
Lethal Use of Drones

When the Executive Is the Judge, Jury, and Executioner

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The United States began using drones to conduct targeted killings in the wake of the terrorist attacks on September 11, 2001. President George W. Bush authorized dozens of drone strikes against terrorism suspects, and President Barack Obama continued this practice and actually expanded the scope of the American use of drones (Rohde 2012). According to media accounts, President Donald Trump has also favored using drones to conduct targeted killings, and his administration has proposed loosening some of the policy restrictions on their use that were put in place under the Obama administration (Savage and Schmitt 2017). Drones have been used under all three presidents not only in traditional arenas of war, such as Afghanistan, Iraq, and Libya, but also against terrorism suspects found in countries such as Pakistan, Somalia, and Yemen without any declaration of armed conflict. In fact, in the latter set of countries, drones have been used in counterterrorism operations and operated through a covert program run by the Central Intelligence Agency (CIA) (A. Boyle 2012). Because of the covert nature of CIA-led drone operations, unanswered questions remain regarding the U.S. targeting policy, the reliability of intelligence information underlying targeting decisions, as well as any meaningful oversight by other governmental or judicial bodies. In addition, the CIA use of drones to conduct targeted killings raises important domestic and international law issues.

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This article begins by discussing the development of the U.S. use of drones to conduct targeted killings. Next it discusses relevant domestic law issues and then international law issues related to the lethal use of drones, before considering the applicability of human rights law to the use of drones. I conclude that the U.S. use of drones to conduct targeted killings has raised problematic issues under domestic, international, and human rights law, but that, in light of limited information available regarding such drone strikes, it is difficult to fully assess the program's compatibility with all applicable laws. In addition, I argue that the covert nature of the CIA drone program and the lack of meaningful oversight regarding specific targeting operations have been detrimental to the human rights values of a democratic society such as the United States.

Use of Drones for Targeted Killings

Drones, or unmanned aerial vehicles, are remotely piloted vehicles, which the United States has used to conduct both surveillance and lethal strikes through targeted killings (Sterio 2015a, 2015b). Although the use of drones for surveillance purposes can raise difficult legal questions, this article focuses on the use of drones to conduct targeted killings, which poses complex issues under domestic, international, and human rights law. In addition, it should be noted that the United States has operated two separate drone programs: a publicly acknowledged one, directed by the Pentagon and Joint Special Operations Command in declared theaters of war, such as Afghanistan, Iraq, and Libya, and a covert one commanded by the CIA and utilized in counterterrorism operations in countries such as Pakistan, Somalia, and Yemen (A. Boyle 2012). The latter program has raised a multitude of questions regarding its scope and its compatibility both with domestic and international law as well as with human rights law. Thus, this article focuses primarily on the CIA drone program to conduct targeted killings.

Although the use of drones to conduct targeted killings originated in the wake of terrorist attacks in September 2001 during the presidency of George W. Bush, this practice was embraced and expanded during the Obama administration (Mayer 2009). As one commentator noted, "Under Obama, drone strikes have become too frequent, too unilateral, and too much associated with the heavy-handed use of American power" (Rohde 2012). Because of the CIA drone program's covert nature, little information has been made publicly available regarding the program's specific contours. In addition, the program has had practically no oversight, despite increasing calls for greater transparency and accountability (Sterio 2015a, 2015b). In 2014, a United Nations Human Rights Council expert panel on the use of armed drones and international law expressed clear consensus around the need for greater transparency and accountability for any government that chooses to use drones (Rogers 2014). At the domestic level as well, concerns have been raised regarding the covert nature of the CIA drone program. In June 2014, a bipartisan panel of experts condemned the "long-term killing program

based on secret rationales” and recommended that most drone operations be shifted from the CIA to the Pentagon (Mazzetti 2014). Human rights groups, such as the American Civil Liberties Union (ACLU), have engaged in complex litigation with the U.S. government and the CIA through which the ACLU has requested drone-related information under the Freedom of Information Act of 1967 (Vladeck 2013).

Although the U.S. government, including the CIA, has publicly acknowledged the existence of a drone program and its use to conduct targeted killings and has provided some information on the drone program through a policy paper, many questions remain unanswered, and little oversight of the drone program exists. As I have noted elsewhere, the government has argued that we should trust the president on this important national security issue. However, “in this case, trusting the President implies that he forms the judge, jury, and executioner regarding terrorism suspects who may be targeted via drone strikes” (Sterio 2015b, 471). This type of unlimited power vested in the executive branch and potentially resulting in the loss of life is contrary to the foundations of any democratic society. As this article argues, the CIA drone program should be subject to more robust oversight procedures by an independent court or panel, to which the government would need to present meaningful intelligence information in order to justify each proposed lethal strike. In addition, the CIA drone program raises a multitude of complex legal issues under domestic, international, and human rights law. The discussion in subsequent sections highlights some of these issues; however, because of the covert nature of the CIA-operated drone program, it remains difficult to assess the program’s compliance with domestic and international law norms.

