

Introduction

On the first night of the campaign against Al Qaeda and the Taliban in Afghanistan in October 2001, the United States nearly had a major success. Officials believed that they had pinpointed the location of supreme leader of the Taliban, Mullah Muhammad Omar. While patrolling the roads near Kabul, an unmanned but armed CIA drone trained its crosshairs on Omar in a convoy of cars fleeing the capitol. Under the terms of an agreement, the CIA controllers did not have the authority to order a strike on the target. Likewise, the local Fifth Fleet commander in Bahrain lacked the requisite authority. Instead, following the agreement they sought approval from United States Central Command (CENTCOM) in Tampa to launch the Hellfire missile from the Predator drone positioned above Omar.

The Predator followed the convoy to a building where Omar and about one hundred guards sought cover. Some delay ensued in securing General Tommy R. Franks' approval. One report indicated that a full-scale fighter bomber assault was requested, and that General Franks declined to approve the request on the basis of legal advice he received on the spot.¹ Another report suggested that the magnitude of the target prompted Gen. Franks to run the targeting by the White House.² Media reports indicated that President Bush personally approved the strike, although the delay permitted time for Mullah Omar to change his location and thus disrupt the attack.³ F-18s later targeted and destroyed the building, but Omar escaped.⁴ Some speculated that the attack was aborted because of the possibility that others in a crowded house might be killed.

The decision to target specific individuals with lethal force after September 11 was neither unprecedented nor surprising. In appropriate circumstances the United States has engaged in targeted killing for a long time, at least since a border war with Mexican bandits in 1916.⁵ In a time of war, subjecting individual combatants to lethal force has been a permitted and lawful instrument of waging war successfully. But new elements of the targeted killing policy emerged in recent years, in response to terrorism and its threats against the United States at home and abroad.

The components of the targeted killing policy quickly took on a sharper focus soon after September 11. For the first time, pilotless drone aircraft were equipped both with sophisticated surveillance and targeting technology and with powerful Hellfire missiles capable of inflicting

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¹ See Seymour Hersh, King's Ransom xx, *The New Yorker* (Oct. 10, 2001).

² Michael R. Gordon & Tim Weiner, *A Nation Challenged: The Strategy*, N.Y. TIMES, Oct. 16, 2001, at A1.

³ Eric Schmitt, *U.S. Would Use Drones to Attack Iraqi Targets*, N.Y. TIMES, Nov. 6, 2002, at A16.

⁴ Michael R. Gordon & Tim Weiner, *A Nation Challenged: The Strategy*, N.Y. TIMES, Oct. 16, 2001, at A1.

⁵ See William C. Banks & Peter Raven-Hansen, Targeted Killing and Assassination: The U.S. Legal Framework, 37 U. Richmond L. Rev. 667, 688 (2003).

lethal force effectively from a safe distance. The drones are CIA aircraft, part of the Special Activities division. Thus, the drones were controlled by civilian leaders outside the chain-of-command. The civilian officials cooperate and share information and decision making with military commanders in a shared campaign against terrorism.

The use of the Predator promised gains in the war against terrorism. If targets as significant as Mullah Omar or even Usama bin Laden could be dispatched with such effectiveness and with little or no risk to U.S. personnel, the objectives of the war on terrorism could be advanced dramatically. At the same time, some questioned the use of the new weapon and its CIA links, as well as several more general short and longer term consequences of an invigorated policy of targeted killing.

This case is designed to raise and explore a few themes that are central to the present and likely future national security posture of the United States. The issues assessed range from host government cooperation, collateral damage, and the locus of decision authority, to tactical questions about the appropriate uses of technology and weaponry. The next section provides a concise narrative backdrop on the conflict triggered by the September 11 attacks. Then the case reviews the emerging policies and procedures that permit targeting terrorists with lethal force, followed by a short section that explores the evolving DOD/CIA relationship in this area. The two final sections assess the legal authorities for and potential limits on targeted killing and the utility of targeted killing in the war on terrorism.

