

US Targeted Killing Rules Conflate Legality and Politics

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In January 2013, President Barack Obama promised to make the rules for the United States' targeted killing program "more transparent to the American people and the world" because "in our democracy, no one should just take my word for it that we're doing things the right way."

Three and a half years later, a Freedom of Information Act (FOIA) request by the ACLU and resulting court order finally forced the administration to make public the Presidential Policy Guidance regarding the program. But much of it is redacted, or blacked out. That is the opposite of transparent.

The 18-page Presidential Policy Guidance document purports to outline procedures for the use of lethal force in locations outside "areas of active hostilities." In other words, it does not cover Iraq, Afghanistan and Syria. It does cover Pakistan, Yemen, Somalia and Libya (although now that the Obama administration is officially bombing Libya, it might now include that country as an "area of active hostilities").



A protester holds a sign in front of the Smithsonian Air and Space Museum in Washington, DC, on October 4, 2014, to oppose an exhibition glorifying the use of unmanned military aircraft known as "drones." (Photo: Stephen Melkisetian / Flickr)

Several layers of bureaucracy are required to approve the targeting of individuals. Although the document gives lip service to the law, it skirts the legal requirements for the use of force. It appears to elevate political and policy considerations above the law.

Presidential Policy Guidance and Legal Requirements

The document states that "international legal principles, including respect for a state's sovereignty and the laws of war, impose important constraints on ability of the United States to act unilaterally." That means the United States must comply with the UN Charter, which allows the use of military force only in self-defense after an armed attack by another country, and with approval by the Security Council.

But none of the countries where people are targeted, including Iraq, Afghanistan or Syria, has attacked the United States or another UN member nation. Under international law, the 9/11 attacks constituted a crime against humanity, not an armed attack by another state.

The Presidential Policy Guidance would sanction targeting a person who poses a

“continuing, imminent threat,” not just to “U.S. persons,” but also to “another country’s persons.” A 2011 Department of Justice (DOJ) white paper, leaked in 2013, said that a US citizen can be killed even when there is no “clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.” This makes a mockery of the “imminence” requirement. The administration presumably sets an even lower bar for non-citizens.

There must also be “near certainty that an identified HVT [high-value terrorist] or other lawful terrorist target” is present before using lethal force against him. Yet the administration engages in “signature strikes” that don’t necessarily target individuals but rather target all males of military age present in an area of suspicious activity. And the Presidential Policy Guidance does not define “high-value terrorist.”

In addition, there must be “near certainty that non-combatants [civilians] will not be injured or killed.” Given the large number of civilian casualties from drone strikes and other targeted killings, the administration does not appear to be complying with this requirement either.

The Presidential Policy Guidance says “the United States prioritizes, as a matter of policy, the capture of terrorist suspects as a preferred option over lethal action” because capture offers the “best opportunity for meaningful intelligence... and disruption of terrorist threats.” Thus, there must be “an assessment that capture is not feasible at the time of the operation.” The document does not define “feasible.”

It also specifies, “In no event will additional detainees be brought to the detention facilities at the Guantanamo Bay Naval Base.” Since the Obama administration rarely sends people to US courts for terrorism trials, its default action is apparently killing rather than capture.

According to the Presidential Policy Guidance, there must also be assessments that “the relevant governmental authorities... cannot or will not effectively address the threat to U.S. persons” and “no other reasonable alternatives to lethal action exist to effectively address the threat to U.S. persons.” The document contains no definition of “threat to U.S. persons.” And how would there be a threat if US persons were not present in countries where they do not belong?

The list of minimum criteria to be considered in the “individual profile” of each suspect is totally redacted, leaving us to guess at the requirements for targeting an individual.

In order to target a “U.S. person,” the operation must be “consistent with the laws and Constitution of the United States.” But the targeting of all persons, whether “U.S. persons” or not, must comply with US law. Ratified treaties constitute part of US law under the Supremacy of the Constitution. They include the UN Charter and the International Covenant on Civil and Political Rights. The covenant, which protects the right to life, mandates due process — or fair trial — before taking a life. The rules set forth in the Presidential Policy Guidance do not comply with due process.

Moreover, the Presidential Policy Guidance allows for waivers from the rules in “extraordinary circumstances” or “extraordinary cases,” both left undefined. Nothing in the UN Charter permits a waiver of the use of force provisions in “extraordinary” cases or circumstances.

Authorization for the Use of Military Force

The administration released four additional documents along with the Presidential Policy Guidance. One of them, titled Report on Process for Determining Targets of Lethal or Capture Operations, states that “the principal domestic legal basis for [Department of Defense] direct action operations is the 2001 Authorization for the Use of Military Force.”

The 2001 Authorization allows the president to use “force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”

But that authorization is limited to those connected with the 9/11 attacks. Islamic State did not even exist on 9/11. And when George W. Bush asked for authority “to deter and preempt any future acts of terrorism or aggression against the United States,” Congress refused. Thus, the 2001 Authorization does not accord with Obama’s targeted killings.

More Transparency or Politics as Usual?

It wasn’t until July 2016 that the administration publicized its numbers of civilian deaths from targeted killings “outside areas of active hostilities.” The administration’s figures were vastly lower than those documented by the leading non-governmental organizations. And besides omitting figures for Iraq, Afghanistan and Syria, they left out the locations, dates, numbers and names of civilians and combatants that would enable us to accurately assess their claims.

The Presidential Policy Guidance states that officials considering an operational plan proposed by the US military or the CIA shall evaluate “the broader regional and international political interests,” the “policy objectives,” and the counter-terrorism strategy of the United States. Political and policy considerations apparently trump compliance with the law.

Under the guise of increased transparency, the administration has revealed partial information about its targeted killing program. But much remains classified. And what we do know does not comply with the law.

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