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## Targeted Killing - Death by Drone

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SPECIAL CONVENTION SECTION



SEPTEMBER 2013

# MANAGING SECURITY *Today*



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## Honoring Those Who Serve

ASSIST: PROVIDING THE LEADERSHIP FOR TODAY AND TOMORROW

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**ON THE COVER:** From left to right: Sergeant Deputy Robert Almanza, El Paso County Sheriff's Department; Agent Vennesa Martinez, Customs and Border Protection; Air Enforcement Agent Angela Garcia, CBP Office of Air and Marine; Security Officer Bobby Leyva, Sun City Security Service.

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# Targeted killing – Death by drone

By Jeffrey Addicott, Director of the Center For Terrorism Law | SAINT MARY'S UNIVERSITY SCHOOL OF LAW  
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▶▶ With the recent filing of a federal civil lawsuit by the father of the late American-born al-Qaeda cleric and leader, Anwar al-Awlaki, the issue of targeted killings of American citizens is once again in the news. Was President

Obama justified in ordering a drone to kill al-Awlaki in Yemen?



Jeff Addicott

In a report delivered to the United Nations Human Rights Council, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, defined targeted killing as “the intentional, premeditated and deliberate use of lethal force, by states or their agents acting under colour of law . . . against a specific individual who is not in the physical custody of the perpetrator.” Of course, the rule of law that justifies a state killing another human being rests in either the law of war or the long recognized customary international legal right of self-defense. Illegal state killings conducted outside of these two limited arenas are either murder or assassination.

**THE TERM TARGETED KILLING IS MOST OFTEN ASSOCIATED WITH THE USE OF UNMANNED AERIAL VEHICLES (UAVS), OR DRONES.** These attack platforms have been in use in the War on Terror for a decade. The first targeted killing of an unlawful enemy combatant outside of the active war zone of Afghanistan occurred in November 2002 when a predator drone stuck a car carrying Al-Harethi and four others. Al-Harethi was an al-Qaeda member and suspect in the 2000 USS Cole attack in Yemen.

Since taking office, President Obama has demonstrated a predilection for the use of drones to kill unlawful enemy combatants. One commentator called Obama’s use of drones as a “remarkable turnaround for a politician who had criticized almost every aspect of the ‘war on terror’ waged by his predecessor in the oval office.” Under Obama, American drones have killed hundreds of suspected enemy combatants, mostly in Pakistan and Afghanistan, but also in Somalia, Sudan, and Yemen. From the time that Obama took office in 2009 until early 2012, there have been over 240 drone attacks in Pakistan alone, “with a death toll well over 1,300.” The use of a drone to kill deprives the subject of all his civil liberties. Unlike other issues such as de-

tention authority, interrogation, or trial, a targeted killing provides no “appeal.” The goal is to kill.

The primary legal theory for the Obama drone attacks is that the United States is at war. Unlawful enemy combatants are not killed because they are necessarily guilty of a crime, but because they are members of a hostile force. Again, the unlawful enemy combatant determination is made by the president, not by a court. These enemies can be American citizens.

In addition to the standard targeting considerations of proportionality, unnecessary suffering, and military necessity, it is well established that noncombatants may be killed if incidental to a lawful attack. This concept is known as collateral damage.

Even if the U.S. were not at war, targeted killing could still be lawful under the longstanding concept of self-defense. In other words, the authority to use violence in war exists in tandem with the inherent right of State’s to defend themselves.

**WHILE THE GENERAL LEGAL BASIS FOR TARGETED KILLING IS RATHER ELEMENTARY, THE APPLICATION IN THE WAR ON TERROR IS OFTEN CLOUDED DUE TO THE UTTER FAILURE OF THE GOVERNMENT TO SET OUT THE AUTHORITY WITH CLARITY.**

For instance, the confusion associated with whether the 2011 American “drone” killing in Yemen of Anwar al-Awlaki, was “legal” or not, reflects very poorly on the political leadership of the U.S. Due to the inability of the commander-in-chief to lucidly articulate a legal justification divorced from political overtones, even people in the U.S. found it quite easy to accuse the country of wrongdoing.

The *New York Times* editorial page of October 4, 2011, carried six letters to the editor on the topic of al-Awlaki’s death. Of those six letters, only one of them understood that the killing was an entirely lawful act carried out under the law of war. All the others reflected varying degrees of confusion that included sentiments that the U.S. was: (1) wrong for not operating under domestic criminal law to arrest al-Awlaki; (2) wrong for killing a U.S. citizen; or (3) that the rule of law didn’t really matter because al-Awlaki was a “bad guy” and “we have to do what we have to do (the law of the jungle).”

Amazingly, not a single voice in the

Obama Administration took the time to defend the action as lawful under a simple set of legal parameters related to the law of war. Instead, the White House issued statements associated with the fact that we were “defending” ourselves against a terrorist, even though the foundational rule of law justification has nothing to do with the fact that al-Awlaki was a “terrorist” or a bad person.

It took a full seven months after the killing of al-Awlaki before Attorney General Holder finally offered his “thoughts” on targeted killing at his March 5, 2012, address to Northwestern School of Law. He indicated that the U.S. would kill by drone or otherwise when: (1) the subject is located abroad; (2) the subject is a senior operational figure; (3) the subject is a member of al-Qaeda, Taliban, or associated forces; (4) the subject is involved in planning operations focused on killing Americans; (5) the threat is imminent and an opportunity to kill is open; (6) there is no feasible option for capture; and (7) the use of violence will comply with the law of war.

In the case of Anwar al-Awlaki, if he was a member of al-Qaeda (and he was), then he qualified for treatment under the full parameters of the law of war. Thus, it is not a violation of the law of war for the U.S. to kill an American citizen al-Qaeda member without warning. **MS**



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