The “War on Terrorism”

The worst terrorist attack ever occurred in the United States on September 11, 2001, when 19 Al Qaeda-linked operatives used knives and boxcutters to kill or wound passengers and pilots and then commandeered four separate but coordinated aircraft in pursuit of pre-selected targets.⁶ Two of the planes struck in New York City at the World Trade Center, causing both towers to collapse, killing approximately 3000 persons, including hundreds of firefighters and rescue personnel who were helping to evacuate the towers.⁷ A third plane was flown directly into the Pentagon in Arlington, Virginia, where 189 persons died, including all who were on board the plane. The fourth plane crashed in Stony Creek Township, Pennsylvania, apparently after passengers overpowered the terrorists, preventing the aircraft from being used as a missile toward its unknown target. All 45 persons aboard were killed in the crash.

Within hours the hijackers had been linked to Al Qaeda and Usama bin Laden.⁸ President Bush visited the World Trade Center site the next day and said, “Freedom and democracy are under attack.”⁹ On September 17, the President remarked that bin Laden “is wanted dead or alive.”¹⁰ In a September 20 address to a joint session of Congress the President

⁶ U.S. Dept. of State, *Patterns of Global Terrorism*, May 21, 2002, available at <http://www.state.gov/s/ct/rls/pgtrpt/2001/html/10235.htm>.

⁷ Id.

⁸ Id.

⁹ U.S. Dept. of State, *Patterns of Global Terrorism*, May 21, 2002, available at <http://www.state.gov/s/ct/rls/pgtrpt/2001/html/10235.htm>.

¹⁰ Barton Gellman, *CIA Weighs “Targeted Killing” Missions*, WASHINGTON POST, Oct. 28, 2001, A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A63203-2001Oct27.html>.

also stated, “Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.”¹¹ The President emphasized that “we will make no distinction between the terrorists who committed these acts and those who harbor them.”¹²

The war on terrorism began dramatically and won significant early gains. But as the targeted killing policy evolved from the early days of the war in Afghanistan, not all the signs were positive. After the near miss on Mullah Omar, no verified intelligence reported seeing much less targeting either Omar or Usama bin Laden during the Afghanistan campaign. Senior leaders of Al Qaeda remained at large, and they were likely relocating early and often to elude detection, capture, or death. However, on November 3, 2001, a missile-carrying Predator drone killed Mohammed Atef, Al Qaeda’s chief of military operations, in a raid near Kabul.¹³ Then, in early May 2002 the CIA tried but failed to kill an Afghan factional leader, Gulbuddin Hekmatyar, an Islamic fundamentalist who had vowed to topple the government of Hamid Karzai and to attack U.S. forces.¹⁴

The calculus for targeted killing changed dramatically on November 3, 2002, when a CIA drone fired a Hellfire missile and killed a senior Al Qaeda leader and five low-level operatives traveling by car in a remote part of the Yemeni desert.¹⁵ In the first use of an armed Predator outside Afghanistan or, indeed, the first military action in the war against terrorism outside Afghanistan, Qaed Salim Sinan al-Harethi was killed. Al Harethi was described as the senior Al Qaeda official in Yemen, one of the top ten to twelve Al Qaeda operatives in the world, and a suspect in the October 2000 suicide bombing of the U.S. destroyer Cole, where 17 American Navy personnel were killed. U.S. intelligence and law enforcement officials had been tracking his movements for months before the attack. Along with al Harethi, killed in the Predator strike were five other Al Qaeda operatives, including an American citizen of Yemeni descent, Kamal Derwish, who grew up in the Buffalo suburb of Tonawanda and who, according to FBI intelligence, recruited American Muslims to attend Al Qaeda training camps.

