



Written by [Joe Wolverton, II, J.D.](#) on September 22, 2012

Attack of the Drones

As he sat enjoying a roadside picnic in Yemen with a few second cousins and their friends — most of whom the young Colorado native had never met before that day — the teenager and all his companions were killed by two Hellfire missiles fired from a Predator drone.

The finger that pressed the button launching the lethal ordnance was American, and so was 16-year-old Abdulrahman al-Awlaki, the target of the strike.



A question that has never been answered by President Barack Obama — the man who authorizes such assassinations — is what law authorized the murder of 16-year-old Abdulrahman al-Awlaki, son of the American cleric Anwar al-Awlaki, who was also killed by Hellfire missiles fired by a Predator drone. Both men were U.S. citizens, and neither was ever charged with a crime.

Some in the Obama administration, including the president, have argued that such sudden strikes are justified in the face of a credible threat posed by the victim. No such claim has been made in the case of the younger al-Awlaki. He posed no threat to the national security of the United States, but he was killed without opportunity to defend himself before an impartial judge in a court of law.

Denial of Due Process

Abdulrahman al-Awlaki was killed in October 2011, and to date the Obama administration has never informed the country of any wrongdoing by this teenager, other than being related to a man (his father) who posted on the Internet anti-American videos that allegedly influenced others to commit crimes. A government-sanctioned assassination of such an individual is repugnant to all those who cherish life, liberty, and the due process that protects them.

An additional denial of due process came from the fact that no known attempt was ever made to capture this young man and take him into U.S. custody. Of course, that could be because he might actually have ended up in a court of law if he had been apprehended; and President Obama, a former lawyer, knows that trials can be long, messy, and unpredictable. It is much quicker and cleaner just to launch a missile and kill someone without going through the hassle of due process.

Finally, with regard to civilian casualties, not even the White House claims that Abdulrahman al-Awlaki was a member of al-Qaeda or any associated group believed to pose a threat to the United States. He was quite literally killed for being associated with one who was allegedly associated with those allegedly associated with al-Qaeda.

As Tom Junod wrote in *Esquire*:

But Abdulrahman al-Awlaki wasn't on an American kill list. Nor was he a member of Al-Qaeda in the Arabian Peninsula. Nor was he "an inspiration," as his father styled himself, for those determined to draw American blood; nor had he gone "operational," as American authorities said his father had, in drawing up plots against Americans and American interests.



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He was a boy who hadn't seen his father in two years, since his father had gone into hiding. He was a boy who knew his father was on an American kill list and who [sneaked] out of his family's home in the early morning hours of September 4, 2011, to try to find him.

Not only was the target of the nighttime drone attack a civilian, but so were the boys sitting with him when two U.S. missiles lit up the area and killed them all. Being merely near a person related to someone accused of being associated with a group allegedly affiliated with an alleged al-Qaeda network is apparently sufficient provocation for becoming "collateral damage" in the U.S. "war on terror."

Tragically, the unjustified killing of these boys only added to the ever-increasing tally of victims of the death-by-drone program. As of press time, the death toll of people killed by the United States in the Middle East by drone strikes is rising. During the first two weeks of September, for example, 34 Yemenis were killed by missiles fired from U.S. drones, adding to the total of almost 200 people killed in that country in 2012.

How many of those killed were innocent bystanders such as those who happened to be with Abdulrahman al-Awlaki? How many of the actual "targets," like Abdulrahman, were themselves innocent or at least had no demonstrable ties to terrorist organizations? This question will never be known with certainty because the president alone serves as judge, jury, and executioner — and does not believe he is obliged to provide evidence to the American people.

In fact, it would be very naïve to believe the targeted assassination of an innocent like Abdulrahman was an unfortunate miscalculation. When the judicial and executive powers of government are consolidated and restraints on the exercise of power are cast aside, it can be expected — based both on our knowledge of history and on the nature of man — that power will be abused and no one's rights or life will be safe from elimination by despots.

Despite the unconscionable details of the death-by-drone program, President Obama is beginning to tear the shroud of secrecy off this once hush-hush plank in his foreign policy platform.

From his interview with Ben Swann, host of *Reality Check* on Cincinnati's Fox affiliate, to his sit-down with CNN's chief White House correspondent Jessica Yellin, the kill-list compiler-in-chief is gradually exposing details of the principles he purportedly follows before targeting someone for assassination.

