

[EDITED BY]

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DRONES

AND THE FUTURE OF ARMED CONFLICT

[*Ethical, Legal, and Strategic Implications*]

Drones and the Future of Armed Conflict

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Preface: Coming to Terms with Drones

Christof Heyns¹

During the last decade the use of armed drones or remotely piloted aircraft has become a central issue of both global security and human rights agendas. Drones are bound to be part of the arsenals of states for the foreseeable future and may be joined by other new technologies, such as increasingly autonomous weapons systems. These unmanned systems invariably point toward the greater depersonalization of the use of force.

Drones are not illegal weapons, but they are unique in some respects, which necessitates special care in the regulation of their use. They make the long-distance deployment of targeted lethal force across national borders much easier than before. These remotely controlled aircraft allow the states using them to keep their own forces out of harm's way, while gathering information and directing force with great precision against those they single out for targeting.

As a result, some of the traditional extralegal constraints on the use of force by states—such as political resistance against placing a nation's soldiers at risk, individual reluctance to kill, and geographical distance—no longer seem to apply, or at least not with the same power. Drones could make it easier to go to war, and to stay at war (we have yet to see how a drone war ends). They also seem to make it easier for states to decide to

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use force in situations that may not qualify as armed conflicts, for example, in places far away from established battlefields. The increased use of drones raises the specter that targeted killing—traditionally the exception, in need of justification—could become the rule, not requiring special justification.

At the same time drones—depending on the quality of the information available to those who make targeting decisions—may offer unique potential to hit only specified targets. The delivery of force may be depersonalized, but the targeting outcome may be more personalized. The argument that drones can potentially reduce harm to civilians who are not participating in hostilities cannot be ignored—provided that they are used appropriately within the confines of armed conflict.

The issue today is no longer whether drones are part of the future—it is widely accepted that they are likely to be used more rather than less in the future. The question is not about their legality but, rather, about how their use is to be regulated to secure the values at the core of the international system, such as the protection of life and the containment of the use of force.

The challenge is to ensure that the same framework for the use of drones is accepted by a multiplicity of states, each responding to its own perceived security needs. The likely proliferation of drones militates against accepting a precedent where drones are used in secret programs by an increasing number of states, each interpreting the rules of international law to suit its own purposes. The proliferation of armed drones, if not subject to proper constraints, poses potential risks to global security, in addition to individual lives, because it can make the use of force by different sides easier.

This danger is exacerbated by the extent to which the possibility to press a button to deploy targeted lethal force anywhere can bring about an exaggerated sense of one's own ability to solve global problems—problems that may in reality be intractable and in fact be aggravated through the use of force. This may displace other, less coercive and in some cases more sustainable solutions, such as diplomacy, negotiation, or capture and trial, and in general may reduce reliance on multilateral as opposed to unilateral approaches to issues of global security.

In view of the above, it is important not to focus on one specific state and its use of drones—an exercise that more often than not imperceptibly distorts one's perspective, whatever the point of departure—but to

consider the issue in principle. What would be an acceptable regime regarding drones for the countries of the world as a whole?

Trying to strike the right balance between the permissible and the impermissible use of drones is a complicated task that will continue to present challenges to the collective wisdom of the human race for many years to come. This task raises pressing issues of realpolitik, as well as legal, ethical, psychological, and other questions. How do the short-term perceived military gains offered by drones compare with the long-term consequences? Only a proper consideration of the whole range of dynamics involved can provide a proper perspective. In this context time is of the essence. The longer that precedents of the liberal use of force through drones are set by the first states to have this technology, the more difficult it will be to contain their use in the long run.

Some have argued for new law or at least a new interpretation of international law, in order to deal with the threats of global terrorism, and by extension for a more permissive legal framework for the use of drone weapons. This takes the form of a flexible interpretation of imminence during self-defense and a broad interpretation of the targetability of specific groups or associated forces.

Increasingly, however, states and commentators express themselves in favor of the view that the established legal framework—which offers general principles of law on most of the areas concerning the use of force that are accepted by the majority of states—should be maintained and applied to the use of drones, with an accompanying emphasis on the importance of greater accountability and transparency. I have emphasized in various reports to the United Nations and others my view that drones should follow the law, not the other way around.

It may indeed be asked whether the unique features of drones and the ease of their use do not require a specifically rigorous application of the existing international framework, in order to counter the potential risks they pose, while at the same time making sure that one does not eschew the benefits they may offer. Part of such an approach would take the form of maintaining a narrow interpretation of notions such as imminence, participation in hostilities, and the designation of parties to a conflict. Moreover, while the principles of transparency and accountability are established in both international human rights law and international humanitarian law, it may be necessary to give them more precision and traction.

Finding a sustainable way to deal with drones could also entail further strictures in the way in which international standards are applied. I will mention five possible aspects of such an approach that become apparent in the context of drones and can also be equally applicable to other advanced technologies:

- Higher precaution standards. Some commentators have made the argument that if drones do offer greater targeting precision, higher standards of precaution in avoiding harm to protected civilians also should be maintained when these weapon platforms are used, in terms of targeting decisions and in assessing possible accountability afterwards.
- The role of the United Nations (UN) Security Council. The UN Security Council is the primary international body responsible for world peace. The UN Charter requires states that use force in self-defense on the territory of another state to report this to the Security Council. This is a transparency requirement aimed *inter alia* at protecting state sovereignty and by implication at containing the geographical spread of violence. The ease with which drones could be used to cross international borders could prompt a demand that, whenever there is a change in the material circumstances of such a first resort to the use of force, a further notification to the Security Council is due.
- Monitoring transnational drone killings. It may be beneficial for the UN, including its human rights machinery and in particular its field offices, to assume a specific role in monitoring transnational killings by states through drones or other means outside the context of established conflict zones. This could be in the form of a public record—at least of the numbers and the names—of those killed. This would draw on and further enhance the important work that is already being done by civil society groups.
- Domestic overview of drone operations. Some civil society watchdogs—non-governmental organizations as well as the press—have played an important role in pushing for greater transparency, and will continue to do so. However, states and other parties also have an important but neglected role to play in this regard. This may, for example, include oversight in the legislature but also by national human rights commissions. At the time of writing, steps to ensure stronger domestic overview of casualties inflicted by drones are being debated in the Congress of the United States.
- Focusing on state complicity in drone strikes. The implication of global cooperation between states and others in gathering and sharing information that is used to support drone strikes needs to be considered. Those providing such

cooperation may find themselves being considered complicit in strikes that violate their own standards or those of the international community.