Domestic Law Issues

In order to remain lawful under domestic law, the CIA-operated drone program would have to comport with both the U.S. Constitution and relevant federal statutes. Jamie Kleidman (2010) has argued that the U.S. Constitution authorizes covert action, such as the CIA drone strikes. Kleidman reaches this conclusion based in part on the argument that drone attacks are conducted as part of the nation’s inherent right of self-defense and as such “fall under the types of activities that the framers thought would be necessary to protect the U.S.” (362). In addition, Kleidman has argued that both the legislative branch and the executive branch have concurrent authority to authorize covert actions, such as drone strikes. Moreover, because the Constitution provides that the president serve as commander in chief of the armed forces, so long as covert drone operations are congressionally authorized via statute and used as part of the so-called war on terror, the president has the authority to order such drone strikes (367–68). Kleidman claims that, absent congressional authorization, the president may have independent constitutional authority to order drone strikes (368). However, even if one embraces Kleidman’s view that the Constitution allows the president or the president pursuant to congressional authorization to order lethal drone strikes, such constitutional delegation of authority does not insulate the executive branch from oversight and

accountability. Unlimited delegation of lethal authority to the executive branch, even if such delegation is constitutionally permissible, is detrimental to the fundamental values of a democratic society, such as the protection of individual freedom and the protection of life.

In addition to being permissible under the Constitution, drone strikes must comply with federal law. The U.S. government, under both the Bush and the Obama administrations, has argued that drone strikes are congressionally authorized under the Authorization for Use of Military Force (AUMF) of 2001, a statute passed in the wake of the attacks on September 11 (U.S. Congress 2001; Vogel 2011, 107–8). The Trump administration has thus far indicated that it agrees with this approach (Savage and Schmitt 2017). In order to prevent any future acts of international terrorism against the United States, the AUMF permits the use of force against “those nations, organizations, or persons” that aided the attacks (U.S. Congress 2001). The Bush and Obama administrations argued that organizations such as al-Qaeda and the Taliban constitute an ongoing threat to the safety of the United States and that eliminating such threats via drone strikes, authorized by the AUMF, is a means to prevent future acts of international terrorism (Vogel 2011). The Trump administration has embraced this broad view of the AUMF (Savage and Schmitt 2017).

Many have criticized this expansive interpretation of the AUMF. Scholars have pointed out that this type of broad interpretation would place almost no limitations on the president’s authority to wage the so-called war on terror (O’Connell 2012). Moreover, scholars have asked questions regarding the link between current terrorism suspects targeted via drone strikes and al-Qaeda and Taliban leaders responsible for the attacks of September 11: “Accepting the AUMF as authorization for the use of lethal force by the United States against those responsible for the attacks of September 11 does not amount to accepting the AUMF as a perpetual statutory authorization to use deadly force through covert operations throughout the world against suspects who may have only circumstantial ties to the masterminds of September 11” (Sterio 2015b, 490). Because the CIA drone program remains covert, it is impossible to assess the validity of the program under the AUMF; in order to make such an assessment, one would have to know not only the identity of the targets but also their link to those responsible for the attacks of September 11. If the executive branch were required to obtain prior authorization for each contemplated drone strike from an independent court or panel, it would arguably need to provide intelligence information demonstrating each target’s link to organizations responsible for the attacks. Because the executive branch is currently not subject to any such oversight, its targeting decisions remain insulated from any type of judicial or other scrutiny and thus may or may not fall within the AUMF’s scope.

During the Obama administration, several government officials publicly provided policy justification and guidelines for the use of drones to conduct targeted killings. Harold Koh, then legal adviser to the State Department, argued that the use of drones was legal under all applicable law—domestic and international (Koh 2010). First, he

said, U.S. drone targets are legitimate because targeted individuals are belligerent members of an enemy group engaged in an armed conflict against the United States. Second, drones constitute an appropriate choice of weaponry during such armed conflict as long as their use comports with the laws of war. Third, targets are selected through robust procedures, and, fourth, targeting high-level leaders of belligerent groups through drone strikes does not violate domestic law banning assassinations (Koh 2010). John Brennan (2012), assistant to President Obama on homeland security and counterterrorism, argued that deadly force may be used in accordance with international law against a nonstate enemy actor when the country where such an actor is found consents or is unable or unwilling to take action against this nonstate actor. Brennan (2012) also argued that the United States could use lethal force through drone strikes in any place where terrorism suspects may be found as long as the “host” country consents or is unwilling or unable to counter the terrorism threat. Attorney General Eric Holder confirmed this reasoning and also argued that the targeted killing of even an American citizen is legal if the target is located abroad, if he is a senior operational leader of al-Qaeda or associated forces, if he is actively engaged in planning to kill Americans, if he poses an imminent threat of violent attack against the United States and cannot be captured, and if the strike itself is conducted in a manner consistent with relevant law-of-war principles (Palazzolo 2012). After Attorney General Holder made these remarks in March 2012, the Justice Department published a White Paper entitled *Lawfulness of a Lethal Operation Directed against a U.S. Citizen Who Is a Senior Operational Leader of al-Qa`ida or an Associated Force* (U.S. Department of Justice 2011), which confirmed Holder’s view.

