

State Sanctioned-Targeted Killing A Talk with Judge Andrew Napolitano

- U.S. Targeted Killing Program
 - Program generally operates in secret, although past administrations have released certain information related to strikes and those killed. Composed of “kill lists” and secret criteria for being placed on the list.
 - Kill lists are composed of the names of those considered terrorists and who are targeted by military efforts and drone attacks.
 - Critics point out that the factors that determine who is targeted are vague, malleable, and have changed over time.
 - Targeted people may be on kill lists for years.
 - A United Nations special report describes targeted killings as deliberate use of lethal force employed by States against a specific individual outside their custody.¹
 - Following the September 11, 2001 terrorist attacks, the U.S. government created and increasingly uses targeted killing to combat terroristic activity.
 - Controversial program because of its secrecy and the sometimes-tenuous legal justifications of the use of lethal force against individuals.
 - The program has been the basis of several lawsuits against the federal government.
 - Targeted killing is generally carried out via drone strikes and kill/capture missions.

- Legal authorities for targeted killing
 - 2001 AUMF
 - Enacted shortly after the terrorist attacks of September 11, 2001.
 - Authorizes the President to use “all necessary and appropriate” against those responsible for the 9/11 attacks, “in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”²
 - “Organizations and persons” are specified rather than just nations.
 - 2002 AUMF
 - Authorizes the use of armed forces against Saddam Hussein’s Iraq government.
 - From the Bush administration on (including Trump), the 2001 AUMF has been used as the legal justification to combat terrorism.

- International law framework
 - During war times, international rules are more permissive in the use of lethal force for self-defense purposes.

¹ UN Human Rights Committee (HRC), *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, 28 May 2010, A/HRC/14/24/Add.1

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>

² [The 2001 AUMF 115 STAT. 224](#)

- Charter of the United Nations, Article 51, Chapter VII
 - Article 51 provides that, “Nothing in the present Charter shall impair the right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations...”³
- The laws of war provide that an imminent and specific threat need not be required against an enemy combatant in war zones. However, an imminent threat is necessary to justify a preemptive strike for self-defense. Preventive self-defense, employed to counter non-imminent threats, is illegal under international law.
- Under international customary law, the scale of a military attack that may be expected to cause civilian deaths and damage civilian communities must be proportional to the military advantage anticipated.
- War powers of Congress and the Executive
 - President has power to wage war as Commander-in-Chief under Article 2.
 - Article 2, Section 2
 - “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States”.⁴
 - Congress has power to declare war.
 - War Powers Resolution of 1973⁵
 - Enacted during the Nixon administration in an effort to curtail the president’s ability to engage in armed hostilities without Congressional approval.
 - Provides procedures for both the president and Congress to follow when sending U.S. armed forces abroad to engage in potential conflict.
 - Requires the president to consult with congress before sending armed forces into hostilities.
- Targeted killing of Qassem Soleimani
 - On January 3, 2020, Iraqi Major General Qassem Soleimani was killed by a targeted drone strike. It was the first time that the U.S. launched a drone strike to kill a foreign government military official.
 - Administration’s justifications for targeted killing
 - To deter Iran from conducting or supporting further attacks against the U.S. and interests.
 - Serves “national interests”
 - As a matter of “national self-defense”
 - Some have called the killing of Soleimani a political assassination.

³ U.N. Charter art. 51, ch. VII, <https://www.un.org/en/sections/un-charter/chapter-vii/>

⁴ [Article 2 Section 2, U.S. Constitution](#)

⁵ Public Law 93-148: <https://www.govinfo.gov/content/pkg/STATUTE-87/pdf/STATUTE-87-Pg555.pdf>

- President Ford’s Executive Order 11905
 - “[g] No employee of the United States Government shall engage in, or conspire to engage in, political assassination.”⁶
 - Subsequent presidents have issued executive orders reaffirming and expanding the ban on carrying out political assassinations.
- Anwar al-Aulaqi
 - Anwar Al-Aulaqi and Samir Khan, both U.S. citizens, were killed in a U.S. drone strike in Yemen in 2011. Two weeks later, 16-year-old American Abdulrahman Al-Aulaqi was also killed in a drone strike in Yemen.
 - In 2010, Anwar Al-Aulaqi was placed on a “kill list” following a drone strike on a compound where he allegedly met with other al-Qaeda leaders.⁷ The State claimed that Anwar Al-Aulaqi was the head of external operations for al-Qaeda. In September 2011, while Anwar Al-Aulaqi, Samir Khan, and at least two others were traveling in a vehicle in Yemen, they were killed by a drone strike. Two weeks later, another drone strike targeting someone else killed Anwar Al-Aulaqi’s son, Abdulrahman Al-Aulaqi, while he was eating at an outdoor restaurant with his teenage cousin.
 - Al-Aulaqi v. Panetta⁸
 - In 2012, the ACLU and the Center for Constitutional Rights filed a suit in the federal district court in Washington, D.C., claiming that the killings were a violation of their due process rights.
 - In 2014, the D.C. District Court dismissed the suit.
 - The court found no available remedy under U.S. law. The court opined that the claims on behalf of Anwar al-Aulaqi could not proceed because special factors including separation of powers, national security, and the risk of interfering with military decisions precluded extending a remedy for a category of defendants who had an implied cause of action for deprivation of a constitutional right under *Bivens v. Six Unknown Named Agents*.⁹

⁶ [Executive Order 11905](#)

⁷ Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, Washington Post (Jan. 27, 2010), http://www.americanbar.org/content/dam/aba/migrated/2011_build/law_national_security/dana_priest_article.authcheckdam.pdf.

⁸ Al-Aulaqi et al v. Panetta et al.

<http://www.internationalcrimesdatabase.org/Case/935/Al-Aulaqi-v-Obama-et-al/>

⁹ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971), ruling that an action for damages may be brought against federal agents who violate an individual’s rights.