The above are examples that deserve attention of some of the possible elements of a long-term framework for dealing with—and containing—the use of drones by states. Further debates will no doubt yield additional ideas—not least on how to avoid a situation where drones fall into the hands of nonstate actors.

It is to be welcomed that states around the world are increasingly engaged in these debates. Those that have drones are asked by other states and by international organizations to justify their use on a principled basis, knowing that many of their interlocutors may in the future resort to the same arguments. Those that do not have drones but foresee that they might in the future likewise know that what they say now can later be used against them. States on whose territory drones are or may be used—with or without their approval—have an equally clear interest in letting their views be known. In this context, intergovernmental organizations such as the UN and regional organizations have an important role to play.

Although the involvement of states in these debates is important, they invariably reflect a specific perspective. States respond most directly to their immediate interest. The voices of those who are more detached—academics, researchers, and policy experts—are equally important in mapping out a conceptual framework that the different sides can recognize as acceptable in the long term. The past decade has shown the importance of these voices in shaping the global response to drones.

While it is important that these debates take place around the world—the use of drones by any state is an issue of global concern—it is of particular importance that they take place in the United States of America, the primary repository of drone technology, and for that very reason the state whose example will set the tone for much of what will be done in the rest of the world.

For this reason the availability of the present multidisciplinary volume is welcome. By setting out the views of people with a high level of experience and knowledge in the field and making them accessible to readers around the world, the book makes an important contribution to the global process of coming to terms with armed drones.

Assessing the Debate on Drone Warfare

David Cortright and Rachel Fairhurst

Drone systems represent a significant advance in technology and are generating fundamental changes in the nature of warfare and the use of military force. In addition to the surveillance and real-time intelligence capabilities they provide, drones (also known as remotely piloted vehicles) make it possible to target lethal force precisely and with reduced risk of collateral damage. They are a central element in ongoing efforts to suppress and eliminate the threat from al-Qaeda and associated forces and have been used along with other military aircraft in the fight against the Islamic State in Iraq and Syria (ISIS).¹

Drone weapons are more accurate and discriminating than conventional bombing. They can loiter for extended periods over potential targets, with flight times more than three times greater than that of traditional surveillance aircraft.² They allow operators to gather large amounts of information and provide the ability to launch pinpoint strikes against specific individuals or groups. Drones enable states to engage in military operations over long distances without putting boots on the ground or incurring casualties among their own forces. They permit armed strikes in remote and dangerous locations where conventional bombing or the use of ground forces would entail significant costs. Drones overcome the limitations of human endurance among fighter pilots. At less than one-tenth the cost of an F-16, drones are easier to produce and more expendable than conventional combat aircraft. They provide the option of conducting prolonged counterinsurgency

and counterterrorism operations with reduced risks to the forces using them.³

In this opening chapter we offer a brief overview of the evolution of the drone warfare program and the debates surrounding the use of these weapons. We introduce the principal themes examined by the authors and review the ethical, legal, strategic, and human rights concerns they address, situating the author contributions within the context of the latest scholarly debates and policy developments. We offer a holistic analysis that emphasizes the linkages among these various themes, toward the goal of identifying principles for the use of these weapons that are ethically and legally sound and strategically wise.

An Evolving Program

Over the past decade, the United States has significantly increased its commitment to the development and use of weaponized drones. The number of US drone systems multiplied from fifty in 2001 to more than 8,000 in 2013. The US Air Force operates dozens of combat air patrols on a continuous twenty-four-hour-a-day basis, mostly in Afghanistan, Yemen, and North Africa.⁴ Most of the drone systems currently being used by the United States are for surveillance and reconnaissance, but about 5 percent are capable of launching missile strikes.⁵ Military drone strikes are conducted by the Joint Military Special Operations Command (JSOC), a subunit of the Pentagon's Special Operations Command that has grown dramatically in recent years. The Central Intelligence Agency (CIA) also conducts drone strikes in Pakistan and other countries, often coordinated with JSOC operations.⁶ Drone technology is spreading rapidly, with more than seventy countries and even non-state actors such as Hezbollah and Hamas now developing or acquiring these systems.⁷ ISIS also claims to have surveillance drone capability. In August 2014 the militant group released video footage of a Syrian army base with the caption "From the drone of the army of the Islamic State."⁸ To date only a handful of countries—including Israel, the United Kingdom, China, and Iran—have operationally deployed armed drones, but others are catching up.⁹

The first known use of weaponized drones occurred in November 2001 when a US Predator aircraft fired a Hellfire missile to kill Mohammad Atef, a senior al-Qaeda leader in Afghanistan. Since then both

the United States and the United Kingdom have extensively employed drones. During the years 2008–2012, US and British forces launched more than 1,200 drone strikes as part of military operations in Afghanistan, Libya, and Iraq, according to figures compiled by the Bureau of Investigative Journalism (TBIJ).¹⁰ The first CIA drone strike occurred in November 2002, when a Predator attack in Yemen killed Qaed Senan al Harethi, one of the alleged bombers of the USS *Cole*.¹¹ Over the following years the CIA launched hundreds of additional covert drone strikes, primarily in Pakistan and Yemen, as well as a handful of strikes in Somalia.

According to TBIJ estimates, the CIA launched a total of 408 drone strikes in Pakistan from 2004 through December 2014. Figures in Yemen are less precise, with between seventy-two and eighty-four confirmed strikes, and perhaps as many as 101 to 120 additional, unconfirmed strikes. From 2004 through 2014, US drone strikes in Pakistan killed an estimated 2,410–3,902 people, of whom an estimated 416–959 were civilians. In Yemen, confirmed drone attacks have killed between 371 and 541 people, of whom sixty-four to eighty-three were civilians.¹² The wide variance in these estimates reflects the difficulty of obtaining accurate information in the affected conflict zones, as well as the covert nature of the CIA and JSOC drone programs and the absence of published casualty figures from the US government. Uncertainties also exist in determining who is a civilian or a combatant. Human rights and civil liberties groups have expressed concern that the US government may be employing overly broad definitions of “militant” or “combatant” and thus undercounting civilian casualties.¹³