In a speech given at the National Defense University in May 2013, President Obama defended the use of drones to conduct targeted killings. Although he rejected the notion that the United States is engaged in a boundless war on terror, he argued that it *is* engaged in a war with al-Qaeda, the Taliban, and their associated forces and that drone strikes against such forces are legal under both domestic and international law (Obama 2013). He reiterated that drone strikes had been conducted against terrorists who pose a threat to the United States and who operated in countries whose governments are unable or unwilling to combat such terrorism threats. He also confirmed Attorney General Holder’s view that American citizens engaged in terrorism activity against the United States can be targeted via drone strikes and stated that his administration would be willing to engage in greater transparency and oversight by appropriate congressional bodies regarding CIA-led drone strikes. Following the president’s speech, the U.S. government published a Presidential Policy Guidance (PPG) on the use of drones, which codified and confirmed President Obama’s arguments (White House 2013). The PPG stated that every lethal operation must have a legal basis and that lethal strikes can be conducted only if the target poses a continuing imminent threat to American citizens. In addition, it provided that for every drone strike, five conditions must be met: (1) near certainty that a terrorist target is present; (2) near certainty that noncombatants will not be harmed or killed; (3) a determination that

capture is not feasible; (4) an assessment that the governmental authorities in the country where the strike will take place cannot or will not effectively combat the terrorism threat; and (5) an assessment that no other reasonable alternatives are viable (White House 2013). The PPG also addressed the issue of oversight by specifying that each targeting operation be reviewed by relevant officials in various governmental departments and agencies. In cases of U.S. citizens, the PPG provided that additional legal analysis would take place to ensure that the contemplated action is conducted in accordance with the Constitution and domestic laws (White House 2013).

The Trump administration has largely embraced the Bush-era and Obama-era views on the use of drones to conduct targeted killings. It has, moreover, attempted to loosen some of the Obama-era restrictions. In 2017, the Trump administration agreed to a Pentagon request to exempt parts of Yemen and Somalia, countries where the United States is not engaged in armed conflict, from the Obama rules, by declaring these parts of the world to be “areas of active hostilities,” thus temporarily bringing them under the law of armed conflict, which is less restrictive regarding the use of drones (Savage and Schmitt 2017). The *New York Times* recently reported that, in addition, the Trump administration has been deliberating whether to relax and suspend other Obama administration restrictions. First, President Trump’s top national security advisers have suggested that targets be selected more broadly (Savage and Schmitt 2017). Under the Obama rules, targets of drone missions by both the military and the CIA have been limited to high-level militants deemed to pose a “continuing and imminent threat” to Americans. The proposed Trump administration policies would expand the contemplated targets to include foot-soldier jihadists with no particular leadership roles (Savage and Schmitt 2017). Second, Trump advisers have suggested that proposed drone attacks and raids would no longer need to undergo high-level vetting within the executive branch. The administration has indicated that it would keep in place one Obama-era constraint for all drone raids: a requirement of “near certainty” that no civilians will be killed. Higher-level approval would still be required to conduct drone strikes in new countries, under specific “country plans,” which would be reviewed every twelve months (Savage and Schmitt 2017). According to the *New York Times*, “The policy paves the way for broader and more frequent operations against Al Qaeda, the Islamic State and other jihadists. It would also apply in countries where the United States has targeted Islamist militants outside of regular combat for years, including Yemen, Somalia and Pakistan, and would ease the way to expanding such gray-zone acts of sporadic warfare to elsewhere in Africa, Asia and the Middle East where terrorists operate” (Savage and Schmitt 2017). As of February 2018, the Trump administration has not yet adopted such less-restrictive policies on drone strikes, but, regardless, it does appear that the administration will continue using drones to conduct targeted killings.

Because of the covert nature of CIA-led drone operations, it is difficult to determine whether such operations are authorized by the Constitution and fall within the scope of the AUMF. Officials’ speeches and published policy did shed some light on the Obama administration’s views on specific drone policies, such as targeting. Nonetheless,

they provided insufficient information to fully assess the CIA drone program's legality under domestic law. Moreover, it is unclear whether President Trump will continue to follow President Obama's policy on the use of drones, and it is thus impossible to conclude whether current drone policies comply with the Constitution and with federal law. The next section discusses relevant international law issues in an attempt to assess whether CIA drone operations comport with international law.

International Law Issues

The CIA-operated drone strikes raise several international law issues. The first such issue is whether the use of drones complies with *jus ad bellum*, or the law governing a state's use of force against another state or nonstate actors, and the second issue is whether each drone strike comports with principles of *jus in bello*, or international humanitarian law.

Jus ad Bellum

Jus ad bellum is a subset of international law rules governing the use of force by states against other states or nonstate entities. International law prohibits states from using force against the territorial integrity or political independence of other states. The general prohibition on the use of force is subject to two exceptions: United Nations Security Council authorizations to use force and self-defense (Blank 2012, 1662). The United States has been using drones in several countries without Security Council authorization. Thus, the only way that its use of drones could comport with international law would be in self-defense.

