

Killing with Near Certainty. Judge Andrew Napolitano

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*Last week, **President Joseph R. Biden Jr.** secretly reaffirmed his own self-willed authority to kill persons in other countries, so long as the CIA and its military counterparts have "near certainty" that the target of the homicide is a member of a terrorist organization. That standard was concocted by the Biden administration.*

There is no "near certainty" standard in the law, as the phrase is oxymoronic and defies a rational definition; like nearly pregnant. One is either pregnant or not. One is either certain or not. There is no "near" there.

Yet, the creation of this standard underscores the lamentable absence of the rule of law in the Biden administration, and in the administrations of its three immediate predecessors, each of which deployed drones to kill persons who were not engaged in acts of violence at the time of their killing, irrespective of the near certainty of their membership in any organizations.

"Terrorist" cannot be a standard for murder because it is subjective. To King George III, George Washington was a terrorist. To the poor folks in Libya and Syria, to the popularly elected governments toppled by CIA-inspired violence, to the innocents tortured at black sites around the world, the CIA is a terrorist organization.

The presidential use of drones to kill persons overseas began in 2002 with targeted killings ordered by President George W. Bush. It continued under President Barack Obama — who even killed Americans overseas. The rules for killing were made up by each president. They were relaxed under President Donald Trump, who gave CIA senior personnel and military commanders the authority to kill without his express approval for each killing.

The Biden administration quietly took back the Trump grants of authority so that today only the president can authorize targeted killing. Yet, there is no moral, constitutional or legal

authority for these killings. But presidents of both political parties do it anyway.

The laws of war — a phrase itself that is oxymoronic — which are generally codified in the Geneva Conventions and the United Nations Charter, all of which were spearheaded and ratified by the United States, mandate essentially that lawful wars can only be defensive and proportional to the threat posed or the harm already caused. Stated differently, treaties to which the U.S. is a signatory restrain the president from killing persons in other countries with which the U.S. is not lawfully at war.

Under the Constitution, treaties sit alongside the Constitution itself as the supreme law of the land. The last four occupants of the White House have ignored this when it comes to secret killings. Each has claimed publicly or secretly that the Authorization for Use of Military Force of 2001, or its cousin, the AUMF of 2002, somehow provide congressional authorizations for presidents to kill whomever they please; and somehow Congress can authorize killings.

Yet the AUMF of 2001 purported to authorize Bush to hunt down and kill the folks he failed to see coming on 9/11, whom he reasonably found caused 9/11. The AUMF of 2002 authorized Bush to invade Iraq in pursuit of the weapons of mass destruction that we now know Saddam Hussein never had.

The Constitution authorizes Congress to declare war, not random killings. Neither of the AUMFs was or is a valid declaration of war, which the Constitution requires as a predicate for all extrajudicial presidential killing. A declaration of war defines the target and sets the end. It is not open-ended as the last four presidents have claimed with respect to these two Bush-era statutes.

If the presidents are right, and the AUMFs authorize them to kill whomever they wish — including Americans — then they are not presidents answerable to the law and the Constitution, but kings who can kill on a whim without transparency or legal consequence.

The whole purpose of confining the war-making power to Congress and the war-waging power to the president was to keep those powers separate. History is littered with examples of tyrants using the powers of the state to kill for no moral purpose. American presidents have given themselves the power to kill.

Abraham Lincoln was the first head of state in world history to target civilians militarily and the first to kill civilians of his own country. Franklin D. Roosevelt slaughtered thousands of innocent helpless German civilians at the end of World War II by carpet-bombing German cities, rather than targeting the German military. Harry Truman slaughtered many thousands of Japanese civilians at Hiroshima and Nagasaki. All these murders were met with popular approval, as the targets had been demonized by the machinery of government — just like the “terrorists” Bush, Obama, Trump and Biden have killed.

But demonization of human targets and popular approval of their murders cannot make an immoral act a moral one. An act is moral when it is consistent with the Natural Law. According to the Declaration of Independence, under the Natural Law, all persons are “endowed by their Creator with certain unalienable Rights, and among these are Life, Liberty, and the Pursuit of Happiness.” The right to live is the foremost natural right and the great divine gift to all persons — not just Americans.

No person may morally be targeted for death by government for any reason unless it is presently necessary to stop that person from actively killing another. In the cases cited above, the presidential killings were done to terrify political opponents, as the civilian targets were helpless. And the killers were lauded as heroes.

Today, American troops — special forces — are on the ground in Ukraine showing Ukrainian forces how to use American weapons to kill Russian troops. This was done by a secret presidential order that has never been publicly acknowledged. These bullied and terrified Russian conscripts pose no threat whatsoever to life, liberty or property in America. But presidents kill because they can get away with it.

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