscuous military intervention abroad. Constantly meddling in foreign conflicts costs American lives, wealth, and liberty. This interventionist foreign policy also inevitably [creates hostility](#) and [encourages terrorism](#). Indeed, Washington's "war on terrorism" has left Americans less secure and free.

Osama bin Laden and terrorists like him long ago lost the military aspect of the war on terrorism. But they succeeded in transforming the U.S. Amazingly, most Americans view as unexceptional the president's claim to unilateral power to kill anyone anywhere in the world. If we forget that we are securing a constitutional republic, we risk losing the freedoms which make America unique and worth defending. Then the terrorists truly will have won.

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