The U.S. government has argued that because the attacks of September 11 constituted an armed attack on American soil, it can respond in self-defense against all those responsible for this attack, anywhere in the world where such individuals or groups may be located, and at any time (see Vogel 2011, 107–8; Obama 2013). International law is unsettled on the issue of what constitutes an “armed attack” that would trigger a state's right to self-defense. A traditional view of international law requires an attack of significant scope and magnitude that it endangers the victim state in a particularly threatening manner. According to this view, an individual attack such as the one committed on September 11 is not sufficient to trigger the U.S. right to self-defense (see International Court of Justice 1986; Blank 2012, 1663). According to more recent views, however, a single “armed attack” triggering a state's right to self-defense may be committed by a nonstate actor; if one accepts this view, then the attacks of September 11 would clearly provide sufficient basis for the U.S. right to self-defense against those responsible for the attacks (see International Court of Justice 2003; Orr 2011, 739). The Obama administration embraced this view. John Brennan (2012) argued that international law does not prohibit the use of deadly force against a nonstate actor found on the territory of another sovereign nation that is unable or unwilling to take action

against this nonstate actor. According to this view, lethal force, such as the use of drones to commit targeted killings, is not restricted to traditional battlefields but may be used anywhere in the world against terrorism suspects related to the attacks of September 11 so long as the country where such suspects are located is unwilling or unable to effectively take action against such suspects. Yet “this rationale would arguably exclude the possibility of conducting drone strikes in countries which are able and willing to combat terrorist threats, but would allow the United States to use lethal force in self-defense, in the territory of countries which are not engaged in any armed conflict against the United States but which harbor al-Qaeda and Taliban associates” (Sterio 2015b, 476–77).

The U.S. government’s argument has not gone unchallenged. Some scholars have criticized the United States for attempting to stretch the contours of the battlefield beyond the traditional parameters of a territorial armed conflict. They have questioned the legality of drone strikes under *jus ad bellum* that have occurred outside of declared armed conflict zones in Afghanistan. These scholars argue that because the United States is not engaged in armed conflict in Pakistan, Somalia, or Yemen, it may not use lethal force under the *jus ad bellum* paradigm of self-defense in these countries (see O’Connell 2012; Sterio 2015b, 480). Even if one adopts the U.S. government’s view of self-defense as applied against nonstate actors, one would have to have access to more information to determine that each drone strike is legal under *jus ad bellum*. “Under this rationale, one would have to focus on each country where drone strikes are currently conducted. For example, one could conclude that drone strikes are legal in Yemen and Somalia, but illegal in Pakistan. And, in order to fully assess whether any nation is unwilling or unable to combat terrorism within its borders, one would need access to intelligence information and other relevant data about each state where targeting operations are proposed” (Sterio 2015b, 479). Because the CIA-led drone program is covert in nature and the agency has not shared much information regarding specific locations where it has conducted drone strikes, it is impossible to determine whether such strikes comply with *jus ad bellum* rules.

In addition, even if one accepts the argument that the United States can lawfully carry out drone strikes under the law of self-defense, each strike would have to comply with the *jus ad bellum* requirements of necessity and proportionality. According to Laurie Blank, “the requirement of necessity addresses whether there are adequate non-forceful options to deter or defeat the attack” (2012, 1665). In other words, the targeting state, such as the United States, must determine that the target poses an imminent threat because it is actively involved in planning further terrorist attacks against the United States and that no other operational means of stopping such attacks are available (Sterio 2015b, 480). The proportionality requirement “measures the extent of the use of force against the overall military goals, such as fending off an attack or subordinating the enemy” (Blank 2012, 1665). Because of the covert nature of CIA-led drone operations, it is impossible to determine whether each strike comports with the *jus ad bellum* requirements of necessity and proportionality. One would need more information regarding the agency’s definition of imminence as well as data about

specific individuals targeted and whether other means of stopping the targets were available. Thus, the inherent secrecy of the CIA-operated drone program has disabled a coherent analysis of the program under *jus ad bellum*.

Jus in Bello

Both the Bush and the Obama administrations characterized the post-September 11 conflict with al-Qaeda, the Taliban, and other associated forces as an armed conflict (e.g., Obama 2013). This characterization is significant because it dictates the applicability of the law of armed conflict, or *jus in bello*. *Jus in bello* governs the conduct of states and nonstate actors during armed conflict; its primary goals are to minimize suffering during wartime (see Blank 2012, 1661). Three main principles of *jus in bello* apply to the U.S. use of drones during armed conflict: the principles of distinction, proportionality, and precautions.