Deciding to Take Action

The Predator is an ungainly, 40 million dollar, propeller-driven aircraft that flies as slowly as 80 miles per hour and is guided by an operator at a television monitor who may be hundreds of miles away.¹⁶ The drone can hover continuously for 24 hours or more at 15,000 feet above any battlefield, and it can send live video to AC-130 gunships or command posts around the world without putting any pilots in harms way. The drone’s radar, infrared sensors and color video camera can track vehicles at night and through clouds, producing sharp enough pictures to make out people on the ground from more than three miles away. The Predator cannot fly in

¹¹ Id.

¹² Michael R. Gordon & Tim Weiner, *A Nation Challenged: The Strategy*, N.Y. TIMES, Oct. 16, 2001, at A1.

¹³ James Risen, *A Nation Challenged: The Terror Network*, N.Y. TIMES, Dec. 13, 2001, at A1.

¹⁴ Thom Shanker & Carlotta Gall, *U.S. Attack on Warlord Aims to Help Interim Leader*, N.Y. TIMES, available at <http://query.nytimes.com/search/article-page.html?res=9D04E2D91330F93AA35756C0A9649C8B63>.

¹⁵ John J. Lumpkin, *Al-Qaida Suspects Die in U.S. Missile Strike*, ASSOCIATED PRESS, Nov. 5, 2002, available at <http://www.timesunion.com/AspStories/story.asp?storyID=68947>.

¹⁶ See http://www.af.mil/factsheets/fs_122/shtml See also Eric Schmitt, *U.S. Would Use Drones to Attack Iraqi Targets*, N.Y. TIMES, Nov. 6, 2002, at A16.

stormy weather, and they have been prone to icing. The drone is also vulnerable to enemy anti-aircraft fire. The Predator has been flown by the U.S. military for a number of years. The combat debut of the Predator came in 1995 in the skies over Bosnia, where it provided sharp “real time” images of the battlefield. One year before the September 11 attacks, an unarmed CIA drone captured video in Afghanistan of a man that intelligence officials believe was Usama bin Laden.¹⁷

The decision to develop the Predator as a combat device was made specifically to attack bin Laden, according to administration officials.¹⁸ The Hellfire missiles are air-to-ground, laser-guided weapons that were used effectively by Apache helicopter gunships against Iraqi tanks in the 1991 Gulf War.¹⁹

The idea of using the armed Predator drone in counter terrorism combat has been circulating for years. However, lingering disagreements over who should have the ultimate authority for firing the Hellfire missiles – the military or the CIA – slowed the development of the new counter terrorism weapon. It was the possibility that a Predator missed a chance to strike a convoy that apparently included Mullah Omar on the first night of the Afghan war that finally settled the targeting authority dispute, at least for the time being. The missed opportunity, caused by traditional military chain-of-command reviews up to and apparently including the Commander in Chief, gave the CIA its first ever authority to strike beyond a narrow range of pre-selected counter terrorism targets.

It has often been said that the September 11 terrorist attacks changed everything. However broad and deep the changes wrought by the cataclysmic attacks, the U.S. clearly reacted by changing long-standing tenets of its counter terrorism strategy. Where law enforcement and intelligence gathering were the primary instruments of U.S. policy against terrorism outside any designated battlefield, after September 11 the concept of theater of war itself was shelved in the war on terrorism.

In the weeks after September 11, President Bush signed an intelligence finding giving the CIA broad authority to pursue terrorism around the world.²⁰ A finding contains the factual and policy predicates for the intelligence activities authorized in any significant operation, and document must be personally approved by the President. By statute, a finding must accompany any covert operation approved by the President, including those that permit targeted killing. However, a finding governs the use of appropriated funds for covert operations by intelligence agencies. (The military use operations orders.) In the classified finding, the President delegated targeting and operational authority to senior civilian and military officials. Precise approval mechanisms remain classified. The authority given in the presidential finding is surely the most sweeping and most lethal since the founding of the CIA. In part, the finding contemplates a high and unprecedented degree of cooperation between the CIA and special forces, as well as other

¹⁷ Id.

¹⁸ Bob Woodward, *CIA Told to Do 'Whatever Necessary' to Kill Bin Laden*, WASHINGTON POST, Oct. 21, 2001, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A27452-2001Oct20.html>.

