Secrecy, Targeted Killing and the Rule of Law

Draft of paper for Conference on Sovereignty and the New Executive Authority

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Abstract

The targeted killing of Anwar al-Awlaki has finally produced the collective self-examination it merits. The case is a turning point in American national security policy, and the American public has only just taken notice, despite the fact that al-Awlaki was killed over 18 months ago. It is a microcosm of all that is challenging, and all that is frightening, about fighting terrorism in what one might call the *post-war era*.

Not only was al-Awlaki an American citizen, and the first American citizen to be targeted and killed as an enemy in war without trial since the Civil War. This decision was made as an exercise of executive discretion, a concept that appears more expansive with each passing drone strike. The expansive scope of executive discretion is the first of what I would identify as three crucial trends in national security law, the combination of which has brought about a radical shift in the balance of powers in American government, as well as a transformation of due process rights of potentially immense proportions.

The second important development is the dramatic increase in the use of the classification privilege on the part of executive branch agencies, along with a reduction in the degree to which classification decisions are internally reviewed. The clearest symptom of the conjoined effects of enlarged scope of executive discretion and the increase in use of classification is to be seen in the expansion of the CIA's targeted killing program. The United States now deploys drones both under the auspices of the military's Joint Special Operations Command (JSOC) and the CIA. While JSOC operations are already secret enough, the CIA drone strikes are covert. Once covert action was the exception, now it's the rule. Executive discretion and expanded use and scope of classification both enables and fuels these developments.

The third important development has to do with the role of the judiciary in supporting the two foregoing changes in national security law, with a judicial philosophy that corresponds to each. The first pertains to deference to executive authority in the domain of war. The al-Awlaki case is the first such case in which federal courts have asserted the so-called "political question doctrine" as such a basis for refusing to take jurisdiction of the due process claims of an American citizen threatened with state-sanctioned execution. The Executive branch exercised its ever-broadening discretion, and the D.C. Circuit deferred to that discretion, in an opinion that declared, in sweeping terms, that there is no "carve out" from the power of the executive to make national defense policy for the due process rights of Americans regarded as a military threat.

This is a significant change in the way Article III courts have traditionally understood an assertion of individual constitutional rights.

The second part of the shift in the judicial response has to do with decisions responding to Freedom of Information Act (FOIA) requests. The change in judicial philosophy on this topic has been most evident in response to the FOIA requests filed to obtain the 2010 memorandum of the Office of Legal Counsel in response to the al-Awlaki case. The 2010 memo addressed the question whether it was permissible to target and kill American citizens involved in hostilities against the United States as non-governmental actors. Of course there had never been a question that it is permissible to kill American combatants who fight on the side of official enemy forces. But the 2010 memo addressed the situation of Americans in the position of "unlawful combatants," which would have constituted civilian status under traditional laws of war. The upshot of the FOIA decisions has been the same as that for the decisions dealing directly with executive discretion: The executive branch has almost unfettered authority to decide which documents must remain secret in times of extreme national security needs, and these decisions are both internally unreviewable, and extremely difficult to review in federal courts.

In both of the foregoing lines of cases, the federal judiciary has abdicated its traditional role of protector of individual rights and liberties in favor of being the endorser of executive prerogative and discretion where matters of national security are concerned.

The upshot of the foregoing trends is the collective endorsement of three significant principles: 1. *The executive branch has largely virtually unlimited discretion to make life or death decisions with regard to suspected enemies of the state in time of heightened national security threat,* 2. *The executive branch has unlimited discretion to declare sensitive documents secret, with virtually no review or oversight,* and 3. *Article III courts are committed to a judicial philosophy that declares both 1) and 2) unreviewable.* While each individual proposition may seem reasonable on its face, the trio of principles, taken together, poses a significant threat to the rule of law. The seeds of this triumvirate were arguably sown many years ago – most notably with the Bush Administration's decision to label al-Qu'aida affiliates "unlawful combatants" and its asymmetric conception of the rights of such persons relative to traditional combatants – the internal logic of this policy is only now being clearly felt. What the public is beginning to observe is that in our haste to secure our nation from terrorist threat, the logic of unlawful combatancy may have worked a permanent transformation in the traditional safeguards for the protection of personal liberty of which Americans have historically been so proud.

In his confirmation hearing on February 28, John Brennan noted the public interest in the "thresholds, criteria, processes, procedures, approvals and reviews" for drone strikes and he claimed that "our system of government and our commitment to transparency demand nothing less" than a public discussion of those criteria. This is a lofty ideal, but we cannot meaningfully debate what we don't know. Of course Brennan understands this, as shown by his call for codifying his own procedures for targeting decisions. This would be crucial to ensure that our

practices conform to the rule of law and would impose self-restraint on the Executive's decision-making capacity over the awesome power of life and death. But there is a catch: just as the Bush Administration went through the exercise of articulating rules for the use of enhanced interrogation techniques, but kept such rules *secret*, so the Obama Administration has engaged in an elaborate exercise of private law-making. Articulating limits on discretion will do little to protect the rule of law if the rules and standards that establish those limits remain clandestine. The necessary protection can only come from the articulation of *publicly available* rules and standards which are then subject to public scrutiny and debate.

This paper will discuss the three foregoing trends in national security law. It will trace their occurrence as an outgrowth of dramatic changes in the nature of warfare, and identify their potential impact on the traditional division between military jurisdiction and civil law enforcement. Among other things, the paper will argue that these trends reflect the shrinkage of the domain of traditional law enforcement, where the locus of due process rights resides, and the growth of non-due process based civil defense under the heading of military intervention. This development – the shrinkage of the domain of civil law enforcement and the growth of military jurisdiction – poses a significant challenge to the rule of law. How to reconcile this challenge, however, with the demands of strong national security is a crucial question, one to which there are no easy solutions.