The *principle of distinction*, a core principle of *jus in bello*, requires that a party distinguish between participants and nonparticipants in armed conflict; only the former may be deliberately targeted. “A lawful attack must be directed at a legitimate target: either a combatant, member of an organized armed group, a civilian directly participating in hostilities, or a military objective” (Blank 2012, 1671). Although international law is somewhat unclear about the exact parameters of the standard of “direct participation” in hostilities, the United States has argued that almost any member of al-Qaeda, the Taliban, or associated forces is targetable. This approach has been criticized because it may entail the conclusion that “any military aged male in a kill zone” may be targetable (Rona 2012). In addition, this type of aggressive targeting rationale has been embraced by only a handful of countries other than the United States and so does not reflect uniform state practice (Bergen 2012). Thus, it is unclear whether CIA-operated drone strikes comply with the principle of distinction.

The *principle of proportionality* requires that parties to an armed conflict refrain from attacks that would cause excessive civilian casualties in relation to the anticipated military advantage (see Blank 2012, 1673). This principle encompasses two other core principles: military necessity and humanity. A military commander should launch an attack only if such an attack is truly necessary, will produce a significant military advantage, and will not cause excessive civilian suffering and thus become inhumane.

The *principle of precautions* imposes on every party to an armed conflict a duty to take precautionary measures to protect civilians. Such duties involve employing military methods to ensure that targets are military objectives in each instance; choosing weaponry with the aim of minimizing incidental civilian harm; launching attacks at night when civilians are less likely to be in public places; and warning civilians about impending attacks (see Blank 2012, 1674–75).

Because *jus in bello* inquiries are highly fact specific, and because the CIA-led drone program has been covert in nature, it is impossible to assess whether the program complies with the three principles of *jus in bello*. “It may be that most, if not all, drone

strikes satisfy the requirements of [the principles of] distinction, proportionality, and precautions, but unless and until the CIA releases more factual information regarding specific drone operations, it will remain impossible to draw any legal conclusions regarding the United States' targeting operations' compliance with *jus in bello*" (Sterio 2015b, 484).

Human Rights versus International Human Rights Law

In addition to the rules of *jus ad bellum* and *jus in bello* that apply to CIA-operated drone strikes, an additional body of law, human rights law, applies to at least some aspects of this paradigm. If a drone strike is used to commit a targeted killing within a specified armed conflict, then *jus in bello* applies to such a drone strike as so-called *lex specialis*. The United States has consistently argued that it is engaged in a global armed conflict against al-Qaeda, the Taliban, and associated forces and that *jus in bello*, as the more specialized law, applies and displaces others laws, such as human rights law (Sterio 2012). The U.S. government has claimed that its armed conflict against al-Qaeda, the Taliban, and associated forces has no geographic boundaries and that *jus in bello* applies regardless of the location of each particular drone strike—because the battlefield follows terrorism suspects (Koh 2011).

Many in the international community have criticized this argument. Scholars have argued that if the United States uses drones for targeted killings outside of declared armed conflict—for instance, in places such as Pakistan, Yemen, and Somalia—then human rights law would apply either instead of or in addition to *jus in bello* (M. Boyle 2015). Under human rights law, the use of lethal force by state authorities against an individual, such as a terrorism suspect, can be justified only under limited circumstances, when absolutely necessary to protect potential victims of terrorist acts (United Nations 1966; Blank 2012, 1668). The “necessity” standard under human rights law is thus different from *jus in bello* standards, and the application of human rights law may render particular strikes unlawful—even though they may be lawful under *jus in bello* standards. Because of the covert nature of CIA-operated drone strikes, it is impossible to determine where the United States is truly engaged in an armed conflict and thus where only *jus in bello* should apply or where human rights law should apply as well. Thus, it is difficult to assess whether these drone strikes comply with applicable human rights law principles.

In sum, despite U.S. government officials' speeches and published policy and guidance, many have remained skeptical regarding the legality of CIA-led drone strikes under domestic, international, and human rights law in light of the covert nature of such strikes. Scholars have pointed out that the government policy and guidance do not clarify how potential terrorism suspects are identified and selected. As Amos Guiora has argued, “The Obama administration's articulation that mere ‘likelihood’ of membership in a terrorist organization justifies defining a target as legitimate is highly problematic” (2011). In addition, scholars have charged, first, that government policies

and guidance have adopted an overly expansive view of the “imminence” requirement, and they argue that targets should instead be identified based on reliable and probative intelligence information and that the executive branch should have to demonstrate that each target poses a threat justifying the use of deadly force at that moment, under a strict scrutiny test (see Guiora 2013). Second, the policies and guidance provide that lethal strikes will be conducted when no other alternatives, such as capture, are feasible. However, because it is unclear how this determination is reached in each instance, and because the imminence requirement seems to be interpreted rather broadly, the executive branch’s claim that no other alternatives are viable cannot be properly tested. Finally, the policies and guidance are problematic because they may not properly distinguish between combatants and noncombatants. If one is not sure how targets are identified, one cannot claim with certainty that only combatants are being targeted: “The most critical question with respect to the issue of collateral damage is to properly distinguish the terrorist suspects themselves from those who live around them and who may not be engaged in any type of terrorist activity. If we are not certain who our targets are or how and why we are targeting certain individuals, we cannot determine the extent of collateral damage caused by drone strikes” (Sterio 2015b, 501). The Trump administration has proposed revising Obama-era policies on the use of drones, but it is unclear as of now what approach the administration will ultimately adopt and whether its approach will be consistent with applicable domestic, international, and human rights law.