When asked by CNN what process he uses to make the life-or-death decisions to deploy the drones to kill a "militant," President Obama listed five criteria:

- First, "It has to be a target that is authorized by our laws."
- Second, "It has to be a threat that is serious and not speculative."
- Third, "It has to be a situation in which we can't capture the individual before they move forward on some sort of operational plot against the United States."
- Fourth, "We've got to make sure that in whatever operations we conduct, we are very careful about avoiding civilian casualties."
- And fifth, "That while there is a legal justification for us to try and stop [American citizens] from carrying out plots ... they are subject to the protections of the Constitution and due process."

It appears that none of the deaths authorized by the president meets these criteria. In these interviews, the president consistently defends the fact that he orders drone strikes to assassinate people based on nothing more than his suspicion that they threaten U.S. national security. But for all his apparent



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frankness, there is one aspect of his drone-based assassination program about which the president has remained tight-lipped.

This silence shrouds the cold and callous manner in which civilian deaths are disregarded by the president when it comes to counting the number of fatalities resulting from his death-by-drone campaign. “Mr. Obama embraced a disputed method for counting civilian casualties,” the *New York Times* reported in an article published May 29, 2012. When read in conjunction with the headline from an Associated Press article reading “Iraq to Stop Counting Civilian Dead,” a picture of global casualness as to casualties begins to emerge.

The *Times* clarified: “Mr. Obama embraced a disputed method for counting civilian casualties that did little to box him in. It in effect counts *all military-age males in a strike zone as combatants*, according to several administration officials, unless there is explicit intelligence posthumously proving them innocent.” (Emphasis added.)

The highly informative *New York Times* piece illuminates much of the macabre methodology of aggregating the names of enemies of the state to President Obama’s proscription list.

Recounting the scene at one of the regularly scheduled Tuesday intelligence briefings at the White House, Jo Becker and Scott Shane wrote, “The mug shots and brief biographies resembled a high school yearbook layout. Several were Americans. Two were teenagers, including a girl who looked even younger than her 17 years.”

It cannot be too soberly restated that these seemingly cold-blooded conferences are occurring every week in the Oval Office and are presided over by the president.

That last fact is essential if one is to understand the era into which our Republic has entered. The president of the United States, in this case Barack Obama, sits in a chair in the White House rifling through dossiers of suspected terrorists. After listening to the advice of his clique of counselors, it is the president himself who designates who of the lineup is to be killed. As the *New York Times* explains: “Mr. Obama has placed himself at the helm of a top secret ‘nominations’ process to designate terrorists for kill or capture, of which the capture part has become largely theoretical. He had vowed to align the fight against Al Qaeda with American values; the chart, introducing people whose deaths he might soon be asked to order, underscored just what a moral and legal conundrum this could be.”

As a candidate, President Obama, a former adjunct professor of law, ran on a promise of ending foreign conflicts, bringing home the troops, and closing the prison at Guantanamo Bay. In just over three years, this professor of peace has become the decider of death. In a very real and irrefutable way, the American people have permitted the elected president of the United States (beginning with George W. Bush and the passage of the PATRIOT Act, the Authority for the Use of Military Force, and other similar legislation) to codify a grant of power over life and death.

Does the president feel compelled to make these decisions so as to relieve others of such a heavy burden? No. *The New York Times* piece reads:

When a rare opportunity for a drone strike at a top terrorist arises — but his family is with him — it is the president who has reserved to himself the final moral calculation.

“He is determined that he will make these decisions about how far and wide these operations will go,” said Thomas E. Donilon, his national security adviser.

There is a salient question that the president would likely laugh at were it to be posed to him: Where is



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the constitutional authority for creating and issuing kill orders?

The presidential presumption of guilt by association followed by the autocratic order of a lethal drone strike rightly worries many constitutionalists and friends of liberty. In fact, many questions prompted by the president's drone program remain unanswered. For instance, why can't these alleged "terrorists" be tried in our federal court system? For decades those accused of terroristic crimes have been formally charged with those crimes, had those charges heard before an impartial federal judge, and been permitted to mount a defense to those crimes.

