

FROM: THE VOLOKH CONSPIRACY

# THE SECRET “KILL LIST” AND THE PRESIDENT

*Kenneth Anderson*<sup>†</sup>

**M**y corner of the national security law world is abuzz today reading the outstanding New York Times article by Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will.”<sup>1</sup> As Ben Wittes says at Lawfare,<sup>2</sup> it is a richly textured, detailed look at how the administration approaches targeted killing (whether with drones or human teams or in combination), and is the most detailed insider account of how the administration has gradually evolved a process for vetting targets. Opinio Juris’ Deborah Pearlstein focuses in on a key passage<sup>3</sup> in the story, one that talks about the essentially casuistical evolution of targeting standards, case by case:

It is the strangest of bureaucratic rituals: Every week or so, more than 100 members of the government’s sprawling national security apparatus gather, by secure video teleconference, to pore over terrorist suspects’ biographies and recommend to the president who should be the next to die.

This secret “nominations” process is an invention of the Obama administration, a grim debating society that vets the

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<sup>†</sup> Professor of Law, American University Washington College of Law, and Visiting Fellow, The Hoover Institution on War, Revolution and Peace, Stanford University. Original at [www.volokh.com/2012/05/29/the-secret-kill-list-and-the-president/](http://www.volokh.com/2012/05/29/the-secret-kill-list-and-the-president/) (May 29, 2012; vis. Apr. 15, 2013). © 2012 Kenneth Anderson.

<sup>1</sup> [www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?\\_r=3&hp&pagewanted=all&](http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?_r=3&hp&pagewanted=all&).

<sup>2</sup> [www.lawfareblog.com/2012/05/the-new-york-times-on-obama-and-counterterrorism/](http://www.lawfareblog.com/2012/05/the-new-york-times-on-obama-and-counterterrorism/).

<sup>3</sup> [opiniojuris.org/2012/05/29/nyt-must-read-on-obama-counterterrorism-and-targeting/](http://opiniojuris.org/2012/05/29/nyt-must-read-on-obama-counterterrorism-and-targeting/).

PowerPoint slides bearing the names, aliases and life stories of suspected members of Al Qaeda's branch in Yemen or its allies in Somalia's Shabab militia. The video conferences are run by the Pentagon, which oversees strikes in those countries, and participants do not hesitate to call out a challenge, pressing for the evidence behind accusations of ties to Al Qaeda.

"What's a Qaeda facilitator?" asked one participant, illustrating the spirit of the exchanges. "If I open a gate and you drive through it, am I a facilitator?" Given the contentious discussions, it can take five or six sessions for a name to be approved, and names go off the list if a suspect no longer appears to pose an imminent threat, the official said. A parallel, more cloistered selection process at the C.I.A. focuses largely on Pakistan, where that agency conducts strikes. The nominations go to the White House, where by his own insistence and guided by Mr. Brennan, Mr. Obama must approve any name. He signs off on every strike in Yemen and Somalia and also on the more complex and risky strikes in Pakistan – about a third of the total.

The article is important in several ways. First, it seems pretty clear that the administration cooperated in giving information to the reporters, because it wants to make clear that there is a process and a robust one for making targeting decisions. In this regard, this article fits with the series of national security speeches by senior officials and general counsels of national security departments of government – most of them are collected [here](#), at Lawfare, in a list<sup>4</sup> that gets periodically updated. It is quite true that if one believes that targeted killing is simply extrajudicial execution as a matter of substance, or that it has to be approved by a judge, or that the process has to be judicial rather than that of the political branches or the executive acting in an armed conflict and/or national self defense, then none of this will impress you. But if you are most people in the United States, your reaction is much more likely to be, good, I'm glad they are killing the bad guys, and I'm glad they're thinking hard about who they're killing and why before they do it. Clearly the

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<sup>4</sup> [www.lawfareblog.com/2012/04/readings-the-national-security-law-speeches-of-the-Obama-administration-general-counsels/](http://www.lawfareblog.com/2012/04/readings-the-national-security-law-speeches-of-the-Obama-administration-general-counsels/).

administration wants to get across a message to the public that there is a serious process, even if the circumstances for making targeting decisions are novel.

That signal is aimed, presumably, at broad opinion-setting elites – liberal and conservative, but mostly liberal – whose visceral reactions to how the issue is framed (targeting in unconventional war or just remote execution?) matter over the long run to its institutional legitimacy. As Jack Goldsmith has pointed out in his new book, *Power and Constraint*, targeted killing and drone warfare are likely to be the next “detention and interrogation” ground of delegitimation in the broader argument over counterterrorism. The Obama administration is more aware than most administrations just how important it is to hold a certain legitimacy high ground, and that starts with its framing among opinion-elites.

Second, there is also likely a signal here to the judicial branch that this is not unconsidered or purely discretionary; far from it. More exactly, there is a signal that the judiciary would have no ability to do a better job, as an effectiveness question, quite apart from the Constitutional and other domestic legal questions. It is highly unlikely that the judicial branch, taken as a whole, has any appetite for getting involved in these questions – particularly on the front end, of signing off in advance on targeting, effectively death warrants, given the Constitutional and other domestic legal issues raised. Even in an indirect, informal way, this kind of article helps set the picture of a process with serious mechanisms for discussion and review; it helps establish the legitimacy of the process – and so also helps establish the legitimacy of the judiciary staying out of it.

Third, the administration wants to send a clear signal that the President considers and signs off on these personally, and that this is far from a perfunctory or unconsidered sign-off. I applaud the President for this level of personal review; I think it is right. This signal carries a certain ambiguity, however – one that I believe the administration needs to consider closely. The ambiguity lies in whether the President’s personal, considered attention to each decision is understood and conveyed to the public as a matter of the burden of the institutional presidency – something that would be no less true

of a President Romney than a President Obama. In that case the implication is that President Obama is stepping up to the plate to establish a process not just for himself, but for his successors and for the institution of the presidency. And he does so in a way that both sets a precedent (in the sense of a certain burden) for the proper level of involvement of the president in targeted killing decisions. But, while setting a presidential burden, this also gives future presidents important institutional legitimacy, through the weight of precedent established by the acts of a prior president, and institutional stability – to targeted killing, specifically, but also by implication to the emerging paradigm of covert and small-scale self-defense actions against non-state terrorist actors which, in the future, may or may not have anything to do with Al Qaeda and might be addressed to wholly new threats.

The alternative is that President Obama is sending a signal that these actions are legitimate only because he is personally trusted to do the right thing on these decisions, just because he is Barack Obama. His constituencies trust him with this power in a way that they would not entrust to any other president, including those who come after. In other words, there is a question implicit in the *New York Times* description as to whether the President is conferring a purely personal legitimacy that disappears with this presidency, or whether he and his administration are creating a long term process, and conferring the weight of institutional legitimacy on it.

It is obvious from how I've framed the ambiguity that I believe that the administration has an obligation to create lasting institutional structures, processes, institutional settlement around these policies. It owes it to future presidencies; every current president is a fiduciary for later presidents. It also owes it to the ordinary officials and officers, civilian and military, who are deeply involved in carrying out killing and death under the administration's claims of law – it needs to do everything it can to ensure that things these people do in reliance on claims of lawfulness will be treated as such into the future. And in fact I believe this is what the senior leaders and lawyers who have issued speeches for the administration are seeking. But I think there is still room for the players involved to say clearly

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that these processes are legitimate for the executive, this president and future presidents.

Finally, we might add, the article says that the decision to target Anwar Al-Aulaqi was, in the President's mind, an "easy one." //