Thus, in light of limited information shared by the U.S. government regarding the CIA drone program, one may conclude that the current drone operations may be contrary to existing domestic, international, and human rights law rules. The government may be in possession of additional information that could legitimize some targeting operations under domestic and international law. In the absence of such information, however, one may either choose to trust the government blindly or continue to question existing drone policies and to push toward more oversight and accountability. It is this article’s conclusion that the latter choice is preferable in a democratic society committed to upholding values of human rights and individual freedoms.

Problems: Covert Nature and Lack of Review/Oversight

The discussion of the legality of the CIA-operated drone strikes to conduct targeted killings has highlighted two fundamental issues regarding the program, which may be particularly problematic in any democratic society: secrecy and the lack of oversight and accountability. As Jameel Jaffer, deputy legal director of the ACLU, has argued, “The administration has claimed the power to carry out extrajudicial executions of Americans on the basis of evidence that is secret and is never seen by anyone. . . . It’s hard to understand how that is consistent with the Constitution” (quoted in Rohde 2012). The Bush, Obama, and Trump administrations have delegated the lethal function of

carrying out drone strikes to the CIA; the CIA program has been of a covert nature, and so, despite some government officials' speeches and the publication of policy papers, many questions have persisted regarding the specific contours of the drone program. Secrecy in this instance is particularly problematic because it precludes any meaningful analysis of the drone program's lawfulness under domestic, international, and human rights laws, as discussed earlier. Secrecy is also problematic because it requires citizens of a democratic state, such as the United States, to blindly delegate a lethal governmental function to an agency without having access to information regarding why and whether such lethal use of force is necessary. Perhaps most importantly, secrecy regarding the CIA drone program is troublesome because it has precluded meaningful oversight of the program or any type of accountability for the executive branch. Other authors and I have argued in favor of developing a more robust drone policy that "would ensure that the executive branch's decision to use lethal force through drone strikes is reached pursuant to clear and well-defined targeting practices and overseen prospectively by an appropriate independent judicial body" (Sterio 2015b, 471; see also Guiora 2013).

President Obama claimed in 2013 that his administration would review proposals to establish a form of oversight for lethal drone operations (Obama 2013). In the subsequently published PPG, his administration suggested that congressional oversight of the drone program already exists because members of Congress are routinely briefed about existing drone operations (White House 2013). This type of oversight is inadequate because it does not allow for screening of proposed drone strikes. Thus, scholars have advocated for the necessity of establishing prestrike oversight judicial mechanisms.

Amos Guiora (2011) has advocated for the development of a criteria-based process, under which intelligence information would be gathered and thoroughly analyzed to determine which information is actionable and warrants a response through a targeted strike. According to Guiora, such criteria include the following: (1) a target must have made significant steps in contributing to a planned act of terrorism; (2) an individual can be considered a legitimate target only if intelligence information indicates his or her involvement in future acts of terrorism; (3) an individual can be targeted only if he or she is still involved in the planning of a terrorism act and has not dissociated from it; (4) the individual must be providing more than just passive support to a planned terrorism attack; (5) collateral damage must be minimized in every instance; (6) verbal threats alone are insufficient to categorize an individual as a legitimate threat. Guiora has argued that this criteria-based approach would ensure that targets are identified based on "reliable, material, and probative" intelligence information (2011).

In addition, Amos Guiora and Jeffrey Brand (2015) have argued in favor of establishing a U.S. drone court, which would have to approve each proposed targeted strike. Such a drone court would be staffed with federal judges selected from diverse geographic areas; it would have a trial level as well as an appellate level; and final appeals could be presented to the U.S. Supreme Court. The drone court would have an office staffed with special military advisers, who would be able to answer questions regarding

the military necessity of each proposed strike. The executive branch would have to submit to the drone court information to justify each proposed drone strike against particular targets. In order to ensure that the targets' interests are represented as well, the court would appoint attorneys to represent targets in absentia in an adversarial hearing before the court's trial-level panel. The executive branch would have to share adequate intelligence information with the "defense" attorneys, who would have the opportunity to cross-examine witnesses and have access to military experts to advise them on questions regarding the executive branch's intelligence reports. The executive branch would need to meet a heightened standard of strict operational scrutiny. The drone court hearings would not be open to the public, but the court would operate under the Federal Rules of Evidence during its hearings. Guiora and Brand have proposed that in the case of a truly imminent threat the executive branch may be able to act without consulting the drone court. In this situation, the executive branch would file an affidavit with the drone court, under seal, explaining why immediate action is necessary and describing the nature of the imminent threat and the evidence upon which the threat has been so assessed. In addition, the executive branch would submit to the drone court an affidavit soliciting poststrike review; if the drone court were to find that the executive branch action is not justified, it would issue a citation of contempt. According to the Guiora-Brand proposal, the drone court could consider publishing each citation of contempt, which would provide the public with more transparency and which could potentially expose the executive branch to questioning and criticism regarding targeting decisions. This type of poststrike review, according to Guiora and Brand, would provide a check on the executive power by imposing a level of transparency as well as public accountability for specific targeting decisions.

