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America As a Constitutional Republic: When Can the President Kill?

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The U.S. has been fighting the "war on terrorism" for more than a decade. Thousands of Americans have died, both in the 9/11 attacks and Washington's wars in Afghanistan and Iraq. The Constitution also is under assault, as successive presidents have asserted extraordinary and unreviewable power in the name of combating terrorism.

Washington even has turned targeted killing—or assassination—into routine practice. U.S. SEALs are used when the job needs to be close and personal, like the mission against Osama bin Laden. But drones have become the tool of choice, widely used in Pakistan, Yemen, and elsewhere.

This new form of warfare raises fundamental questions for a democratic, 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 the opportunity for a full public debate over issues of war and peace.

In traditional conflict the opposing sides are reasonably clear. Not so in the "war on terrorism." Is this fight traditional war, law enforcement, or a new hybrid? If the latter, what rules apply? What should be done if there are no obvious battlefields and no certain combatants? Should propagandists be treated as fighters? Are any procedural protections required before a U.S. citizen can be killed?

These issues ended up in federal court in August 2010 when Nasser al-Aulaqi filed suit seeking a preliminary injunction to prevent the Obama administration from killing his son, Anwar al-Aulaqi. The latter, an American citizen living in Yemen, had been added to a federal "kill list" four months before. Judge John Bates dismissed the lawsuit on procedural grounds, ruling

that Nasser al-Aulaqi lacked "standing" to sue and the so-called "political doctrine" prevented the court from deciding the issue. Last September Anwar al-Aulaqi was killed by a Predator drone.

The Constitution is the fount of authority for the national government and protects Americans even when they are overseas. The 4th Amendment regulates the seizure of citizens, who are to be "secure in their persons." The 5th Amendment mandates that no one can "be deprived of life, liberty, or property, without due process of law." Other constitutional provisions cover prosecuting traitors and imposing bills of attainder (the former requires the testimony of two witnesses; the latter is prohibited).

The Alien Tort Statutes and Torture Victim Protection Act also bar arbitrary killing. Moreover, this principle has been incorporated into customary international law. Admittedly, "many norms of international law are vague and even border on the vacuous." Nevertheless, international law reinforces domestic legal restrictions on killing American citizens.

Limits on government are necessary to preserve a liberal democratic order and protect individual liberty. These constraints are most important where state power is most extreme and its consequences are most significant. Like killing people. In 2004 the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions observed: "Empowering governments to identify and kill 'known terrorists' places no verifiable obligation upon them to demonstrate in any way that those against whom legal force is used indeed are terrorists, or to demonstrate that every other alternative has been exhausted."

So can the U.S. government kill its own citizens, like al-Aulaqi? Ryan Alford, a professor at Ave Maria School of Law, observed: "It is beyond peradventure that the Framers never intended to invest the president with the power to order a citizen's execution without trial."

Yet police sometimes shoot and kill without trial. Doing so is legal, but requires a powerful justification. The same principle applies to combating terrorism.

The U.S. government may prosecute citizens for many reasons. Committing treason, for instance. Supporting organizations which threaten the U.S. Perhaps even for serving as propagandists for America's avowed enemies. But none of these activities would warrant secretly placing the person's name on a

"death list," especially without a conviction or other adjudication of guilt by an objective body. Even Jeh Johnson, the Department of Defense General Counsel, observed that simply embracing al-Qaeda's ideology would not be enough.

In contrast, joining enemy armed forces and fighting U.S. forces would allow the U.S. government to target a U.S. citizen. But Anwar al-Aulaqi was living in Yemen where no U.S. troops were fighting, unlike in Afghanistan and Iraq, had joined the equivalent of a gang rather than an army, and was not involved in traditional combat.

Nor did the authorization to use military force adopted by Congress after 9/11 cover al-Aulaqi. The resolution authorized the president to use "all necessary and appropriate force" against those who "planned, authorized, committed, or aided" the 9/11 attacks in order to "prevent future acts of terrorism." As such, the AUMF targeted al-Qaeda and those who attacked America a decade ago. Al-Aulaqi did not leave the U.S. until 2002, settling in Yemen two years later.