The rise of drone warfare has stirred strong passions and sparked a vigorous debate among ethicists, international lawyers, strategic analysts, and human rights specialists. Court challenges, journalistic accounts, and criticisms from domestic and international policy reports have elevated public concerns and generated pressure on the Obama administration to reduce unintended civilian casualties and pay greater attention to ethical and legal principles.¹⁴ After initially refusing even to acknowledge the existence of the program, the White House offered partial explanations and justifications for its drone policies, although the limited release of information so far falls short of full disclosure. In May 2013, President Obama gave a major speech promising greater transparency and accountability in the use of drone weapons. He announced new guidelines to ensure that drone strikes are launched only if there is “near

certainty” that no civilians will be killed or injured.¹⁵ He also proposed shifting drone operations from the CIA to military command, where they would be subject to the legal guidelines of the Uniform Code of Military Justice. To date little or no progress has been achieved in implementing the proposed shift to military control.¹⁶

In 2012 the Obama administration began to scale back the number of drone strikes in Pakistan, leading to a general trend toward fewer attacks and fewer civilian casualties. Beginning in late 2013 and into the first months of 2014 the administration suspended strikes in Pakistan altogether, as the government in Islamabad pursued peace talks with the Pakistani Taliban.¹⁷ No drone strikes occurred in Pakistan through the first four months of 2014. Table 1.1 below depicts the pattern of drone attacks in Pakistan, where the estimated number of attacks and civilian casualties has declined. According to TBIJ estimates, there were twenty-seven drone strikes in 2013, and another twenty-five in 2014, without a single civilian casualty. This indicates remarkable progress toward the goal of reducing unintended harm to civilians. The administration has not officially disclosed its reasons for scaling back drone warfare in Pakistan. The changes seem in part a response to greater public debate and scrutiny of drone policy and increased criticisms of the program within Pakistan.¹⁸ They may also reflect the more discriminating operational practices promised by the administration in 2013 and the scaling back of

TABLE 1.1. Total CIA drone strikes per year in Pakistan and minimum reported civilian casualties, 2004–2014

Year	Number of CIA strikes	Minimum number of civilian deaths
2004	1	2
2005	3	5
2006	2	90
2007	5	11
2008	38	59
2009	54	100
2010	128	84
2011	75	52
2012	50	13
2013	27	0
2014	25	0

Source: The Bureau of Investigative Journalism. <http://www.thebureauinvestigates.com/2014/01/06/a-changing-drone-campaign-us-covert-actions-in-2013/>, current as of January 6, 2014.

military operations accompanying the official end of the US combat role in Afghanistan in 2014.¹⁹ US drone strikes within Afghanistan have declined as well with the reduction in combat missions.²⁰

In Yemen, the number of US drone strikes increased in 2013 and 2014 as the internal armed conflict in that country intensified. The February 2014 report of the Special Rapporteur on the promotion of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, states that “the frequency of reported drone strikes in Yemen . . . increased” in the latter part of 2013, resulting in “a significant number of reported civilian casualties.”²¹ The *Long War Journal* reported eleven US drone strikes in Yemen through the first four months of 2014, including attacks in late April described by the *New York Times* as among the largest carried out by the Obama administration.²²

Notwithstanding the general trend toward reduced casualties in US drone strikes, incidents involving potential civilian deaths still occur. On December 12, 2013, four Hellfire missiles fired from a US drone struck a wedding party in Yemen near the town of Rad’a in the central province of al-Baydah. The attack reportedly killed twelve men whom the US government and Yemeni officials said were involved in a plot to attack US embassies in the country.²³ Witnesses and survivors of the strikes contradicted official claims about those targeted and expressed anger at attacks against a wedding party.²⁴ According to a special Human Rights Watch investigation into the incident, enraged “relatives and other local residents took the bodies . . . and displayed them in the provincial capital, Rad’a. Armed protesters blocked the main thoroughfare from Rad’a to the Yemeni capital, Sanaa . . . for more than 24 hours.” The Human Rights Watch report described the failure of the United States to acknowledge and investigate civilian casualties in the incident as a potential violation of international legal obligations.²⁵

The Need for Guidelines

In the fall of 2012, the Obama administration reportedly made an attempt to craft explicit drone policy guidelines. This effort was prompted by the imminence of presidential elections and the need for rigorous standards to guide the policies of a potential successor administration.²⁶ According to Mark Mazzetti, the process of trying to codify procedures revealed a largely ad hoc system without clear standards for who can be

killed and where and when such killing is permissible.²⁷ What became of this exercise is unknown, but it reflects a realization among US officials of the need to establish clear guidelines for the use of these weapons.

US drone policy is evolving, but the direction of the change is not clear. A curtain of secrecy continues to hide the program and obscure its operational principles. Systems of public accountability are largely absent, especially in the sizable part of the program that is operated by the CIA. Without greater transparency and public disclosure it is impossible to know whether the trends in Pakistan are a temporary aberration or part of an intentional and long-term shift in policy. Nor is it possible to say with certainty whether the administration is complying with just war doctrine and the principles of international law. The lack of clarity regarding ethical and legal standards impedes efforts to develop US and international standards for their use.

Current drone warfare practices are important not only for American policy but for the world. The precedents established by the United States are likely to be followed by other nations, for better or worse. Spurred by the US example, other countries “are likely to threaten or conduct drone strikes in ways that are harmful to US interests, whether by provoking regional adversaries or targeting domestic enemies,” Sarah Kreps and Micah Zenko write.²⁸ As Christof Heyns observes in the preface to this volume, the prospect of multiple states operating secretive drone policies according to their own interpretation of international law is not a desirable outcome from a global security perspective. This concern is echoed in the report of United Nations (UN) Special Rapporteur Emerson, who warns that ambiguity surrounding international law governing counterterrorism activities “leaves dangerous latitude for differences of practice by States.”²⁹ An anarchic, every-state-on-its-own approach would weaken efforts to develop international standards and constraints on the unilateral use of force. US and global security will benefit if norms and principles can be developed, within the framework of international law, to guide future military uses of drone technology.

