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Obama's Executive Death Warrants

Gene Healy

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Don't Americans have "the right to know when their government believes it's allowed to kill them"? As Sen. Ron Wyden, D-Ore., put it last week, you'd think that's "not too much to ask."

For three years now, thanks to Obama administration leaks, we've known that the president claims the right to summarily execute American citizens far from any battlefield. He even joked about it at the annual White House Correspondents Association dinner in 2010, telling the Jonas Brothers to stay away from his daughters: "Two words for you: 'predator drones.' You will never see it coming." (Oh, Barack -- you slay me.)

In September 2011, the administration launched Hellfire missiles from a Predator drone over northeastern Yemen, eliminating U.S. citizens Anwar al-Awlaki and Samir Khan. A drone strike two weeks later killed al-Awlaki's teenage son.

Khan and Awlaki senior probably weren't any great loss to humanity, but there's an important matter of principle here: Can a president really serve as judge, jury and executioner over any American he deems a security threat?

The Obama administration has hidden the legal memoranda addressing that question behind a veil of state secrecy. In 2011, a New York Times reporter got a stark response to his Freedom of

Information Act request: "The very fact of the existence or nonexistence of such documents is itself classified."

But last week, Newsweek's Michael Isikoff released a leaked Justice Department memo summarizing the administration's reasoning. Reading it, one suspects that, instead of protecting sources and methods, the secrecy has mainly served to cover up an appalling set of arguments.

Any citizen the administration believes to be a "senior operational leader" of al Qaeda or an "associated force" can be killed if a "high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States" and deems his capture "infeasible."

But the memo also makes clear that the administration alone will decide whether it has met those criteria -- and how to define the terms. The American Heritage Dictionary defines "imminent" as "about to occur; impending"; DOJ insists that "imminent" doesn't necessarily mean in the "immediate future."

Regardless, the author(s) insist that these aren't the "minimum requirements" for citizen assassination: "a lethal operation against a U.S. citizen [could be] lawful in other circumstances."

Legal scholar Ryan Alford observes that the 13th century marks "the last time when the executive branch of any country governed by the common law had asserted that it was legal to kill a citizen on the basis of an executive order." Obama's "executive death warrant" is more than a breach of the Fifth Amendment's due process guarantee, he argues, it's an affront to the entire Anglo-American constitutional order.

Some leading conservative legal scholars disagree. In the Wall Street Journal, torture architect John Yoo argues -- confusingly -- that "deaths from the sky violate personal liberty" more than waterboarding ever did, but Obama is still a legalistic pantywaist with "a weaker law-enforcement approach to combating terrorism."

National Review's Andrew McCarthy, who seems to think the Obama team is full of Muslim Brotherhood agents, defended its need for the occasional robot kill shot against citizens.

National Review itself laid down the party line in a Feb. 8 editorial. "Due process is not generally required in battlefield situations" (which this wasn't), and embracing the constitutional objections to citizen assassination "would paralyze our ability to fight war."

It's a strange Constitution they've constructed: It seems it's perfectly legal for the president to deem you a terrorist and vaporize you with a drone. But there's one thing that he can never do: penalize you for failure to purchase health insurance. That would be tyrannical, you see