

OUR ILLEGAL DRONE PROGRAM

Here's Daniel Klaidman's idea of a rule book that represents restraint.

And then there is “the playbook”—an ambitious attempt to create explicit rules and procedures for when lethal force is justified. The initiative began more than a year ago. It is highly detailed and lays out, for example, criteria for the so-called disposition-matrix, which prescribes whether terrorist suspects should be killed, captured, or dealt with in some other way. Embedded in the document are the legal authorizations for pursuing the enemy away from conventional battlefields in places like Yemen, Somalia, and now Mali—a crucial check on a war without defined boundaries. The playbook also toughens the standard for when a targeted killing is justified. Simply being a threat to “United States interests,” for example, no longer meets the threshold. That standard is too elastic, according to officials who have been involved in writing the new rules. And the document makes finely grained distinctions about where one must be in the chain of command of a terrorist organization to be targetable. A driver or cook, who can be easily replaced, may not represent the kind of unique threat that would warrant lethal action. A bomb maker, on the other hand, would.

Mind you, as described, the Rule Book does represent an improvement. I've noted that the disposition matrix may or may not be a good thing; while legal process is better than drone killing, we may still have the trigger for that set too low.

But the real news in this passage seems to be both what was permitted and what still is.

Klaidman reveals, for example, that the standard for killing has been nothing more than threatening US interests, which may or may not even equate to a physical threat. We're killing people because they represent a threat to our interests? Isn't that cheating?

He strongly suggests we've been targeting all manner of alleged terrorists, including cooks and drivers. And we've changed that practice not because of the dubious legality of targeting non-combatants, but because cooks are easily replaced.

But even still the drone program seems to be illegal. Consider this passage.

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As Jack Goldsmith has recently noted, AQIM is not covered in the AUMF.

This framework is becoming obsolete because some newly threatening Islamist terrorist groups do not plausibly fall within the AUMF. Many of these groups—such as al Qaeda in the Islamic Maghreb (in Northern Africa) or the al-Nusra Front (a rebel group in Syria associated with al Qaeda in Iraq)—have no direct links to al Qaeda and unclear ones to al Qaeda affiliates. Regardless of where the precise outer boundaries of the AUMF lie, there is a growing gap between the threats posed by Islamist terrorist groups and the president's legal authority to meet the threats under the AUMF.

So if we're targeting people in Mali as part of a war, whose authorization are we using for that war?

And as Klaidman notes and was reported earlier by the WaPo, these rules will not even go into place universally. We've built in an exception for Pakistan (which, unless the Senate does something totally unexpected, means for John Brennan at CIA). Which means presumably these things – targeting cooks for being a threat to our interests – will continue in Pakistan at least until we withdraw from Afghanistan.