This book is intended to advance that purpose. It brings together scholars and experts from diverse perspectives to examine current drone policies in light of accepted ethical standards for the use of force and the principles of international law. The foundational ethical framework is just war doctrine. The legal principles are embodied in international humanitarian law, also known as the laws of armed conflict, and interna-

tional human rights law, which addresses when force may be used outside the context of war. The book explores the strategic implications of current uses of drone weapons and their impacts on civil and human rights. These consequential concerns are crucial to the core ethical and legal analysis, since they provide the empirical basis for evaluating whether a particular action enhances security and rights and therefore meets ethical and legal standards. To qualify as a just use of force, drone strikes must be shown to prevent civilian suffering and diminish the threat of violent extremism. The results of the action taken must be unambiguously in the direction of greater justice, less armed violence, and the fuller realization of human rights. Anything less would not meet the standard of necessity and does not qualify as a just use of force. As the chapters indicate, opinions vary considerably on whether drone strikes meet these standards.

Our goal in this volume is to help shape the future direction of drone policy and clarify the criteria for assessing its ethical, legal, and strategic implications. The author contributions are part of a growing discourse among scholars and policy analysts on the critical questions that surround drone warfare. Are these weapons being used in conformity with ethical standards for the use of military force and the principles of international law? Is drone warfare an effective tool for countering terrorism and preventing violent extremism? Are current policies for using drones compatible with principles of democratic accountability and human rights? In the pages that follow we address these and related issues in a holistic framework and seek to contribute to the goal of establishing greater international consensus on ethical and legal standards for the use of these weapons.

Technology and Moral Choice

The ethical argument for drones rests largely on their potential capacity for discrimination and the avoidance of unintended civilian harm. What differentiates drones in this respect from other precision-guided weapons is their capacity to loiter.³⁰ The ability of remotely piloted aircraft to remain aloft for extended periods allows operators to identify potential targets with precision and creates the possibility for greater discrimination in the use of force. As Jeff McMahan observes, this loiter capacity

allows operators to make “morally informed decisions” about when to strike.³¹ This makes it possible to conduct military operations with less risk of harming innocent civilians.

Avery Plaw provides empirical evidence to show that drone strikes are indeed better at distinguishing between combatants and civilians. Plaw meticulously examines figures for civilian casualties from TBIJ and three other research centers, the New America Foundation, the University of Massachusetts, and the *Long War Journal*. He compares civilian casualty rates from drone strikes in Pakistan with data from other armed conflicts in recent decades and finds that “drone strikes look significantly better than alternative actions” in avoiding civilian harm.³² Drone strikes result in lower rates of civilian casualties than other forms of warfare.

While drone technology creates the possibility of greater discrimination, it does not guarantee that civilian harm is avoided. Drone systems provide large amounts of data to make operators better informed, but they cannot assure that the decision to attack a particular target will be ethically legitimate. That depends upon moral calculation, not technical capacity. Sarah Kreps and John Kaag observe, “Advanced technology has allowed states to limit the unintended damage of targeted violence, but the ability to undertake more precise, targeted strikes should not be confused with the determination of legal or ethical legitimacy.”³³ Kreps and Kaag emphasize the importance of the fact-value distinction in ethical analysis. One cannot infer an “ought” from an “is.”³⁴ The fact that operators can better differentiate among potential targets does not mean that the decision to attack is morally justified. That determination requires a careful ethical evaluation of the standards of just war doctrine, as Jennifer Welsh and Martin Cook examine in chapters two and three of this volume.

Kreps and Kaag are critical of the tendency among some drone advocates to conflate the concepts of distinction and proportionality.³⁵ It is necessary to keep the two separate.

If there is a will to uphold IHL [international humanitarian law] and *if* the distinction between combatants and civilians is made accurately, with the help of technologically advanced surveillance *and* ethical deliberation, then governments can, through precision-guided munitions, spare those individuals who have been designated as civilians. What technology cannot do alone, however, is to create the will to abide by IHL and the ability to differentiate civilians from combatants.³⁶

The failure to acknowledge this distinction creates what the authors see as a “disturbing propensity” for the means of modern warfare to determine the ends, for the technological features of drone weapons to shape decisions on using lethal force.³⁷

Bradley Jay Strawser seems to reflect that tendency in asserting that a moral obligation exists to use drone weapons because of their technological capacity to avoid civilian harm and reduce the risk to those operating them. The use of drones against terrorist targets is not only ethically permissible, he contends, it is obligatory. He asserts that “for any just action taken by a given military, if it is possible for the military to use [drone] platforms in place of inhabited aerial vehicles without a significant loss of capability, then that military has an ethical obligation to do so.”³⁸ He adds that military leaders “are morally required to use drones over . . . manned aircraft to prevent exposing pilots to unnecessary risk.”³⁹ This may be a valid argument if there is indeed a “just action,” but it avoids the larger question of whether a given military mission meets just war standards.

More War?

The most critical ethical question about drone weapons is whether their availability increases the propensity of political leaders to use force. If decision makers have more accurate weapons that are easier to use and do not risk the lives of their soldiers, they may be more inclined to employ military force. Mazzetti argues that drone systems and targeted-killing policies have lowered the bar for waging war.⁴⁰ US political leaders are now able to intervene militarily in remote localities they never would have considered previously.⁴¹ The possession of advanced weapons designed for that purpose increases the temptation to use force. Drone systems are “seductive,” writes Mary Ellen O’Connell, because they lower the political and psychological barriers to using lethal force.⁴² They induce a faith in the efficacy and morality of armed force and increase the tendency of national leaders to seek military solutions to complex political problems.

Kenneth Anderson takes issue with this suggestion. He writes, “There is something wrong with the conceptual form of this argument in which a successful strategy in war turns out to be immoral, not because of the damage it causes achieving its success, but because success itself in-

creases the propensity to do it too much.”⁴³ Anderson points out that military decision makers will prioritize national security concerns over force protection and that the safety of troops is merely one of many factors considered when determining whether to use force. Anderson nonetheless concedes that drones can make the resort to force “easier,” although not “too easy.”⁴⁴ This partially acknowledges the argument of critics such as Welsh, who are troubled by any development that makes the recourse to war appear easier and that weakens the moral presumption against the use of force that is at the heart of just war doctrine.