¹⁹ Eric Schmitt, *U.S. Would Use Drones to Attack Iraqi Targets*, N.Y. TIMES, Nov. 6, 2002, at A16.

²⁰ James Risen & David Johnston, *Bush Has Widened Authority of C.I.A. to Kill Terrorists*, N.Y. TIMES, Dec. 15, 2002, available at <http://www.nytimes.com/2002/12/15/international>.

military units. Reacting to the finding, one official implicitly warned the terrorists: “The gloves are off.”²¹

Terrorists were first singled out by name in a 1995 Executive Order by President Clinton that introduced a category of “specially designated terrorists” on a list maintained by the Secretary of State and the Treasury Office of Foreign Assets Control.²² In fact, the CIA has been authorized since 1998 to use covert means to disrupt and preempt terrorist operations planned by Usama bin Laden. The Clinton Administration directive was affirmed by President Bush before September 11 and was based on evidence linking Al Qaeda to the August 1998 bombings of U.S. embassies in Africa. The directive stopped short of authorizing targeted killing, but did authorize lethal force for self-defense.

Neither the 1998 directive nor the one issued by President Bush after September 11 exempted the agencies from the 1981 Executive Order provision banning political assassination. The 2001 finding broadens the class of potential targets beyond UBL and his close circle, and also extends the boundaries beyond Afghanistan.²³ In permitting explicitly the targeting of an individual with lethal force, the finding also more narrowly focuses the potential to inflict violence. John C. Gannon, retired deputy director of central intelligence, reacted favorably to the new finding: “The important thing is that the accountability chain is clear. I would want the president’s guidance to be as clear as it could be, including the names of individuals. You’ve got to have the political levels behind you so the intelligence officers are not left hanging.”²⁴

But was the use of the Predator in Yemen the only way to achieve the Administration’s objectives? One alternative to the Predator was a “snatch and kill” operation conducted by a squad of commandos, deployed by helicopters from ships in the Red Sea. In discussions with Yemeni officials, it was feared that a ground operation could ignite a guerilla war. U.S. officials commented that armed Predators had been flying over Yemen for some time, awaiting targets of opportunity. Yemeni government officials were aware of the surveillance and of its potential application against Al Qaeda, U.S. officials said.

The Yemeni government increased its cooperation with the U.S. effort in the months before the November 2002 strike, after U.S. officials complained of a lack of cooperation in investigating the Cole bombing and other terrorist attacks where suspects hiding in Yemen were potentially involved. Although Yemen sought to conduct its own counter terrorism operations near its remote and largely lawless border with Saudi Arabia, a principal sanctuary for Al Qaeda operatives, a December 2001 operation led to heavy Yemeni casualties.²⁵

²¹ Id.

²² Barton Gellman, *CIA Weighs ‘Targeted Killing’ Missions*, WASHINGTON POST, Oct. 28, 2001, A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A63203-2001Oct27.html>.

²³ David Johnston & David E. Sanger, *Fatal Strike in Yemen was Based on Rules Set Out by Bush*, N.Y. TIMES, Nov. 6, 2002, at A16.

²⁴ Barton Gellman, *CIA Weighs ‘Targeted Killing’ Missions*, WASHINGTON POST, Oct. 28, 2001, A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A63203-2001Oct27.html>.

²⁵ James Risen & David Johnston, *Bush Has Widened Authority of C.I.A. to Kill Terrorists*, N.Y. TIMES, Dec. 15, 2002, available at <http://www.nytimes.com/2002/12/15/international>; James Risen & Judith Miller, *CIA Kills a Leader of Qaeda in Yemen*, THE INTERNATIONAL HERALD TRIBUNE, available at <http://www.ihf.com/cgi-bin/generic.cgi?template=articleprint.tpl&ArticleId=76077>.