Along similar lines, Neal Katyal (2013) has recently proposed the establishment of a national security court within the executive branch. According to this proposal, such a court would be staffed with national security experts, and it would provide an adversarial mechanism within the executive branch that would work toward determining whether each individual strike should be launched. The final decision regarding each strike would be reached by a panel of the president's most senior national security advisers. Panel decisions would later be reviewed by congressional intelligence committees. According to Katyal's proposal, the president would be able to overrule the "court" but would have to justify his or her action to Congress after the strike.

Finally, some scholars have argued that federal judges serving on the Foreign Intelligence Surveillance Court could review each executive-branch request to conduct targeted strikes, in a procedure similar to how these judges review the administration's requests for wiretapping (Greenwald 2013; Harman 2013; Shane 2013).

It may be argued that the covert nature of CIA-led lethal drone operations has precluded the public as well as the congressional and judicial branches of our government from assessing the program's validity under domestic and international law. Regardless of the specific features of each of the drone court proposals, it may also be argued that establishing appropriate oversight over the executive's decision to launch

each particular drone strike, before such a strike is undertaken, would be beneficial in any democratic society, including that of the United States: “The distinguishing feature of a vibrant democracy is the ability . . . to demand that decisions that might compromise individual rights be subject to meaningful review consistent with the cherished values of our constitutional democracy” (Guiora and Brand 2015, 334–35).

Conclusion

The U.S. government’s use of drones to conduct targeted killings through a covert CIA program has raised multiple legal questions under domestic, international, and human rights law. The covert nature of the CIA program has precluded a thorough assessment of the legality of each targeting operation. In addition, such secrecy regarding drone strikes has eliminated the possibility of independent oversight over targeting operations. The covert nature of the CIA drone program as well as the lack of meaningful prestrike review undermine the fundamental human rights values of a democratic society and thwart individual freedoms. In a democracy, the executive branch should not act as the judge, jury, and executioner.

References

- Bergen, Peter. 2012. Civilian Casualties Plummet in Drone Strikes. CNN, July 14. At <http://www.cnn.com/2012/07/13/opinion/bergen-civilian-casualties/index.html>.
- Blank, Laurie R. 2012. Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications. *William Mitchell Law Review* 38, no. 5: 1655–1700.
- Boyle, Ashley S. 2012. *Contextualizing the Drones Debate*. Washington, D.C.: American Security Project, August. At <https://www.americansecurityproject.org/ASP%20Reports/Ref%200079%20-%20Contextualizing%20the%20Drones%20Debate.pdf>.
- Boyle, Michael J. 2015. The Legal and Ethical Implications of Drone Warfare. *International Journal of Human Rights* 19, no. 2: 105–26. At <https://www.tandfonline.com/doi/full/10.1080/13642987.2014.991210>.
- Brennan, John O. 2012. Address at the Woodrow Wilson International Center for Scholars. Washington, D.C., April 30. At <https://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>.
- Greenwald, Glenn. 2013. The Bad Joke Called “the FISA Court” Shows How a “Drone Court” Would Work. *Guardian*, May 3. At <https://www.theguardian.com/commentisfree/2013/may/03/fisa-court-rubber-stamp-drones>.
- Guiora, Amos. 2011. Drone Strikes: What the U.S. Could Learn from Israel [Blowback]. *Los Angeles Times*, September 29. At <http://opinion.latimes.com/opinionla/2011/09/drone-strikes-us-learn-israel-blowback.html>.
- . 2013. Drone Policy: A Proposal Moving Forward. *Jurist*, March 4. At <http://www.jurist.org/forum/2013/03/amos-guiora-drone-policy.php>.