A March 2011 report from the Development, Concepts and Doctrine Centre of the United Kingdom Ministry of Defence concluded that the availability of drone weapons was indeed a factor in the decision of British leaders to participate in military operations in Pakistan and Yemen. In its study the center found that manned aircraft and commando raids could have been used for the selected missions but were rejected as too risky. The decision to use force was “totally a function of the existence of an unmanned capability—it is unlikely that a similar scale of force would be used if this capability were not available.” The report urged “removing some of the horror” of these weapons so that “we do not risk losing our controlling humanity and make war more likely.”⁴⁵

Drone weapons transform the very meaning and social context of war. What was once considered an act of supreme sacrifice and national mobilization has become a distant, secretive process of robotic strikes against an unknown “kill list.” The average citizen has little knowledge of or involvement in the state’s use of military force and thus becomes desensitized to acts of targeted killing. Drone systems partially remove the person from the emotional equation of war, creating a vast physical and psychological distance between the launching of a strike and its bloody impact. The human targets of war are reduced to images on a computer screen. A UN report warns against “a ‘PlayStation’ mentality to killing” that may induce public callousness and susceptibility to claims about costless warfare.⁴⁶

Peter Singer has expressed concerns about the widening disconnect between government decisions to use military force and public engagement on these issues.⁴⁷ Mary Dudziak also addresses this concern in chapter ten. Singer acknowledges the potential military benefits of robotic technology, but he also emphasizes their social and political consequences, especially the erosion of public inhibitions on the use of military force. He worries that advances in robotic technology may feed

overconfidence among political leaders as to what military force can accomplish and lead to a weakening of moral constraints on the use of force.

Morality and Law

US officials argue that current uses of drone strikes are fully compatible with ethical and legal principles for the use of force. “This is a just war,” President Obama declared in his May 2013 speech, “a war waged proportionally, in last resort, and in self-defense.”⁴⁸ Under the UN Charter and the laws of war, states may use military force to defend themselves if they are under armed attack, but this right is subject to strict conditions as spelled out in international humanitarian law and international human rights law. The former addresses the right of a state to protect itself against armed attack, while the latter raises the humanitarian imperative to protect innocent life. The 2010 report of the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions notes that these categories are sometimes inappropriately mixed, leading to “a highly problematic blurring and expansion of the boundaries of the applicable legal frameworks.”⁴⁹

Drone strikes and other uses of military force against al-Qaeda and related forces are authorized in US law by the Authorization to Use Military Force resolution that was adopted by Congress immediately after 9/11 and subsequently reauthorized. This authority has force within domestic law, but it does not obviate the obligation to comply with the standards of international law that are embodied in treaties and conventions that the United States helped to write and to which it is party. As several of the authors in this volume argue, considerable uncertainty exists whether current US drone war practices comply with these standards.

Questions also arise in relation to the principle of last resort, which holds that the use of military force is permissible only after all other means have been considered and found wanting. The impact of drone weapons on this principle cuts both ways. On the one hand, as Jennifer Welsh notes, the possibility that a precise preemptive strike could eliminate a threat before it metastasizes into a large-scale danger presents options for addressing that threat without having to resort to full-scale war. On the other hand, the very possibility and ease of that preemptive option may lower the threshold for using force and prompt uses

of violence that are not genuinely necessary and could risk further war. The latter view depends on whether one believes that the availability of drone technology increases the propensity to use force. Daniel Brunstetter expresses concern that administration officials have become so enamored of the advantages of drones that they may act “as if the threshold of last resort no longer applies to drone strikes.”⁵⁰ Several of the authors in the volume agree that the availability of this new technology may have the worrisome effect of cutting short the consideration of alternative options. Drone strikes could become the ready resort rather than a last resort.

One of the central themes weaving through the chapters in the first section of the book is the debate about imminence—whether and to what degree the threat of immediate risk is necessary to justify the use of lethal force. Customary legal usage defines imminence as the clear and present danger of a concrete and specific threat of violence. Under this strict interpretation, the use of force is permissible only when the danger of attack or loss of civilian life is palpable and immediate and overwhelmingly clear. The Obama administration has attempted to redefine this concept, asserting in a Department of Justice white paper leaked by NBC News in February 2013 that imminence “does not require . . . clear evidence that a specific attack on US persons and interests will take place in the immediate future.”⁵¹ Some ethicists and legal scholars accept this more relaxed view, arguing for a standard of probability rather than imminence. Jennifer Welsh, Karen Greenberg, and Pardiss Kebriaei in their chapters in this book reject this loosening of standards. As they note, such an approach means forgoing immediate facts (the clear evidence of gathering threat) for an assessment of what may transpire in the future. From an evidence-based perspective, this is shaky ground. It is also questionable ethically, opening the door to a much more expansive range of options for the use of lethal force.

Much of the public concern about drone warfare centers on the policy of targeted killing. Although weaponized drones are often used as a means to carry out targeted killings, the two are not the same. Anderson emphasizes the need to distinguish between targeted killing as a policy and drones as weapons platforms often used for that purpose.⁵² Targeted killing is defined as “the use of lethal force . . . with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.”⁵³ Under international law, targeted lethal force may be used only under specific and narrowly

defined circumstances—against combatants in a recognized armed conflict and those directly participating in hostilities or who pose an immediate threat to innocent life and when capture is not feasible and would involve significant military risk and potential loss of life. David Wetham argues that a person can be targeted only if there is “extremely clear” evidence of active participation in hostilities.⁵⁴ Mere membership in a group vaguely defined as “associated” with al-Qaeda is not enough to justify the use of lethal force.⁵⁵

Targeted killings that do not meet the standards of international law can be considered a form of assassination or extrajudicial killing. In 1976 President Gerald Ford issued Executive Order 11905 banning any employee of the US government from engaging in or conspiring to engage in political assassination. In the weeks following the 9/11 attacks, President George W. Bush issued a national security directive lifting the ban on CIA involvement in assassinations.⁵⁶ Since then lethal attacks against the leaders of militant organizations have become a regular feature of CIA and military operations. These are justified as part of the struggle against terrorism, part of what Mazzetti calls the “shadow war,” the worldwide campaign of military operations and covert action against alleged terrorist movements and violent extremist groups that began in 2001 and continues today.⁵⁷ Whether these military actions are lawful as self-defense against an imminent threat to national security and innocent life remains contested, as the chapters in this volume attest.