One key figure in the Yemen Predator strike was outside the traditional circle of those normally involved in planning military operations. U.S. Ambassador to Yemen Edmund Hull, a seasoned counter terrorism expert, personally traveled to remote Yemeni desert territory to seek intelligence on al Harethi.²⁶ The Arabic-speaking Hull met with local tribesman and reportedly paid for information on al Harethi's whereabouts. Hull angered local Yemeni officials with his freelancing, and by facilitating a Predator strike that threatened peace in Yemen. But the Yemenis had failed to nab al Harethi in the December 2001 raid, and it appeared that Yemen would not strike again on its own. Aside from insufficient training in counter terror operations, Yemen may have been reluctant to act on its own because of a perceived debt that President Ali Saleh owes to Usama bin Laden's forces, which assisted in putting down a separatist movement in 1994.

Grumbling aside, the Yemen strike was conducted after considerable cooperation between U.S. and Yemeni officials, including the mounting of a joint U.S./Yemen intelligence team.²⁷ In addition to the intelligence gathered by Hull, the Yemen Predator operation may also have been aided by global positioning coordinates given by one of the several phones held by al Harethi. Once those coordinates were received, targeting officials knew that the Predator had to act quickly, as soon as al Harethi was traveling in a car, away from civilian areas.²⁸ Apparently, Al Harethi had evaded earlier capture attempts and, on that November day, it was suspected that the passengers were going to a target. Deputy Defense Secretary Paul Wolfowitz called the strike "a very successful tactical operation."²⁹ The wreckage of the car revealed traces of explosives and remnants of communications equipment.³⁰

The DOD/CIA Relationship

Part of the buildup toward use of the Predator for the targeted killing operation involved new and still-evolving relations between civilian and military leaders in DOD and the CIA. In July 2002 Secretary Rumsfeld ordered Special Forces commander and Air Force General Charles Holland to develop a plan to capture or kill members of terrorist organizations, on a global scale.³¹ When questioned in December about the Predator strike in Yemen and Pentagon policy regarding assassination or killing of Al Qaeda operatives, Secretary Rumsfeld denied that the Special Forces personnel were trained to assassinate: "That is not what they are trained to do. They are trained to serve their country and to contribute to peace and stability in the world."³²

The evolving Special Forces roles and missions could conceivably find the military carrying out covert operations much the way that CIA has done so traditionally. Some questioned whether such an overlap or redundancy in operation roles and capabilities is

²⁶ Philip Stucker, *Yemen Officials Angered by Americans' Methods in Hellfire Strike*, CHRISTIAN SCIENCE MONITOR, Nov. 11, 2002, available at http://www.sacbee.com/24hour/special_reports/terrorism/story/616107p-4741358c.html.

²⁷ Seymour Hersh, *Manhunt*, THE NEW YORKER, Dec. 23 & 30, 2002, at 66.

²⁸ Philip Stucker, *Yemen Officials Angered by Americans' Methods in Hellfire Strike*, CHRISTIAN SCIENCE MONITOR, Nov. 11, 2002, available at http://www.sacbee.com/24hour/special_reports/terrorism/story/616107p-4741358c.html.

²⁹ Id.; James Risen & Judith Miller, *CIA Kills a Leader of Qaeda in Yemen*, THE INTERNATIONAL HERALD TRIBUNE, available at <http://www.ihf.com/cgi-bin/generic.cgi?template=articleprint.tplh&ArticleId=76077>.

³⁰ James Risen & Judith Miller, *CIA Kills a Leader of Qaeda in Yemen*, THE INTERNATIONAL HERALD TRIBUNE, available at <http://www.ihf.com/cgi-bin/generic.cgi?template=articleprint.tplh&ArticleId=76077>.

³¹ Seymour Hersh, *Manhunt*, THE NEW YORKER, Dec. 23 & 30, 2002, at 66.

