

DOUGLASS CASSEL
CENTER FOR CIVIL AND HUMAN RIGHTS
301 NOTRE DAME LAW SCHOOL
Notre Dame, Indiana USA 46556
(574) 631-7895
Doug.Cassel@nd.edu

February 21, 2007

Worldview Commentary No. 255 on Chicago Public Radio, 91.5 FM WBEZ

“Targeted Killings – What We Don’t Know”

One day last month several men – the number is disputed -- were incinerated in a hamlet in Pakistan. The Pakistani military called them Al Qaeda terrorists. Local villagers said they were innocent civilians. The Pakistani military claimed they were killed by Pakistani helicopter gunships. Villagers said they were killed by a missile fired from a familiar sight in their skies -- a Predator, an unmanned drone operated by American intelligence.

What is the truth? Will we ever know? How?

On another day a few years ago, several men were incinerated in a car traveling across the Yemeni desert. United States government sources let it be known that they were killed by a missile fired by a CIA Predator drone. At least one was believed by American intelligence to have been involved in an Al Qaeda attack that killed sailors on an American ship in a Yemeni harbor years earlier.

Was the incinerated man guilty? What about his companions? What intelligence sources, with what degree of credibility, led to their deaths? Will we ever know? How?

Questions like these have been left unanswered ever since President Bush, in the wake of 9/11, reportedly issued a directive authorizing targeted killings of suspected terrorists. How many killings have been carried out? Against whom? Where? On the basis of what quality of intelligence information?

Again, we do not know. Decades may pass before declassified documents give us the government’s version, at least, of these killings. By then it may be too late to check whether other evidence may corroborate – or impeach -- the official story.

Are these killings lawful? The short answer is, it depends. The problem is, it depends on facts which are secret, and virtually unknowable outside a small circle of people inside government. Only they have access to the relevant classified intelligence. They are subject to no effective check or balance.

Under international human rights law, if one views the targets of our Predator missiles as persons suspected of criminal acts of terrorism, then the killings are plainly unlawful – unless the victims were targeted while preparing an imminent terrorist attack which could not otherwise be prevented.

The contrary view – that an executive official, on the basis of secret intelligence information – can impose what amounts to instant capital punishment, with no trial or due process of law – would open the door to tyranny.

But what if the suspected terrorists are viewed, not as criminal suspects, but as enemy combatants engaged in armed conflict against the United States?

In that view the killings must be viewed through the lens of international humanitarian law. How one should apply the Geneva Conventions and other laws of war to targeted killings is a matter debated by scholars.

Where the killings take place in a recognized war zone, such as Afghanistan, there is a strong legal argument that persons believed to be in Al Qaeda may be targeted as combatants.

On the other hand, where the killings take place in Yemen – far from any battlefield, and long after the attack on our Navy ship – the case for the existence of an “armed conflict” within the meaning of the Geneva Conventions is weak. And the risk of bypassing the ordinary restraints of due process of law is greater: the targets begin to look more like criminal suspects and less like combatants in a war.

Israeli human rights expert David Kretzmer, a former member of the United Nations Human Rights Committee, proposes to bridge the dichotomy between suspect and combatant. In cases of armed conflict between a state and a terrorist group, he would apply aspects of *both* human rights and humanitarian law. Suspected terrorists could be targeted, but only on the basis of clear and convincing evidence that they are in fact terrorists, and only when necessary to prevent an imminent terrorist attack.

In theory this is defensible. If the intelligence information is shaky, the suspect could not be targeted. Or if he could feasibly be arrested, he could not be executed instead.

The problem comes in practice. No one outside the small circle of decision makers knows the quality of the intelligence information. No court – not even the secret wiretapping court – reviews the identification of the suspect as a terrorist, or the imminent threat he supposedly presents. The executive acts alone, unchecked.

Even if Americans are inclined to entrust their President with such a license to kill, are we prepared to grant that same license to other Commanders in Chief? After all, if international law permits George Bush secretly to kill people he suspects are terrorists, then despots like Robert Mugabe, Fidel Castro and Muammar Khaddafi can also claim the right to kill people they say are “terrorists” -- on the basis of secret Zimbabwean, Cuban or Libyan intelligence, unseen and unreviewed by any court.

No President should have such power outside a traditional combat zone. Whatever uncertain gain there might be in the war on terrorism, the cost to the rule of law is simply too high. Unless, of course, we are content to convert the entire world into Dodge City.

Doug Cassel’s commentaries are generally broadcast Wednesdays during the noon hour of the Worldview program on Chicago Public Radio, 91.5 FM, and rebroadcast at 9 PM in the evening. Views expressed are personal views of the author and not necessarily those of Notre Dame Law School, the Center for Civil and Human Rights or Chicago Public Radio.