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Do Presidents Have the Right to Kill?

by James Bovard

Should the president of the United States be exempt from both American and international law?

Few people would instinctively say yes. But, in actual practice, presidents of the United States have been legally untouchable for most of the past century for the foreign killings they ordered. Even when their orders resulted in the killing of vast numbers of innocent people, it was almost never suggested in this country that the president should face charges for war crimes.

That was true when Woodrow Wilson intervened in Mexico and Haiti, and it was true of Republican interventions throughout Latin America in the 1920s. Franklin Roosevelt approved the carpet bombing of German and Japanese cities, resulting in the deaths of hundreds of thousands of women and children. Harry Truman approved the atomic bombs dropped on Hiroshima and Nagasaki. But those were not war crimes because the victims lived under governments which the United States had publicly announced it must destroy.

In the Korean War, U.S. troops followed rules of engagement that ensured that large numbers of Korean women and children would be killed. Towns and villages were routinely flattened by U.S. bombers. But it was okay because they were fighting in a military campaign (or a “police action,” as Truman said) authorized by the president. The U.S. military in Korea formally defined “war crimes” as actions done by the Communists, not by the United States and its allies.

In Vietnam, Lyndon Johnson approved preemptive attacks on villages and entire broad swaths of South Vietnam held by — or suspected of sympathizing with — the Viet Cong. He never faced the prospect of being charged with war crimes in the United States in part because he managed to sell his carnage to the American people as a necessary defense of freedom. The “better dead than Red” motto justified killing peasants to prevent them from becoming Communists.

Richard Nixon upped Johnson’s ante in Cambodia and Laos. But until he announced a massive invasion of Cambodia, his secret bombing of villages in that country spurred only a few newspaper stories. And all that the U.S. government had to do was deny the facts and the media would mosey along as if nothing had happened.

When Nixon was threatened with impeachment, it was not for the innocent civilians who had perished in his bombing escalations. Regardless of the number of victims, his policies were not treated as criminal offenses. Perhaps the Democrats did not want to imperil the prerogatives they expected to exploit when they recaptured the White House.

When Bill Clinton ordered the bombing of Belgrade in 1999, most of the American media went along for the ride, treating his unprovoked assault on Serbia as if it were little more than a U.S. effort to bring enlightenment to a dark corner of the world. The hundreds of Serb and ethnic Albanian women and children killed by American bombs and missiles rarely rated even an asterisk on the American political scene. As long as Clinton proclaimed his good intentions, his killings were simply proof of his devotion to humanity.

Killing foreigners seems to be a perk of the modern presidency — akin to the band's playing "Hail to the Chief" when he enters the room. Yet, if a foreign ruler authorized killing Americans the way the U.S. president authorizes killing Somalis, or Afghans, or Pakistanis, Americans would almost certainly consider the foreign attacks acts of war.

This prerogative to kill civilians without consequence is especially dangerous now that George W. Bush is revving up his war threats against Iran. British newspapers reported that the Pentagon has a list of thousands of bombing targets. The White House and the Pentagon have engaged in saber rattling off and on ever since late 2003. Various news reports in May assert that administration officials are talking of attacking Iran by the end of the summer.

Almost no one claims that Iran poses a current threat to the United States. Yet few people in Washington seem willing to deny the president's right to attack Iran. It is as if the presidential whim is sufficient to justify blasting any foreign nation that does not kowtow to the commands of the U.S. government — as long as the U.S. government also alleges that the foreign regime might possess weapons of mass destruction now or at some point in the next decade. Some Democrats have said they would oppose such a war but showed little enthusiasm for supporting legislation that would make it clear that the president had no authority to attack Tehran.

The fact that thousands or hundreds of thousands of Iranians might die seems to be irrelevant. Bush appears far more concerned about baseball statistics than the body counts compiled by the U.S. military abroad. The fact that many Americans could also die — either during the attack or from Iranian retaliation on U.S. forces in Iraq — doesn't appear to be costing him any sleep.

Attacking Iran will put American civilians in the terrorist crosshairs, with little or no federal Kevlar to protect them. The key question is not whether terrorists will attack but how the American people will be likely to respond and how politicians could exploit the situation. David Addington, Dick Cheney's top aide, told Jack Goldsmith, a former top Bush appointee in the Justice Department and now a Harvard Law professor, that the United States is one terrorist "bomb away from getting rid" of the court created to curtail the president's wiretaps on other Americans.

Power and immunity

The Bush administration, like other administrations before it, could reap a windfall of new power if foreigners respond violently to unprovoked U.S. violence. Goldsmith observes in his book *The Terror Presidency*,

The president and the vice president always made clear that a central administration priority was to maintain and expand the president's formal legal powers.

And the power to attack foreign nations is one of the most valued prerogatives of today's Republicans.

Bush's top advisors — and especially Vice President Cheney — are devoted to a Nixonian view of absolute power for the commander in chief. After he was driven out of office in disgrace, Nixon told interviewer David Frost in 1977, "When the president does it that means that it is not illegal." Frost, somewhat dumbfounded, replied, "By definition?" Nixon answered, "Exactly. Exactly."

This seems to be the attitude towards Iran of Bush and his war planners. Pentagon Deputy Assistant Secretary Debra Cagan told several British members of Parliament last year that "I hate all Iranians." Perhaps Cagan got her position because of such prejudice towards nations that Bush formally designated as "evil." At the same time that Congress is considering hate-crime legislation, ethnic hatred may be driving U.S. plans to slaughter Iranians.

The power that Bush and prior presidents have used has been buttressed by a corrupted notion of sovereign immunity. The essence of sovereign immunity is that "the king can do no wrong." But as Jeremy Travis, a professor of criminology at CUNY, noted,

The oldest purported rationale for the immunity of the sovereign ... is a perversion of its historical intendment, which was that the king was privileged to do no wrong.

As one English lawyer explained in the wake of James II's fall,

When a king ... does wrong, he thereby ceases to be king.... God and the law are above the king.

But, in the contemporary statist interpretation, a phrase intended to prevent kings from injuring subjects becomes a license for government abuses.

Launching an unprovoked aggressive war was recognized as a war crime at the Nuremberg tribunals in 1946, which declared that to "initiate a war of aggression" is not only an international crime; it is "the supreme international crime differing only from other war crimes in that it

contains within itself the accumulated evil of the whole.” But the Nuremberg principles, like the Geneva Conventions, seem to be long out of fashion in Washington. A president is not considered to have launched a “war of aggression” as long as he publicly asserts some uplifting purpose at the time he commences killing.

No American politician has ever been sentenced to prison for ordering U.S. soldiers to kill innocent foreigners. But the fact that the carnage is inflicted beyond U.S. borders should no longer be sufficient to immunize the killing.

As long as politicians can order killings of innocent people without fearing for their own necks, the government has far too much power. America is long overdue for war crimes trials. The United States cannot act as if 96 percent of the world’s population have no rights — including the right to life — that the U.S. government is obliged to respect.

The president and his top officials should face the same perils and procedures common citizens face when they are accused of breaking the law. To investigate the president and his top aides will not imperil the American people. Seeing a president answer for his crimes would be uplifting. It is interesting to consider the subsequent course of American foreign policy if Lyndon Johnson or Richard Nixon had been tried, convicted in federal court, and publicly punished for committing war crimes.

Americans cannot expect to have good presidents if presidents are permitted to make themselves tsars. If an American president refuses to restrain himself in his foreign warrings, Americans should draw on the wisdom of Thomas Jefferson. Sometimes the threat of a Nuremberg noose is the best way to put government back on a leash.

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