- Guiora, Amos, and Jeffrey S. Brand. 2015. Establishment of a Drone Court: A Necessary Restraint on Executive Power. In *The Legitimacy of Drones: Legality, Morality, and Efficacy of UCAVs for Counterterrorism*, edited by Steven J. Barela, 323–59. Farnham, U.K.: Ashgate.
- Harman, Jane. 2013. Drone Courts Can Work. CNN, February 19. At <http://security.blogs.cnn.com/2013/02/19/harman-drone-courts-can-work/>.
- International Court of Justice. 1986. Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. U.S.*). International Court of Justice 14, paragraph 191, June 27. At <http://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>.
- . 2003. Case Concerning Oil Platforms (*Islamic Republic of Iran v. United States of America*). Advisory Opinion and Orders. International Court of Justice 189, paragraph 72, November 6. At <http://www.icj-cij.org/files/case-related/90/090-20031106-JUD-01-00-EN.pdf>.
- Katyal, Neal. 2013. Who Will Mind the Drones? *New York Times*, February 20. At <http://www.nytimes.com/2013/02/21/opinion/an-executive-branch-drone-court.html>.
- Kleidman, Jamie L. 2010. The Constitutionality of the Predator Drone Program. *Vienna Journal on International Constitutional Law* 4, no. 3: 359–62.
- Koh, Harold. 2010. Address at the Annual Meeting of the American Society of International Law. Washington, D.C., March 25. At <https://www.state.gov/documents/organization/179305.pdf>.
- . 2011. The Lawfulness of the U.S. Operations against Osama bin Laden. *Opinio Juris*, May 19. At <http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>.
- Mayer, Jane. 2009. The Predator War: What Are the Risks of the CIA's Covert Drone Program? *New Yorker*, October 26. At <https://www.newyorker.com/magazine/2009/10/26/the-predator-war>.
- Mazzetti, Mark. 2014. Use of Drones for Killings Risks a War without End, Panel Concludes in Report. *New York Times*, June 26.
- Obama, President Barack. 2013. Remarks at the National Defense University. Washington, D.C., May 23. At <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.
- O'Connell, Mary Ellen. 2012. When Are Drone Killings Legal? CNN, August 16. At <http://www.cnn.com/2012/08/15/opinion/oconnell-targeted-killing/index.html>.
- Orr, Andrew C. 2011. Unmanned, Unprecedented, and Unresolved: The Statute of American Drone Strikes in Pakistan under International Law. *Cornell International Law Journal* 44, no. 3: 729–39.
- Palazzolo, Joe. 2012. Key Excerpts from Holder's Speech on Targeted Killing. *Wall Street Journal*, March 5. At <https://blogs.wsj.com/law/2012/03/05/key-experts-from-holders-speech-on-targeted-killing/>.
- Rogers, Christopher. 2014. Towards a Global Debate? UN Human Rights Council Takes on Drones. *Just Security*, September 25. At <https://www.justsecurity.org/15521/global-debate-human-rights-council-takes-drones/>.
- Rohde, David. 2012. How Obama's Drone War Is Backfiring. Reuters, March 1. At <http://blogs.reuters.com/david-rohde/2012/03/01/how-obamas-drone-war-is-backfiring/>.

- Rona, Gabor. 2012. The Last Word (for Now) on Targeted Killings: Rona Responds to Lewis. *Opinio Juris*, August 3. At <http://opiniojuris.org/2012/08/03/the-last-word-for-now-on-targeted-killings-rona-responds-to-lewis/>.
- Savage, Charlie, and Eric Schmitt. 2017. Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids. *New York Times*, September 21. At <https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html>.
- Shane, Scott. 2013. Debating a Court to Vet Drone Strikes. *New York Times*, February 9. At <http://www.nytimes.com/2013/02/09/world/a-court-to-vet-kill-lists.html>.
- Sterio, Milena. 2012. The United States' Use of Drones in the War on Terror: The (Il)Legality of Targeted Killings under International Law. *Case Western Reserve Journal of International Law* 45, no. 1: 197–202.
- . 2015a. The Covert Use of Drones: How Secrecy Undermines Oversight and Accountability. *Albany Government Law Review* 8, no. 1: 129–65.
- . 2015b. Drones: A Proposal for New Policy Inclusive of Independent Judicial Oversight. *Wake Forest Journal of Law and Policy* 5, no. 2: 469–511.
- United Nations. 1966. International Covenant on Civil and Political Rights. G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316, Art. 6, December 16.
- U.S. Congress. 2001. Authorization to Use Military Force. S.J. Res. 23, 107th Cong. (enacted). Public Law No. 107-40, section 2(a), 115 Stat. 224, 224 (2001).
- U.S. Department of Justice. 2011. *White Paper: Lawfulness of a Lethal Operation Directed against a U.S. Citizen Who Is a Senior Operational Leader of al-Qa'ida or an Associated Force*. Washington, D.C.: U.S. Department of Justice, November 8. At <https://fas.org/irp/eprint/doj-lethal.pdf>.
- Vladeck, Steve. 2013. D.C. Circuit Rejects Glomar Response in ACLU/CIA Drone FOIA Suit. *Lawfare*, March 15. At <https://www.lawfareblog.com/dc-circuit-rejects-glomar-response-aclucia-drone-foia-suit>.
- Vogel, Ryan. 2011. Drone Warfare and the Law of Armed Conflict. *Denver Journal of International Law and Policy* 39, no. 1: 101–8.
- White House. 2013. U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations outside the United States and Areas of Active Hostilities. May 23. At <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>.

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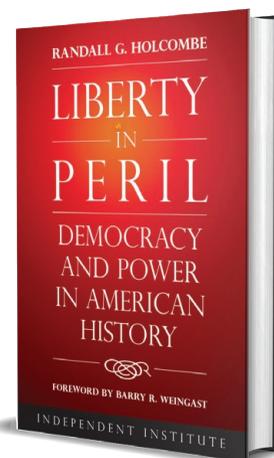
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