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It's Time to Stop Killing in Secret

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President Barack Obama telephoning Yemeni President Ali Abdullah Saleh, with counterterrorism adviser John Brennan at right, November 2, 2010

What would President Romney do with a drone? *The New York Times* [reported](#) Sunday that this question apparently haunted the White House so much that in the weeks before the election it raced to establish “explicit rules” and “clear standards and procedures” for the use of unmanned drones for targeted killings. It should not be surprising, I suppose, that the administration was less comfortable with someone else pushing buttons to kill people than with its own exercise of that authority. As one candid, though anonymous, official stated, “There was concern that the levers might no longer be in our hands.”

The content of the rules remains a tightly-held mystery. Apparently they are so secret that they are toted around from office to office in a single “playbook,” and not even shared on the government’s secure email reserved for classified material.

But what is most disturbing is the news that it took a possible transfer of power to push the White House to establish such rules. We’ve been assured by multiple Obama administration spokespersons over the years that its targeted killing program is fully lawful, and subject to “rigorous standards and process of review,” as Obama’s chief counterterrorism adviser John Brennan put it in a [speech](#) at the Woodrow Wilson Center in April. Yet only on the eve of a potential transition did the administration think to reduce these rigorous standards and procedures to writing?

So they work on deadline, you’re thinking. What else is new? After all, a looming presidential transition is one hell of a deadline. According to the *Times* story, the administration was shooting to complete the rules by January; now that it’s clear that there will be no transition for another four years, the “matter may have lost some urgency.”

But a possible transition from Obama to Romney was not the only, or even the most important, deadline in play. What about each and every decision over the past four years to authorize a remote-control execution, without trial, without charges, without a defense? Surely each of those actions presented the decision makers with an even more urgent deadline: one would think that before giving the green light to such a momentous act, you would want the “clear rules and procedures” to be in place. Yet the Obama administration has evidently seen fit to make hundreds of such life-or-death decisions, and to authorize more than three hundred strikes, *without* first developing “explicit rules” or “clear standards and procedures.”

To be fair, it’s not that there were no rules before. A 2011 *New York Times* [story](#) reported on a Justice Department memo, still secret to this day, that authorized the killing of US citizen Anwar al-Awlaki. And it seems likely that there have been many internal memos along the way; you don’t get one hundred people on a conference call every Tuesday to discuss the “kill list” without generating a paper trail.

The real problem is not that there are no guidelines written down—though the administration itself seems now to acknowledge that what it has is insufficient—but that *we the people don’t know what they are*. The idea that the president can authorize the killing of a human being far from any traditional battlefield without any publically accessible set of constraints, conditions, or requirements is unacceptable in a country committed to the rule of law. In his first and only speech on security and our national ideals, at the National Archives in May 2009, President Obama insisted that adherence to the rule of law is essential in the fight against terror, and to that end, promised to be transparent about his actions “so that [the people] can make informed judgments and hold us accountable.” Yet after four years and hundreds of killings authorized in secret, the most the president has been able to offer us about the scope of his most awesome power is a handful of vague paragraphs in a handful of administration officials’ speeches, which experts must then parse for clues as to what the rules might actually be. This is more akin to what law looked like in the Soviet Union than to what it should look like in the United States of America.

Apparently there is a battle within the administration about how public the president should be about his power. Some, not surprisingly at the CIA and the Defense Department, prefer to keep matters under wraps. Others, at the State Department and the Justice Department, are pushing for transparency. News reports suggest that John Brennan is on the side of transparency. As he [told](#) the *Washington Post*, “I think the rule should be that if we’re going to take actions overseas that result in the deaths of people, the United States should take responsibility for that.”

But taking responsibility would mean disclosing the rules of engagement, and reporting on the results of attacks. Targeted killing raises a number of difficult issues, all of which are made only more difficult by being shrouded in secrecy. Here are just four:

1. Critics claim that the attacks have resulted in hundreds of civilian casualties. The administration has suggested that these charges are exaggerated, and that the attacks are extraordinarily precise, generating only minimal collateral damage. But since the administration will not acknowledge even its decision to undertake any specific attack, it cannot give its side of the story in any credible way.
2. The administration claims it targets “imminent” threats to the United States, invoking the international law concept of self-defense. But as I have [noted previously](#) there are serious questions about how it defines “imminent.” The core idea of the imminence requirement is that a state should not attack unless there is no time left, so that lethal force is being used only as a last resort. Yet until now, we have yet to see a single report of a drone strike actually halting a truly imminent attack on the United States. Instead, the administration appears to have redefined imminence to be satisfied by the fact that an individual is a member of a group that seeks to attack the United States whenever it has the chance to do so. Thus, US citizen Anwar al-Awlaki was said to pose an imminent threat even though there was no claim he was engaged in any sort of attack or preparations for an attack when we killed him in Yemen with a drone. Without public rules, we don’t know what criteria the administration is using for its decisions; and without acknowledgement of the grounds for specific attacks, we can’t assess whether those criteria are being properly applied.
3. The *Times* reports that the drone strikes, initially justified as focused on the senior commanders of al-Qaeda, have more recently been deployed against militants who are not part of al-Qaeda and do not directly threaten the United States at all, but who are enemies of states with which we are seeking to curry favor, such as Pakistan and Yemen. If this is correct, this would be a dramatic expansion of drone policy, one that veers far from any justification in the law of war. But again, because the policy is secret, we don’t know why the administration feels such strikes are warranted.
4. Finally, the administration apparently authorizes not only “personality strikes” to target identified and known individuals who have been placed on a “kill list” by an advance review process, but also “signature strikes,” in which drones are used to kill unidentified individuals who are acting in ways that suggest that they are combatants, that they belong to a particular militant or terrorist group. Such attacks might well have a place on a hot battlefield, where the law of war has never required soldiers to identify their enemies before shooting at them. But the president has also reportedly authorized “signature strikes” in Yemen, far from any battlefield, where we are not at war, and where it is much more difficult to assign combatant status to individuals based on patterns of activity.

These are all difficult questions. The world is rightly concerned. The strikes have generated widespread and understandable resentment in those countries where people now have to live in

fear of a US missile raining down upon them without notice. And the United Nations is set to open an investigation of American drone strikes.

But one question should not be difficult. In a democracy that rests on the rule of law, a policy of targeted killing demands *public* authority, *public* debate, and *public* accountability. It's time to stop killing in secret. We don't need to worry about President Romney, but we do need to worry about President Obama, and more importantly, about preserving our character as a nation under law.

President Obama told Jon Stewart on *The Daily Show* in October that "one of the things we've got to do is put a legal architecture in place, and we need Congressional help in order to do that, to make sure that not only am I reined in but any president's reined in terms of the some of the decisions we're making." That's absolutely right, and one can only hope that saying so on a comedy show doesn't mean Obama doesn't take it seriously. Even had the administration finished the playbook in time for a transition, Romney would have been under no obligation to follow his predecessor's secret rules. The rules of the game need to be public, so that they can be debated and assessed, and so that we the people can hold our leaders accountable to the laws they claim to be following in secret.