Outside of active combat, especially in a declared war, when can Washington kill American citizens? Only if the government can demonstrate a compelling interest subject to what the U.S. Supreme Court terms "strict scrutiny." That means the targeted citizen must pose an imminent threat to life (or threaten serious physical injury) and killing him or her must be a last resort.

International law embraces similar concepts. One is proportionality—such as responding to a threat to life. Another is necessity—which reflects imminence and last resort. Also considered is precaution—which requires planning to limit the recourse to lethal force. Thus, under both domestic and international law, the American government can execute people, including American citizens, only for the most important of reasons and when there is no reasonable alternative to doing so.

Were these criteria met in the case of Anwar al-Aulaqi?

The administration insisted they were. It called him chief of operations for al-Qaeda in Yemen. It said he personally instructed a suicide bomber in 2009. It claimed he was "intimately involved in the attacks that have come closest to hitting the United States." It contended that he had a "direct role in supervising" the attempt to send mail bombs to America. It asserted that he pushed al-Qaeda (Yemen) to attack the U.S., something he "said publicly was his goal."

If these allegations are true, al-Aulaqi threatened the lives of Americans. One could imagine someone joining a completely ineffective terrorist-wannabe group, which might not justify a deadly U.S. government response. However, while al-Qaeda (Yemen) thankfully so far has achieved little practical success, it is not for want of trying. Washington should not be restricted to playing defense, hoping to always be lucky in foiling new terrorist plots. By his conduct al-Aulaqi created a presumptive danger to America.

However, the government was not attempting to preempt any particular plot. Was the threat imminent, especially since names apparently are entered on the "kill list" for months or years, without apparent regard to potentially changed circumstances?

Regarding al-Aulaqi Cato Institute Chairman Robert Levy said bluntly: "The imminent-threat contention isn't credible." There is no obvious reason why it was necessary to kill al-Aulaqi on September 30, 2011 versus October 30 or November 30. Indeed, only rarely is the government likely to have reliable knowledge of an upcoming plot of the sort necessary to demonstrate "imminence" in a particular case.

Nevertheless, membership in a hostile, violent terrorist group engaged in an ongoing campaign to harm Americans arguably creates a substitute form of imminence. In essence, al-Aulaqi's actions shifted the burden of proof. Take a leadership role in a group dedicated to attacking Americans and you can be presumed to pose an imminent threat to kill or commit great bodily harm. Membership in al-Qaeda (Yemen) joined intent with action.

Finally, was assassination a last resort—could al-Aulaqi have been captured? The U.S. government has successfully prosecuted other individuals for terrorist activities. Trying instead of killing al-Aulaqi would have showcased America's commitment to the rule of law.

But it obviously is easier to capture a fugitive in the United States, where the government (at whatever level) has full authority. Even with the cooperation of foreign governments, it is much more difficult to grab someone overseas, especially if he or she has friends in the local police, military, or intelligence services. In fact, even attempting to capture someone might require a significant military operation. It would be ironic if the Constitution was interpreted to bar use of a drone to kill a person while justifying a large foreign expedition to capture the same person.

In short, if the administration's claims were true, the al-Aulaqi killing probably met constitutional requirements. However, simply saying it is so does not make it so. My Cato Institute colleague Julian Sanchez warned of the tendency to treat such assertions "as ironclad facts rather than contestable inferences from necessarily patchy data—even though the past decade should have made it abundantly clear that analysts sometimes get it wrong."

Washington policymakers have commonly relied on discredited intelligence claims. Consider the catastrophic war against Iraq. The credibility of foreign sources must be weighed. Competing intelligence must be balanced.

Indeed, this is why trials are held on criminal charges: juries assess witness credibility and compare conflicting claims. In the case Yaser Esam Hamdi vs. Donald H. Rumsfeld, the U.S. Supreme Court even ruled that "a citizen held in the United States as an enemy combatant [must] be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker." It would be ironic if it was easier to kill than imprison a U.S. citizen.

Administration claims regarding al-Aulaqi have been challenged. Gregory Johnsen, a Yemen specialist, contended: "Certainly, Aulaqi was a threat, but eliminating him is not the same as killing Osama bin Laden." Johnson pointed out that al-Aulaqi was not the head of al-Qaeda (Yemen), in charge of military operations, or even the organization's top religious scholar.