In fact, a survey of such trials conducted by Human Rights Watch reported that "Federal civilian criminal courts have convicted nearly 500 individuals on terrorism-related charges since 9/11."

Add to this the story of Timothy McVeigh, who was executed in June 2011 for the Oklahoma City bombing, the worst terrorist act on American soil until 9/11. Extending the full panoply of due-process rights — including a trial in federal court — did not allow McVeigh or other convicted terrorists to evade justice. Furthermore, the purpose of protecting and providing civil liberties to those accused of crimes is not to set the guilty free, but to avoid punishing the innocent who are wrongly accused of crimes.

And should the president suggest that alleged evildoers cannot be apprehended, he should be reminded that "public enemy number one" Osama bin Laden was reportedly tracked and overtaken by a U.S. special operations team. Why could other less high-value targets not be similarly found by the military? Although bin Laden was reportedly killed in the raid, there is every reason to believe that a team skilled in this type of operation could have captured him alive if those had been the orders they were following.

Once in the custody of the United States, these suspects could be brought to stand trial for their alleged crimes. This would preserve, protect, and defend the fundamental concept of due process, one of the pillars of liberty upon which our Constitution is built.

The constitutional preeminence of due process is found in *The Federalist Papers*, where Alexander Hamilton warned against its violation in any form: "The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny."

Due process as a check on monarchical power was included in the Magna Carta of 1215. This list of grievances and demands codified the king's obligation to obey written laws or be punished by his subjects. Article 39 of the Magna Carta says: "No freemen shall be taken or imprisoned or disseised [dispossessed] or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."

Over the years, the Magna Carta was occasionally revised and amended. In 1354, the phrase "due process of law" appeared for the first time. The Magna Carta as amended in 1354 says: "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law."

This fundamental restraint on the royal presumption of the power to lop off heads on command was incorporated by our Founders in the Bill of Rights, particularly in the Fifth Amendment that says in relevant part: "No person shall ... be deprived of life, liberty, or property, without due process of law."

President Obama's nearly daily approval of drone-delivered assassinations is an effrontery to over 650



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years of our Anglo-American law's protection from autocratic decrees of death without due process of law. When any president usurps the power to place names on a kill list and then have those people summarily executed without due process, he places our Republic on a trajectory toward tyranny and government-sponsored terrorism.

Of course, it would be another matter if those targeted and executed by the president were armed enemy combatants — they were not. Were these suspected “militants” enemy soldiers captured during wartime they would be necessarily afforded certain rights granted to POWs. Those slated for assassination are not allowed any rights — neither the due process rights given to those accused of crimes nor the rights of fair treatment given to enemies captured on the battlefield. The White House has assumed all power over life and death and created *ex nihilo* a new category of individual — one deprived of all rights altogether.

Violation of the Fourth Amendment

Although the president's use of drones to execute the war on terror and those he assumes are associated with it has so far only occurred outside the United States, soon drones will slice through the domestic skies, as well. While the sight of drones over U.S. cities and towns is rare right now, the Federal Aviation Administration (FAA) predicts that by 2020, 30,000 of these unmanned aerial vehicles (UAV) will be patrolling American airspace.

Scores of these UAVs will be deployed by state and local law enforcement, adding to the many that will be sent airborne by the federal government.

With the rise of the drones comes the rise of several critical questions of constitutionality of their potential uses. One of the most crucial of those inquiries concerns the application of the Fourth Amendment's prohibition against “unlawful searches and seizures” and the requirement that warrants be supported by affidavits “particularly describing the place to be searched, and the persons or things to be seized.”

To shore up the strength of this constitutional barrier, in June Senator Rand Paul introduced a bill to “protect individual privacy against unwarranted governmental intrusion through the use of unmanned aerial vehicles commonly called drones.” Paul's bill mandates: “A person or entity acting under the authority [of], or funded in whole or in part by, the Government of the United States shall not use a drone to gather evidence or other information pertaining to criminal conduct or conduct in violation of a statute or regulation except to the extent authorized in a warrant that satisfies the requirements of the Fourth Amendment to the Constitution of the United States.”

Senator Paul explained, “Americans going about their everyday lives should not be treated like criminals or terrorists and have their rights infringed upon by military tactics.”