The Strategy of Military Counterterrorism

Preventing terrorist attacks is clearly a just cause and an urgent priority of US and international security, but this does not mean that military force is the only or best means of achieving that objective. If alternative civilian or law enforcement methods are found to be as effective or more, policy makers have a moral and legal obligation to use them. The ethical and legal case for drone warfare is thus directly linked to questions of counterterrorism strategy and policy. US officials contend that drone weapons systems are essential to the goal of countering terrorist threats, that they are the “only game in town” as CIA director Leon Panetta famously remarked.⁵⁸ Research shows, however, that nonmilitary means are available and have been used effectively in suppressing terrorist groups. A widely quoted empirical study by the RAND Cor-

poration reports that terrorist groups end most often through law enforcement and political bargaining not military means.⁵⁹ According to this study, the use of military force has not been a major factor in the demise of many terrorist groups.

Research by Patrick Johnston and Anoop Sarbahi shows that drone attacks temporarily reduce incidents of terrorist violence in the vicinity of a strike but that levels of violence outside the strike zone remain high or increase.⁶⁰ Other studies on the effectiveness of killing or capturing terrorist leaders yield mixed results, with one report showing little or no effect and another indicating positive security outcomes.⁶¹ Drone strikes may succeed at times in disrupting the operations of a specific militant group in a particular locality, but they cannot cut off the vital flow of recruits and support sustaining militant groups in Pakistan, Yemen, and other countries. Moreover, drone strikes themselves may feed militancy by generating support for armed resistance to foreign interference.

Senior US military leaders have expressed concerns about possible blowback effects from drone strikes. Past CIA director and former general Michael Hayden (US Air Force ret.) credits drone warfare with decimating al-Qaeda's senior leadership and reducing the threat of terrorist attack against the United States, but he has also expressed concern about "second and third order effects" that complicate the strategic goal of suppressing violent extremism.⁶² Former Afghanistan commander General Stanley McChrystal (US Army ret.) told the *Huffington Post* in January 2013 that drone strikes are creating increased resentment and animosity toward the United States, creating a "perception of American arrogance" and generating hatred "at a visceral level."⁶³ Drone attacks may be motivating so-called lone wolf extremists who have attempted terrorist strikes in the United States. Faisal Shahzad, the Pakistani immigrant who failed in his attempt to bomb Times Square in 2010, testified that ". . . until the hour the U.S. pulls it [sic] forces from Iraq and Afghanistan and stops the drone strikes in Somalia and Yemen and in Pakistan . . . we will be attacking [sic] U.S., and I plead guilty to that."⁶⁴

The precision of drones depends to a large degree upon the human intelligence that is used to identify potential targets. The local informants the United States utilizes in northern Pakistan are "notoriously unreliable," a former CIA officer told writer Jane Mayer.⁶⁵ In May 2010, the United States mistakenly killed Yemeni deputy governor Jaber al-Shabwani, provoking outrage across the country, an incident Mazzetti describes as "a high-tech hit to settle a tribal grudge."⁶⁶ CIA and mili-

tary programs in unknown cultures are inherently vulnerable to faulty intelligence or manipulation by local vested political interests. A related concern is the discrepancy between US claims that drones are targeting high-level al-Qaeda operatives and the fact that most of those killed in Pakistan and Yemen are low-level militants primarily engaged in local insurgencies.⁶⁷ This suggests a failure by US officials to differentiate among the complex and fragmented insurgent groups operating in the regions where drones are employed. Incorrect determination of organizational affiliation runs the risk of disparate militant groups coalescing and may ensnare the United States in local struggles that are not necessary—and may be detrimental to—US strategic interests.⁶⁸

Another key theme in the volume is the question of consent. Military force is permissible on the territory of a nonbelligerent state if the political leadership of that state consents. US officials assert that the governments of Pakistan and Yemen have approved American military operations and drone strikes on their territory. The accounts of Mazzetti and other writers confirm that the Directorate of Inter-Services Intelligence in Pakistan and the Saleh regime in Yemen provided authorization for US drone strikes. As Martin Cook notes in his chapter, Pakistan could shoot down US drones and force CIA and other American forces out of the country, but it has chosen not to do so. Its acquiescence in this sense is consent. As O'Connell observes, however, under international law, the only person who may consent to the use of force on a state's territory is the head of government. Moreover, it is doubtful that even a head of state could authorize the use of external military force on a state's territory outside of a situation of armed conflict and civil war. Whether the conflicts in Pakistan and Yemen meet that standard is debatable.

As Welsh, Chris Woods, and other authors in the volume note, the civilian parliaments of Pakistan and Yemen have issued formal declarations criticizing drone attacks and demanding that they cease. Both houses of the Pakistani parliament voted in April 2012 for an end to the US use of drone weapons over Pakistani territory.⁶⁹ The government of Pakistan has registered official complaints with the US embassy in Islamabad contesting the claim that it consents to US drone strikes. UN Special Rapporteur Ben Emmerson specifically examined this question during a visit to the country in March 2013 and reported that “as a matter of international law the U.S. drone campaign in Pakistan is being conducted without the consent of the elected representatives of the people or the legitimate government of the state.”⁷⁰ In December 2013, the

Yemeni parliament adopted a nonbinding resolution calling for a halt to US drone strikes.⁷¹

A key metric for assessing whether drone strikes are effective in reducing the threat from extremist groups is the rate of terrorist recruitment. A primary strategic objective of US and international policy is to drive down that recruitment rate and diminish local support for al-Qaeda and related extremist groups. By that standard, US counterterrorism strategy has been of questionable effectiveness. Data from US State Department annual country reports on terrorism and the background assessments of the US Council on Foreign Relations indicate that the Yemeni-based group al-Qaeda in the Arabian peninsula has increased in strength in recent years.⁷² The analysis of Zakaria in chapter twelve and assessments from the Council on Foreign Affairs show that terrorist attacks in Pakistan remained at high levels during the period of frequent US drone strikes.⁷³ The militant groups in Pakistan and Yemen that have borne the brunt of the drone war have grown in recent years and remain resilient.

The many tactical advantages proffered by drone technology should not be dismissed, but the strategic consequences of using these weapons are uncertain and in some respects may be negative, especially in settings outside the framework of recognized armed conflict. These are also the settings where the greatest concerns have been expressed, by authors in this volume and elsewhere, about compliance with ethical and international legal standards. This suggests that strict adherence to moral and legal standards can help to assure more favorable strategic outcomes. Heyns argues in the preface that the future of global security depends on the acceptance of values that are central to the international system—including the protection of life and human dignity and the containment of the use of force. It is in the interest of the United States and other states to work together, ideally through the UN, to forge a common regulatory framework for drones that enhances security for all.

