

# SCOTT SHANE DEFENDS THE COMMANDER-IN- CHIEF'S LANGUAGE

NYT's excellent new ombud, Margaret Sullivan, returns to a perennial ombud issue, how the Grey Lady refers to Executive Branch actions and abuses. She includes a long quote from Scott Shane that reveals a great deal about his reporting, and ultimately convinces me we should be calling drone killing assassination.

## **Adherence to "Targeted Killing" Even While Admitting It's Not**

Let's start with Shane's defense of the term "targeted killing" (a term I sometimes use but should not). Sadly, Sullivan cuts off the direct quote from Scott Shane at its most important part, but in the following, the first paragraph here is a direct quote from Shane, the second Sullivan's report of his comment.

This leaves "targeted killing," which I think is far from a euphemism. It denotes exactly what's happening: American drone operators aim at people on the ground and fire missiles at them. I think it's a pretty good term for what's happening, if a bit clinical.

Mr. Shane added that he had only one serious qualm about the term. That, he said, was expressed by an administration official: "It's not the targeted killings I object to – it's the untargeted killings." The official "was talking about so-called 'signature strikes' that target suspected militants based on their appearance, location, weapons and so on, not their identities, which are unknown; and also about mistaken strikes that kill civilians."

Shane defends using “targeted killing,” even while admitting that a great deal of drone killing is not targeted. Unless Shane knows a great deal more about individual strikes than he lets on – and therefore knows which drone strikes are targeted at known identities and which are targeted at crowds of unknown military aged males – then he is party to an apparently deliberate strategy on the part of the Administration to spin its killing program as much more orderly and legally justified than it actually is. We saw this operate as recently as yesterday, when John Brennan responded to a question from Jan Schakowsky about signature strikes by telling her to look back at speeches that address only “targeted killing.”

SCHAKOWSKY: Let me ask you this, is there any way that you can define and distinguish between targeted strikes and signature strikes by the – by drones?

BRENNAN: I would refer to the comments that were made by a number of U.S. government officials publicly in speeches, including when I was at the White House. I’m not going to engage in any type of discussion on that here to the Congress, ma’am.

As I said, I’m as guilty of using this term without sufficient awareness as Shane. But doing so consciously really is participating in a propaganda effort the Administration is engaged in.

### **Executive Order 12333’s Invisible Ink**

Then there’s Shane’s refusal to use “assassination” based on Administration claims about Executive Order 12333, which ostensibly prohibits the practice.

“Assassination” is banned by executive order, but for decades that has been interpreted by successive administrations as prohibiting the killing of political figures, not

suspected terrorists. Certainly most of those killed are not political figures, though arguably some might be. Were we to use “assassination” routinely about drone shots, it would suggest that the administration is deliberately violating the executive order, which is not the case. This administration, like others, just doesn’t think the executive order applies. (The same issue arose when Ronald Reagan bombed Libya, and Bill Clinton fired cruise missiles at Sudan and Afghanistan.)

Shane appears to misunderstand something about Executive Orders (though he’s not alone on this front). DOJ’s Office of Legal Counsel has twice (once during Iran-Contra, and again in 2001 or thereabouts) judged that EO 12333 – the very EO purportedly prohibiting assassination – need not be formally changed when the President stops adhering to it. The language the Bush-era OLC came up with to justify ignoring EO 12333 without telling anyone reads,

An executive order cannot limit a President. There is no constitutional requirement for a President to issue a new executive order whenever he wishes to depart from the terms of a previous executive order. Rather than violate an executive order, the President has instead modified or waived it.

Granted, in this particular instance, the Administration was secretly “waiving” EO 12333’s prohibition on surveilling Americans overseas, not assassination, but the principle is clear: EOs are not hard and fast rules, they are simply claims the Executive Branch makes about its own behavior but doesn’t always abide by.

So while I get that the Administration continues to offer excuses for why assassinations of some people aren’t like assassinations of others (remember, though, that we claimed to have

assassinated Qaddafi's son, and Qaddafi's ultimate assassination was carried out with drone assistance), pointing back to any E0, particularly E0 12333, just endorses the notion that Executive Branch gets to call its killing whatever it wants.

### **Forgetting the White Paper on 18 USC 1119**

Which brings us to this claim Shane makes.

“Murder,” of course, is a specific crime described in United States law with a bunch of elements, including illegality, so it would certainly not be straight news reporting to say President Obama was “murdering” people.

As Shane and his colleagues have reported, OLC had to write a second memo authorizing the killing of Anwar al-Awlaki because their first one had not treated a statute prohibiting the murder of Americans overseas, 18 USC 1119. While we don't know whether the OLC memo succeeded, we know the white paper summarizing that second memo fails to adequately distinguish the CIA killing Awlaki from murder, ultimately relying solely on Commander-in-Chief say-so to explain why CIA officers bound, under the National Security Act, by domestic law are nevertheless permitted to ignore it if the President says they should.

Similarly, under the Constitution and the inherent right to national self-defense recognized in international law, the President may authorize the use of force against a U.S. citizen who is a member of al-Qa'ida or its associated forces who poses an imminent threat of violent attack against the United States.

Mind you, NYT has “reported” that those of us who find this argument totally inadequate – a group which includes one of the only federal judges to actually look at the question closely

– are simply confused. So Shane’s refusal to consider the word “murder” for actions that OLC had real worries constituted murder is consistent with that earlier “reporting.”

But it is a choice to side with the Executive Branch’s interpretation of things, as is the preference to use “targeted killing” rather than “assassination.”

In the name of “straight news reporting,” Shane defends picking only those words that make up the Administration’s propaganda case.

Update: It was Qaddafi’s son, Saif Qaddafi, we claimed to have assassinated.

Update: Saif didn’t die: he’s on trial.