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Drone warfare — edging bit by bit into the sunlight

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Field Notes From A Battleground

By Charles R. Church

Because al-Qaeda leader Anwar al Awlaki was American-born and therefore a U.S. citizen, his killing in Yemen with missiles fired from a drone on Sept. 30, 2011, sparked an unusual degree of controversy. In fact, it was reported by Politico that the decision to put Awlaki on a target list in early 2010 had been challenged unsuccessfully by the American Civil Liberties Union. The court found the case not capable of judicial resolution because Awlaki's father lacked the legal capacity to represent his son's interests. However, the federal judge said the case presented "stark and perplexing questions," including why judicial approval was needed to wiretap an American overseas, but not to kill him.

According to a report by The New York Times on the day of the attack on Awlaki, American and Yemeni officials had been pursuing him for almost two years.

The strike was the culmination of a desperate manhunt marked not only by near misses and dead ends, but also by a wrenching legal debate in Washington about the legality — and morality — of putting an American citizen on a list of top militants marked for death. It also represented the latest killing of a senior terrorist figure in an escalated campaign by the Obama administration.

But President Obama's remarks at the time about Awlaki's death carefully omitted details about how it occurred. Drones were never mentioned. Rather, as Politico reported on Sept. 30, 2011, the president stated: "The death of al-Awlaki is a major blow to al-Qaeda's most active operational affiliate....[He] repeatedly called on individuals in the United States and around the globe to kill innocent men, women and children to advance a murderous agenda." In a later interview, the president, when asked whether he ordered the strike against Awlaki, declined to answer, stating: "I can't talk about operational details."

The resulting furor was predictable and did not diminish as time went on. Daniel Klaidman of Newsweek reported on Jan. 23 that, after months of internal debate, the Obama administration was planning to reveal publicly the legal reasoning behind its decision to kill Awlaki. As reported by the Los Angeles Times on Jan. 31, Barack Obama vigorously defended using drones to kill al-Qaeda operatives and other militants in Pakistan's tribal areas and, in the process, officially acknowledged the highly classified CIA drone program that U.S. officials had previously refused to discuss in public.

"I think we have to be judicious in how we use drones," President Obama said, adding that "obviously a lot of these strikes have been in [Pakistan's federally administered tribal areas, and used for] going after al-Qaeda suspects who are in very tough terrain along the border between Afghanistan and Pakistan."

The attacks are carefully targeted, he said, echoing the arguments of Pentagon and CIA officials, who often make the point in private discussions that the drones can perform targeted strikes and thereby substantially reduce the potential for civilian casualties associated with high-altitude bombing.

Attorney General Eric Holder gave a major address, in which he provided a defense of the right to target

U.S. citizens, on March 5. His remarks drew heavily on a secret Justice Department legal opinion setting forth the justification for drone killings in general, and specifically for targeting Awlaki in Yemen.

Holder began by making clear the government's preference for capturing suspected terrorists, among other reasons, so valuable intelligence can be gathered, but also recognized that there are instances where the government has the clear authority — indeed, the responsibility — to defend the United States through the appropriate and lawful use of lethal force. Because America is in an armed conflict, “We are authorized to take action against enemy belligerents under international law. The Constitution empowers the President to protect the nation from any imminent threat of violent attack,” he said.

Some have argued that the president is required to get permission from a federal court before taking action against a U.S. citizen. “This is simply not accurate. ‘Due process’ and ‘judicial process’ are not one and the same. The Constitution guarantees due process, not judicial process,” Holder said.

The New York Times, all too predictably, went ballistic, editorializing: “President Obama, who came to office promising transparency and adherence to the rule of law, has become the first president to claim the legal authority to order an American citizen killed without judicial involvement, real oversight or public accountability.”

The Times wanted two things: release of the Office of Legal Counsel (OLC) memorandum underlying the Awlaki killing, and a court as defined by the Foreign Intelligence Surveillance Act to approve targeted killings.

The idea of OLC memos has become noxious, ever since the infamous Bybee/Yoo memos issued by the OLC during the Bush years, which with amazingly shaky legal reasoning sought to justify torture and to provide a golden shield to torturers. (Ironically, it was Holder who made those memos public.) But not all OLC memos are created equal. And typically, legal advice by a lawyer to her client is deemed privileged and confidential, for good reason. With such protection, attorneys can give unvarnished advice to the client that frankly weighs the pros and cons. Not to mention that, in this case, top secret information may have been included in the memo.

So I come down on the side of not releasing the memo. In fairness, however, I must add that, in large measure, my decision is based on my belief in the integrity of the players involved.

As to the need for prior approval by some judicial authority in closed proceedings, that's more difficult. The prospect of having to run to court when a rare and possibly fleeting opportunity arises of getting rid of a killer of Americans before taking action reminds me that, after all, we are at war with those who want to kill as many of us as they can, all the time. And that rare opportunity might suddenly evaporate.

But the thought that our intelligence might be wrong — that we might erroneously seek to deprive a citizen of his life — pushes me in the opposite direction. For right now, I trust Barack Obama, John Brennan and Harold Koh to get it right, so I would opt against the need for court supervision. But what about the next administration, and the next? That makes the question tougher, far tougher for the longer run.

Targeted killings of U.S. citizens are enormously serious business, and the relevant issues should be explored and debated in the political process. I strongly applaud the Obama administration for taking such significant steps toward bringing the discussion of drone killings into the sunlight.

Charles R. Church is an attorney practicing in Salisbury who for years has studied Guantanamo Bay detention, torture, habeas corpus and related issues.

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