The Chapters in This Book

The contributions to this volume are arranged in three broad sections, assessing questions of ethics and law, security, and rights. The first section begins with a comprehensive examination of the morality of drone warfare by Jennifer Welsh. Welsh discusses the ethical conditions un-

der which targeted killing is permissible, critically reviews the US government's application of these principles, and poses questions about the "agent-relative" impacts on governments and the individuals who use these weapons. In the first part of her chapter she insists on a precise differentiation between military action within a war context and the use of force outside of war. This is a theme that runs through several of the chapters in the book, with the authors generally agreed on the need to avoid mixing or confusing these frameworks. Welsh summarizes the consensus among most analysts that lethal force outside of war is legitimate only if there is compelling evidence that the targeted person is directly participating in hostilities and no feasible possibility exists of capture. She unpacks the meaning of necessity and imminence and challenges the attempts of McMahan and others to relax the interpretation of imminence. As Welsh notes, a weakening of that standard expands the justification for military action and makes the use of force more the norm than the exception. Welsh shares the view of several other chapter authors that the Obama administration has adopted an overly broad and at times inconsistent interpretation of relevant ethical principles and is too permissive in defining who may be targeted. She concludes her essay by observing that the secretive use of drones has significant corrosive effects on the ability of liberal democracies to control the use of armed force, a perspective that Mary Dudziak shares and further develops in her chapter. Welsh also discusses the psychological and moral impacts of drone warfare on system operators, who are far removed by distance from their targets but are close to the victims because of observing their activities for prolonged periods and monitoring the destruction afterward.

Martin Cook offers a nuanced perspective on the military use of drone technology through a mostly sympathetic lens. A professor of military ethics at the Naval War College, Cook examines the tactical, operational, and strategic dimensions of drones, as well as their impacts on sovereignty law. He attests to the significant short-term tactical and operational benefits of drones in combat theaters and finds the use of these weapons ethically permissible. He notes, however, that the larger strategic objective of countering terrorism cannot be achieved by military means alone and that the use of drone weapons could make matters worse in some countries by generating more recruits for militant groups. This is a concern we raise in our chapter on strategy and that Cronin and other authors in the volume also address. It gets at the heart of the

strategic conundrum of drone weapons. They are tactically effective and highly discriminate, but their use does not end terrorism and may impede the larger challenge of countering violent extremism. Cook agrees with Heyns and other authors on the need for a common set of international norms to guide the use of these systems into the future. In the last section of his chapter, Cook quotes air force colonel Shane Riza's concern that this new "easier" means of launching military strikes may be lowering the threshold for going to war.⁷⁴ Cook also reflects upon the impact of these weapons for the "warrior ethos." What happens to the willingness to sacrifice and face danger that is traditionally associated with military service when remote operators launch strikes from safe locations far removed from the battlefield?

Mary Ellen O'Connell provides a sharp critique of the US government's case for the legality of drone strikes beyond recognized battlefields. She reviews the legal conditions for engaging in armed conflict found in the UN Charter and the laws of war. States have a clear right to use military force for self-defense, but this right is limited to specific circumstances and conditions and does not provide license for a policy of open-ended military operations and targeted killing in multiple countries. The US claim of a self-defense right was plausible with respect to the original armed conflict to counter al-Qaeda in Afghanistan, she writes, but the basis for that right changed when the war shifted to a counterinsurgency campaign against the Taliban. O'Connell challenges the claim that Pakistan and Yemen have provided consent for military attacks on their territory, noting that this can only come from a head of state and is generally impermissible except in settings of armed conflict and civil war. She dismisses the assertion that states have a right to use force in a state where the government is "unable or unwilling" to act against terrorism, observing that this claim is not found in any treaty or in the principles of international law. O'Connell concludes her essay by urging the United States to bring its drone policies more fully into compliance with international law.

Where O'Connell addresses the international legal dimensions of drone warfare, Karen Greenberg focuses on the realm of US domestic law and the government's increasingly broad definition of what is permissible in the use of targeted force. Greenberg examines the intellectual and legal underpinnings of US counterterrorism and national security policy, tracing their development from the early years of the Bush presidency after 9/11 to their current application by the Obama admin-

istration. Greenberg illustrates how, in her view, Obama's initial vocal commitment to the rule of law has gradually lost momentum, bogged down by the policy of targeted killing. Although the Obama administration has made progress in reaffirming a commitment to the rule of law in some arenas—such as ending torture and creating new legal procedures for the processing of detainees—Greenberg argues that the principles underlying questionable practices of the past persist in the targeted-killing policies of today. Particularly worrisome has been the expansion of the definition of the enemy beyond al-Qaeda and the Taliban to include “associated forces that are engaged in hostilities against the United States or its coalition partners.” This “potentially limitless definition,” in Greenberg's words, was incorporated into the 2012 National Defense Authorization, significantly broadening the Authorization to Use Military Force originally adopted by Congress in 2001. Greenberg also joins Welsh and other authors in critiquing the Obama administration's attempt to shift the meaning of imminence away from the customary meaning of a clear and present danger to an amorphous potential threat in the future.

Pardiss Kebriaei brings a litigator's insight into an analysis of the legal reasoning and lack of judicial oversight of current US drone policy. Kebriaei questions the legal basis offered by the administration for the targeted killing of Anwar al-Awlaki and other US citizens in Yemen. She is critical of the government's lack of transparency regarding the drone program and the denial of opportunities for judicial review. Bringing the drone program into conformity with the law, she argues, requires both internal checks and balances and external and independent judicial and legislative oversight. Although the administration has taken modest steps toward greater transparency, its disclosures remain selective and fall short of meaningful accountability. Proposals for the creation of a secret “drone court” modeled on the Foreign Intelligence Surveillance Court are misguided, she asserts, arguing that ex post judicial review by ordinary courts would offer a sufficient and preferable means of ensuring legal oversight.