Constitutional conflicts rising in the wake of the domestic deployment of drones have already come up in court in the case of Rodney Brossart, who became one of the first American citizens (if not the first) arrested by local law enforcement with the use of a drone owned by a federal agency. Police launched this loaner after Brossart held the police at bay for over 16 hours.

Brossart's run-in with law enforcement began after six cows found their way onto his property (about 3,000 acres near Lakota, North Dakota), and he refused to turn them over to officers. In fact, according to several sources, Brossart and a few family members ran police off his farm at the point of a gun. Naturally, police weren't pleased with Brossart's brand of hospitality, so they returned with a warrant, a SWAT team, and a determination to apprehend Brossart and the cows.



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A standoff ensued, and the Grand Forks police SWAT team made a call to Grand Forks Air Force Base, home to one of the Department of Homeland Security's squadron of Predator drones. No sooner did the call come in than the drone was airborne, and Brossart's precise location was pinpointed with laser-guided accuracy. The machine-gun toting SWAT officers rushed in, tased, and then arrested Brossart on various charges, including terrorizing a sheriff.

At a legal hearing on the matter, Bruce Quick, the lawyer representing Brossart, alleged a violation of the Fourth Amendment's protection against unwarranted searches and seizures. Although the police possessed an apparently valid search warrant, Quick asserts that no such judicial go-ahead was sought for or obtained for the use of the Predator drone to track Brossart. Therein lies the constitutional rub.

In an interview, Quick claims that the police exceeded their authority in several instances, especially when they decided to bypass the Fourth Amendment and illegally search Brossart's farm. "The whole thing is full of constitutional violations," he says.

North Dakota state prosecutor Douglas Manbeck defends the deployment of the drone, claiming, "The use of unmanned surveillance aircraft is a non-issue in this case because they were not used in any investigative manner to determine if a crime had been committed. There is, furthermore, no existing case law that bars their use in investigating crimes." On August 1, Judge Joel Medd, agreeing with Manbeck, denied the defense's motion to dismiss.

Senator Paul's measure, if enacted, would give specific guidance to the judicial branch's understanding of the Fourth Amendment and the scope of its prohibitions. It would prevent citizens from being subject to surveillance without notice.

In practice, this would help judges apply the principles of the Fourth Amendment to drones in a very specific way. The standards presently used to judge the constitutionality of observation by helicopter or patrol car, for example, would be altered appropriately to fit the rapidly advancing drone technology. The improved legal framework would help law enforcement avoid legally suspect surveillance and would maintain the public's protection against unconstitutional searches and seizures.

The potential weaponization of police drones is another important consideration, one that combines both constitutional issues of due process and the Fourth Amendment's search and seizure limitations. Glenn Greenwald, formerly of *Salon*, warned of the likelihood of the gradual shift in the use of drones from surveilling suspects to shooting them: "Many dismiss this concern insisting that when it comes to surveillance drones are no different than police helicopters. Some of these same people dismiss concerns over weaponized drones arguing that there's no difference between allowing the police to Taser you or shoot you themselves and using a drone to do the dirty work. History teaches, however, that creeping police state powers are entrenched one step at a time."

Support for this warning is found in a statement made by a member of the Harris County, Texas, sheriff's department. This agency recently purchased a \$300,000 ShadowHawk drone and is apparently excited about its potential. "We envision a lot of its uses primarily in the realm of public safety — looking at recovery of lost individuals and being able to utilize it for fire issues," Chief Deputy Randy McDaniel said. But in the future, the drone could be equipped to carry nonlethal weapons such as Tasers or a bean-bag gun, McDaniel mused.

For those still doubting the likelihood of such a scenario, read what Dr. Daniel Goure of the Lexington Institute wrote (with obvious pride) about the Switchblade drone popular with law enforcement: "It is an ingenious, miniature unmanned aerial vehicle (UAV) that is also a weapon."



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Taking such comments at their face value, it must be asked, what level of weaponization is permissible for the police? Does local law enforcement need the type of weaponry used by the military, whose mission is very different from that of law enforcement?

Of course, drones aren't bad per se. There are many lawful possible uses of drones, including wildfire control, tracking suspected criminals for whom a qualifying warrant has been issued, tracking of stolen vehicles, etc. It is the unconstitutional use of drones that is objectionable and that Americans must be vigilant against.

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