³² Id.

desirable, or, if desirable, whether it is workable in practice. According to DSB Chairman William Schneider, Jr., the CIA would execute the operations, using DOD assets. Schneider said that the DSB did not recommend changes in the ban on assassinations, or reductions in congressional oversight. Some members of Congress expressed concern on hearing the DSB report, however, because DOD is not subject to the covert operations reporting requirements.³³

Legal Authority for the Operation; Targeted killing vs. Assassination

Because the Yemen strike was authorized by the President in an intelligence finding, at first blush, the relevant law is the law of intelligence. Since the Hughes-Ryan Amendment of 1974,³⁴ Congress has authorized CIA covert operations if findings are prepared and delivered to select members of Congress before the operation described, or in a “timely fashion” thereafter. So long as the intelligence committees are kept “fully and currently informed,” the intelligence laws permit the President broad discretion to utilize the nation’s intelligence agencies to carry out national security operations, perhaps including targeted killing.³⁵ Such an operation would follow Hughes-Ryan as an “operation in foreign countries, other than activities intended solely for obtaining necessary intelligence,”³⁶ and thus presumably would be conducted pursuant to statutory authority.

To some it seemed that the President’s “wanted dead or alive” remark about bin Laden ran counter to the longstanding ban on political assassination. Enshrined in an executive order first by President Gerald Ford and unchanged since President Reagan’s iteration in 1981, the directive forbids political assassination but does not define the term.³⁷ Just what does distinguish lawful targeted killing from unlawful political assassination? The answer turns upon which legal framework applies. During war, the law of armed conflict applies, and targeted killing of individuals is lawful, although killing by treacherous – through the use of deceit or trickery -- means is not. In peacetime, any extra-judicial killing by a government agent is lawful only if taken in self-defense or in defense of others. But what rules apply when the United States is engaged in a non-traditional war on terrorism?

Although President Reagan’s Executive Order 12,333 forbids political assassination, the order does not restrict the lawful use of force against legitimate enemy targets. Without this legal justification, assassination is simply murder and violates domestic and international law. Executive Order 12,333 simply reflects existing law and makes that policy a prominent and explicit part of U.S. law. The defensive use of force – targeted at a known Al Qaeda leader in

³³ Id.

³⁴ “No funds appropriated under the authority of this or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress” Pub. L. No. 93-559, §32, 88 Stat. 1804 (1974). The amendment was a component of reforms in intelligence operations law designed to make U.S. covert operations decisions directly accountable to the decision makers. See Stephen Dycus, Arthur Berney, William Banks & Peter Raven-Hansen, National Security Law 456-459 (3d ed. 2002).

³⁵ Banks & Raven-Hansen at 713.

³⁶ Pub. L. No. 93-559, §32, 88 Stat. 1804 (1974).

³⁷ Barton Gellman, *CIA Weighs ‘Targeted Killing’ Missions*, WASHINGTON POST, Oct. 28, 2001, A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A63203-2001Oct27.html>.

Yemen, for example – has firm legal roots in U.S. law, the U.N. Charter, and customary international law. In making operational decisions like the one made to strike with the Predator in Yemen, the law of armed conflict permits targeting Al Qaeda combatants.

Secretary of Defense Donald Rumsfeld opined, “it is certainly within the president’s power to direct that, in our self-defense, we take this battle to the terrorists and that means to the leadership and command and control capabilities of terrorist networks.”³⁸

On the one hand, President Bush asserted forcefully that the September 11 attacks were acts of war directed at the United States, giving our nation the legal right to repel the horrific attacks. Whether waged against us by a state or a non-state terrorist organization, war is defined by what it does, not by the identity of the perpetrator. Still, the law of armed conflict has not yet evolved to account adequately for the twilight zone between conventional war and conventional peace, when nations are subject to the continuing threat of terrorist attack. On the other hand, within this twilight zone of threat from terrorist attacks it is not clear exactly what distinguishes a combatant and, thus, a proper target, from a civilian who may not be targeted. Nor is it known what evidence will suffice that someone who does not wear a uniform and who does not fight for a sovereign state is sufficiently implicated in terrorist activities so as to warrant targeting with lethal force. Clearly someone who is positively identified as an Al Qaeda operative is an enemy combatant, one who may be targeted with lethal force. But, as Yale law professor Harold Hongju Koh asks, “what factual showing will demonstrate that [the target] had warlike intentions against us and who sees that evidence before any action is taken?”³⁹