Explained Johnsen: "Rather, he is a mid-level religious functionary who happens to have American citizenship and speak English. This makes him a propaganda threat, but not one whose elimination would do anything to limit the reach of the Qaeda brand." Indeed, added Johnsen, "Mr. Aulaqi's name may be the only one Americas know, but that doesn't make him the most dangerous threat to our security."

How to decide the truth about al-Aulaqi and others like him? The administration apparently produced a 50-page memo citing his operational role in a group viewed as a co-belligerent with al-Qaeda. Washington also contended that his capture was impracticable. What was reasonable and due process, the administration added, had to be determined by consequence.

These are reasonable arguments. But 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 leave every American more

than uncomfortable. Unreviewable and unaccountable power is inconsistent with a constitutional republic.

Events like 9/11 may justify expanding government power. However, officials still must be held accountable for their use of that power. Yet in cases like al-Aulaqi there is no accountability so long as the government is careful to assert arguments which offer a constitutional justification for targeted killings—that the person posed an imminent threat which could be dealt with no other way—and the courts refuse to exercise oversight.

Even if the president can get away with acting unilaterally, he should not do so. The administration could create a formal process with internal checks and balances. Afsheen John Radsan and Richard Murphy, of the William Mitchell School of Law and Texas Tech University School of Law, respectively, argued that "the government must take reasonable steps based on individualized facts to ensure accuracy before depriving any person of life, liberty, or property," but suggested that this requirement "might be satisfied by independent, intra-executive review." In fact, Jeh Johnson contended: "Within the executive branch the views and opinions of the lawyers on the president's national security team are debated and heavily scrutinized."
However honest such an internal review, it is not enough. In the case of al-Aulaqi, the administration should have released its decision memo. It need not reveal any sensitive intelligence. But the government's arguments should be available for public review. *Chicago Tribune* columnist Steve Chapman complained that the president "saw no need to bother" to make the case that al-Aulaqi "posed a clear threat to American lives and that the missile was the only feasible way to avert it." The president should have made the case.

Moreover, the nation's founders created a system with numerous checks and balances to constrain government irrespective of who was in office. Argued Robert Levy: "The separation of powers doctrine, if it means anything, stands for the proposition that citizens cannot be killed on command of the executive branch alone, without regard to the Fourth and Fifth Amendments." Institutionalizing stricter safeguards is imperative today, with the new forms of warfare which has come to dominate U.S. policy.

Electronic surveillance of foreign powers and their agents, which could include Americans, posed a similar challenge. In 1978 Congress passed the Foreign Intelligence Surveillance Act. FISA allows surveillance of foreign parties without a court order, but requires a warrant, through a special court which hears the case in secret, when Americans are involved.

Congress should 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 was imminent and there was no reasonable alternative to a targeted killing. Judges would be trained to assess intelligence claims. A warrant would allow the government to place a name on an official "kill list." The warrant would sunset after a period of time—six months, perhaps—after which the government would have to return to court to renew the warrant.

Admittedly, "assassination warrants" would seem grotesque in a free society. The fact that the threat of terrorism has generated new forms of war which undercut Americans' liberty provides another reason to rethink an interventionist foreign policy which encourages terrorism. Promiscuous intervention by Washington has left the U.S. less secure in recent years. An activist foreign policy also is undercutting America's heritage of liberty.

As long as Washington responds to terrorism with extreme countermeasures, such as targeted killings, new procedures are necessary. At least judicial review would force the government to make a proffer of proof to someone independent of the executive branch. Moreover, specialized training would enable jurists to ask the right questions. Executive authority might remain excessive and subject to abuse, but it would no longer be essentially limitless.

Osama bin Laden and his fellow terrorists have lost the war on terrorism. However, their attacks have transformed the U.S., threatening the liberties as well as lives of Americans. There is no greater government power than to order someone's death.

In killing Anwar al-Aulaqi the administration may have acted constitutionally. But even if so, it did not act consistently with a free society. Congress should create additional safeguards.

Americans must never forget that we are securing a democratic republic, a system based on protecting individual liberty. If we fail to preserve the freedoms which make America unique and worth defending, the terrorists truly will have won.