http://www.nybooks.com/blogs/nyrblog/2013/feb/06/drones-killing-made-easy/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A%2Bnyrblog%2B%28NYRblog%29

How We Made Killing Easy

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A Yemeni protesting US drone strikes, Sanaa, Yemen, January 28, 2013

On Monday, NBC published a leaked Justice Department "white paper" laying out the Obama administration's case for when the president, or indeed any "informed, high-level official" of the federal government, can authorize the secret killing of a US citizen without charges, a hearing, or a trial. The paper, which appears to summarize a still-classified internal memorandum drafted by the Justice Department's Office of Legal Counsel to authorize the targeted killing in September 2011 of US citizen Anwar al-Awlaki, provides more detail than has yet been made public about the administration's controversial drone program.

Consistent with the positions taken in public speeches by former State Department Legal Advisor Harold Koh, Attorney General Eric Holder, and White House counterterrorism advisor and CIA director-nominee John Brennan, the sixteen-page white paper argues that killing a US citizen with a drone and without trial is legal under domestic and international law, even if the individual is far from any battlefield, not a member of al-Qaeda, and not engaged in planning an imminent attack on the United States. To date, much of the concern about the administration's drone program has stemmed from its largely secret character; unfortunately, the more we learn, the greater those concerns become.

It is unclear why this document had to be leaked in order to enter the public domain. It is not marked classified, and appears to be designed for public consumption—why else would a separate white paper need to be drawn up to describe legal reasoning already contained in a classified OLC memorandum? It may well have been drafted to see whether the contours of the OLC memorandum could be made public without disclosing any classified or sensitive information. But if that's the case, why didn't the Obama administration release the paper as an official public act? In opposing a Freedom of Information Act suit filed by the ACLU, the administration is fighting tooth and nail to keep everything about the drone program secret, but this paper suggests that much more could be disclosed—for example, the procedures and standards employed for placing someone on the "kill list," and the general bases for and results of actual strikes—without the sky falling. If this administration is truly committed to transparency, memos like this should not have to be obtained by the media through back channels.

The white paper addresses the legality of killing a US citizen "who is a senior operational leader of al-Qaeda or an associated force." Such a person may be killed, the document concludes, if an "informed, high-level official" finds (1) that he poses "an imminent threat of violent attack against the United States;" (2) that his capture is not feasible; and (3) the operation is conducted consistent with law-of-war principles, such as the need to minimize collateral damage. However, the paper offers no guidance as to what level of proof is necessary: does the official have to be satisfied beyond a reasonable doubt, by a preponderance of the evidence, or is reasonable suspicion sufficient? We are not told.

Nor does the paper describe what procedural safeguards are to be employed. It only tells us what is *not* required: having a court determine whether the criteria are in fact met. The paper asserts that this assessment is best left entirely to the executive because it involves foreign affairs and military tactics, and maintains that judicial review would impermissibly require a court to "supervise inherently predictive judgments by the

President and his national security advisors." But courts review executive predictive judgments every time they rule on a government request for a search or wiretap warrant, including those sought for national security purposes under the Foreign Intelligence Surveillance Act. If courts routinely issue warrants for arrests and searches, why are they somehow unable to issue warrants for drone strikes?

From news reports, we know that the targeted killing program involves elaborate preparation and review of "kill lists," debated in weekly conference calls in which as many as one hundred people take part. The US citizen and radical Islamist Anwar al-Awlaki was reportedly on such a list for more than a year before he was killed. With that kind of time frame, there is no logistical reason why independent judicial review could not have taken place. The Constitution has long recognized that unilateral executive action may be necessary in "exigent circumstances," as long as it is followed by ex post judicial review. But in this circumstance, the administration rejects out of hand any judicial check whatsoever—before or after the fact, whether there is time to get an independent assessment or not. It wants the power to kill Americans unilaterally—and in secret.

Nor does the paper discuss any alternative checks within the executive branch. For example, is anyone assigned to make the case *against* the targeted killing—that is, to advocate on behalf of the person the administration is considering executing? The CIA uses "red teams" to challenge and improve its analysis of potential operations; shouldn't that be required before the executive kills a human being? Much information has been leaked about the process, but nothing has suggested that such a safeguard exists in the targeted killing program.

But perhaps the most disturbing feature of the paper is how it interprets the criteria of "imminence" and "feasibility of capture." It argues correctly that, under the international legal doctrine of self-defense, lethal force is justified in response to an imminent threat of attack upon the United States. But it then defines "imminence" so broadly that it effectively eliminates the requirement altogether. There need be *no* showing, the paper claims, that an attack will "take place in the immediate future." Instead, it coins what it euphemistically calls a "broader concept of imminence." On this view, an al-Qaeda leader by definition poses an imminent threat, no matter what he is doing—because al-Qaeda is continually plotting attacks against the United States, will undertake them whenever it can do so, and we may not be aware of all such plots. In such a case, all that is required is a "window of opportunity," not an immediate threat.

This reasoning directly contradicts the central purpose of the "imminence" requirement—to ensure that lethal force is used only as a last resort. If there is no evidence of an immediately pending attack, it is possible that some alternative way of countering the threat—in particular, by capture—may become available. And if so, then killing the suspect is neither necessary nor legal under domestic or international law. Is it any coincidence that the Obama administration has killed hundreds of suspected terrorists with drones outside Afghanistan, but captured almost none?

The white paper properly acknowledges that killing in self-defense is appropriate only where capture is not feasible. But it fails to address the central question posed by drones in this regard: Because drones permit the US to kill without risking any American life, and a capture operation will always incur some risk, does the availability of drones change the feasibility criterion? It probably should not, but it is hard to believe, again given the administration's record of hundreds of kills and virtually no captures, that it has not.

In fact, the capabilities of drones raise a number of related questions that go entirely unasked in this paper. Drone technology has made it possible to use lethal force in many situations where we could not or would not have even considered it in the past. Unlike conventional military operations, drone attacks require no "boots on the ground," and therefore do not pose a risk to American lives. Unlike bombings, they have pinpoint accuracy; they therefore reduce the collateral costs of killing and may be easier to disavow. Because drones can effectively travel the world while being controlled remotely from home, they permit the "war" to move far beyond the battlefield. And drones have made it possible for the US government to do something that was unthinkable before, and should be unthinkable still—to kill its own citizens in secret. In short, drones radically reduce the disincentives to killing. And that may well make a nation prone to use military force before it is truly a last resort. That certainly seems to be what has happened here.