Under the law of war, the selection of individuals for targeted lethal force would not be unlawful if the targets are combatant forces of another nation, a guerilla force, or a terrorist or other organization whose actions pose a threat to the security of the United States. Other international law strictures also come into play, including the United Nations Charter. Article 2 proscribes the violation by one nation of the territorial integrity of another nation, although Article 51 permits measures for “collective self-defense.”

In addition to the President’s constitutional authorities as commander in chief and his authorities over intelligence activities authorized by statute, the President’s finding may also be supported by Congress’s September 14, 2001 Joint Resolution giving the President the authority to use “all necessary and appropriate force” against “persons he determines planned, authorized, committed, or aided the terrorist attacks” of September 11. The sweeping authority granted in the resolution is not time-limited; nor does it have a geographic constraint. Nor is his discretion on choice of target narrowed in any way, so long as the target is connected to September 11.⁴⁰

Under what conditions could a U.S. citizen be subject to a Predator attack, ordered by the CIA or the military? Before September 11, the government’s authority to kill a citizen outside of the judicial process was generally restricted to situations where the American is threatening directly the lives of other Americans or their allies.⁴¹ Still, the President’s intelligence finding

³⁸ Id.

³⁹ Id.

⁴⁰ Banks & Raven-Hansen, text at n.482.

⁴¹ John J. Lumpkin, *U.S. Can Target American Al-Qaida Agents*, ASSOCIATED PRESS, Dec. 3, 2002, available at <http://story.news.yahoo.com>.

does not make any exception for Americans. The authority to target U.S. citizens is thus implicit, not explicit.

Al Qaeda members do not wear uniforms or serve in a nation's army, or fight on a conventional battlefield. But the battlefield against Al Qaeda was declared to be the entire world after September 11. American citizen Kamal Derwish was in the car with Harethi. Although Derwish was not targeted, National Security Adviser Condoleeza Rice responded to a question about the killing of an American by stating that "no constitutional questions are raised . . . [the President] is well within the balance of accepted practice and the letter of his constitutional authority."⁴²

The strike could thus be seen as an air strike in a combat zone, or it could be characterized as an assassination of a civilian who was innocent until proven guilty. Officials also alleged that Derwish was the leader of an Al Qaeda cell in Western New York. Although several Yemeni-American members of the alleged cell were arrested and criminally charged with providing support to terrorist activities, Derwish was not accused of any crime.

Senator Richard Shelby supported the Administration's view that Derwish was an enemy combatant whose constitutional rights as an American were nullified by his actions: "A U.S. citizen terrorist will kill you just like somebody from another country."⁴³ But Mohammed Albanna, vice president of the American Muslim Council Buffalo chapter disagreed: Derwish "has not been tried and has not been found guilty . . . he's still an innocent American who was killed."⁴⁴ Former Air Force JAG officer and director of the Duke University Center on Law, Ethics and National Security Scott Silliman expressed concern about the implications of the Administration's legal and operations theories: "Could you put a Hellfire missile into a car in Washington, D.C., under the same theory? The answer is yes, you could."⁴⁵

Weighing the Utility and Implications of Targeted Killing

There was little doubt among U.S. officials that the Predator strike had material benefits. An important Al Qaeda leader was eliminated, and a strong signal was sent that there is no sanctuary for terrorists. Still, tactically the strike against al Harethi represented an escalation of the war on terrorism.

The Predator depends on reliable intelligence; mistakes happen. In February 2002, a Predator patrolling thousands of feet above Afghanistan fed images to CIA and military officers of a very tall man among a small group. After officials on the ground determined that the man could be Usama bin Laden, a request to launch a Hellfire was made through the chain of command. The request was granted a few minutes later, but by then the group had disbanded. When the man and two others were spotted emerging from a wooded area shortly thereafter, the

⁴² John J. Lumpkin, *U.S. Can Target American Al-Qaida Agents*, ASSOCIATED PRESS, Dec. 3, 2002, available at <http://story.news.yahoo.com>.

⁴³ John J. Lumpkin, *U.S. Can Target American Al-Qaida Agents*, ASSOCIATED PRESS, Dec. 3, 2002, available at <http://story.news.yahoo.com>.

⁴⁴ Id.

⁴⁵ Id.

Hellfire was launched and the three men were killed. Media reports indicated that the three were local men who were scavenging for scrap metal.⁴⁶

Could the Yemen strike be interpreted by other nations and even non-state groups as a justification of their own preemptive attacks on perceived adversaries? Silliman thinks so: “We are basically opening up and crafting a new tool and tactic which is not [only] for the United States to use. . . . We may be putting our leadership at risk.” Assassination of a U.S. Secretary of State or another cabinet official cannot be ruled out. Swedish Foreign Minister Anna Lindh expressed similar concerns: “Even terrorists must be treated according to international law. Otherwise, a nation can start executing those whom they consider terrorists.”⁴⁷ Silliman mused, “if we does this outside the traditional combat area in Afghanistan . . . could we not do it in Germany, Ottawa, or even Cincinnati?”⁴⁸

Should the U.S. acknowledge that it has conducted an operation like the one in Yemen? Some Yemeni officials reacted angrily to the U.S. strike. General Yahya al Mutawakel, deputy general of the People’s Congress party, maintained that the public acknowledgement of the Yemen strike by the U.S. violated a secrecy agreement between the two nations.⁴⁹ Al Mutawakel argued that the U.S. did not consider adequately the internal circumstances in Yemen in deciding to go public: “In security matters, you don’t want to alert the enemy.”⁵⁰ He feared domestic unrest in Yemen, and reprisals by Al Qaeda sympathizers still active in Yemen.

How broadly should the targeted killing net be cast? As Vice President Dick Cheney commented, “There’s no piece of real estate. It’s not like a state or a country. The notion of deterrence doesn’t really apply here. There’s no treaty to be negotiated, there’s no arms control agreement that’s going to guarantee our safety and security. The only way you can deal with them is to destroy them. The reach of our efforts must be as broad and deep as the tentacles of the terrorist networks.”⁵¹

As President Bush noted, “We will make no distinction between the terrorists who committed these acts and those who harbor them.”⁵² Another intelligence official commented, “You have to go after the Gucci guys, the guys who write the checks.”⁵³ Killing them would be especially dramatic, he said, because they do not commonly die for a cause.⁵⁴ Although he is opposed generally to targeted killing, retired CIA inspector general Hitz agreed that going after the funding people “would have a tremendously chilling effect” on Al Qaeda.⁵⁵

⁴⁶ Seymour Hersh, *Manhunt*, THE NEW YORKER, Dec. 23 & 30, 2002, at 66.

⁴⁷ Seymour Hersh, *Manhunt*, THE NEW YORKER, Dec. 23 & 30, 2002, at 66.

⁴⁸ Pamela Hess, *Experts: Yemen Strike Not Assassination*, UNITED PRESS INTERNATIONAL, Nov. 8, 2002, available at <http://www.upi.com/view.cfm?StoryID=20021107-042725-6586r>.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Bob Woodward, *CIA Told to Do ‘Whatever Necessary’ to Kill Bin Laden*, WASHINGTON POST, Oct. 21, 2001, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A27452-2001Oct20.html>.

⁵² Michael R. Gordon & Tim Weiner, *A Nation Challenged: The Strategy*, N.Y. TIMES, Oct. 16, 2001, at A1.

⁵³ Barton Gellman, *CIA Weighs ‘Targeted Killing’ Missions*, WASHINGTON POST, Oct. 28, 2001, A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A63203-2001Oct27.html>.

⁵⁴ Id.

⁵⁵ Id.