The second section of the book focuses on the strategic implications of drone warfare for counterterrorism policy, beginning with Audrey Kurth Cronin's detailed assessment of whether drone strikes are an effective means of achieving US policy goals. Cronin notes with Cook and other authors that drones can achieve tactical objectives and that to date US counterterrorism policies have been generally successful in protect-

ing the safety of American citizens, but she questions the larger strategic logic of drone policy. The history of counterterrorism suggests that it is very difficult to defeat terrorist groups through military repression. She evaluates empirical studies on the effectiveness of targeted killing and finds no evidence that al-Qaeda can be defeated through such means. Cronin expresses concern about the negative reaction to drone strikes in targeted countries, which include stoking anti-American sentiment and incentivizing recruitment to extremist organizations. The adverse publicity surrounding drones also detracts from efforts to communicate a counternarrative against al-Qaeda that could focus on the terror network's greatest vulnerability, its wholesale indiscriminate killing of fellow Muslims. Within the United States, deep-rooted public fears and unrealistic political demands for absolute security are driving an unjustified faith in this new weapons technology, she contends, with potential negative consequences for implementing more sustainable strategies to defeat the terrorist threat.

Patrick Johnston offers a counterpoint to Cronin's chapter and argues that drones have been effective in countering al-Qaeda and related terrorist dangers. In a detailed empirical analysis of scholarly studies on the impact of targeted killings, Johnston shows that drones offer significant utility in the fight against terrorism—contributing to leadership degradation and the disruption of terrorist activities, as well as jeopardizing terrorist safe havens. Johnston finds the evidence of longer term disadvantages from drone warfare uneven and insufficient to draw robust conclusions. Drones weapons are effective and desirable tools in US counterterrorism policy, he argues, because of the important new military capabilities they provide, their relative cost effectiveness, and their ability to save American lives. He considers but rejects the concern that US practices may set norms that other governments follow in conducting targeted killings outside their borders. It would be folly, he writes, for the United States to relinquish the counterterrorism advantages it derives from the use of drone weapons to strengthen global norms against targeted killing.

In our chapter we evaluate the relative pros and cons of military and nonmilitary strategies for countering terrorism. Like Cook, Cronin, and Johnston, we point to the necessity of evaluating the effectiveness of drone warfare not just tactically but strategically in light of long-term US and international counterterrorism objectives. The chapter emphasizes the importance of distinguishing between global extremist groups

such as al-Qaeda and locally based insurgent movements involving Taliban and Yemeni militants. We find fault with the military paradigm that prevails in US policy and call for alternative strategies aimed at separating militant groups from potential communities of support. This is the approach of the UN Counterterrorism Strategy, which identifies various nonmilitary means for countering violent extremism. Our analysis advocates a two-pronged approach: coordinated international police and intelligence efforts to prevent terrorist attacks and a parallel series of multidimensional political, economic, and social measures aimed at ameliorating the grievances that give rise to violent extremism through more effective, inclusive, and accountable governance.

The final three chapters address the impacts of drone warfare on various rights—political accountability, freedom of information, and human rights more generally. Mary Dudziak reflects upon the repercussions of secretive targeted-killing policies on the further accretion of presidential powers and the weakening of congressional oversight in the United States. The manner in which the program is conducted has contributed to the erosion of political checks and balances on presidential war-making authority. Dudziak draws a parallel between the political justifications offered for President Obama's decision to kill Anwar al-Awlaki in 2011 and President Nixon's decision to bomb Cambodia in 1969. She traces the contours of both events and the actions undertaken by the respective administrations to shroud their activities in secrecy. The two episodes highlight the weaknesses of legislative constraints on executive authority to use military force. Political oversight has atrophied further in recent decades, she writes, because of structural changes in the way the United States wages war. A combination of all-volunteer armed forces, the rise of private military contracting, and robotic technology has led to what Singer terms a deepening social disconnect between the US military and the American people. The resulting social and political disengagement from military service and the consequences of US national security policy has worrisome implications for the future of American democracy. These trends create a pressing need for what Dudziak refers to as a "new war politics" to enhance public engagement, democratic accountability, and transparency.

Chris Woods writes from the perspective of an investigative journalist to critique the significant discrepancies that exist between US government claims about casualties from drone strikes and the estimates provided by independent reporters. President Obama has expressed

concerns about civilian deaths, and his administration has reduced the number of drone strikes in Pakistan, resulting in sharply lower civilian casualty levels there. Nonetheless, the US government has refused to release information on estimated civilian deaths or to acknowledge direct responsibility for specific killings. Administration officials have reacted with considerable hostility to journalist estimates of civilian drone casualties, routinely questioning the methodology and credibility of organizations seeking to publicize these figures. Through firsthand reporting from the field in Waziristan, however, Woods finds published media accounts of civilian casualties generally accurate. Woods speculates that the continuing discrepancy between administration claims and media reports may be the result of a policy defining “military aged males” as potential militants and thus legitimate military targets. Such a policy, if adopted, would clearly violate ethical and legal conditions for the use of force.

Rafia Zakaria analyzes the broader social consequences in Pakistan of US drone strikes and challenges the contention that these attacks are surgical and precise in their impacts. In the process she casts doubt on the claim that drone strikes are an effective means of preventing terrorist violence. She cites data from South Asian counterterrorism specialists showing that militant attacks in Pakistan multiplied as drone strikes increased. Zakaria also examines the population-displacement effects of drone strikes and militancy in the tribal regions of the northwest and the migration of Pashtun populations to Balochistan in the west and Karachi in the south. As Pashtun communities have expanded in Karachi, so has Taliban influence and the number of terrorist bombings in the city. This rise of violent instability in Karachi directly coincides with the escalation of drone warfare in the northwest. In addressing these developments, Zakaria widens the discussion of human rights impacts to encompass the principle of the “right to a home,” which she defines as the right to remain in one’s home and live free from fear. It is impossible to disaggregate the effects of drone strikes from the other factors fostering instability in Pakistan, she acknowledges, but at a minimum, drone strikes have not prevented a rise of terrorist bombings in the country.

As the authors in this volume write, drone weapons are bringing fundamental changes to the nature of armed conflict that will have lasting and widening impacts in the years ahead. These consequences will be felt across a range of concerns: ethical, legal, strategic, and human rights. All of these concerns are interconnected and have mutually reinforcing

impacts. Debates about the ethical and legal suitability of drone warfare, for example, are linked to calculations of its strategic value and impact upon human rights. As we note above and the authors discuss in the chapters that follow, answers to questions about ethical and legal issues such as necessity, just cause, self-defense, imminence, consent, and last resort are linked to assessments of whether the use of drone weapons enhances security and prevents terrorist violence. They also hinge on whether one believes that the availability of drone weapons makes the use of armed force more likely and how current drone policies affect fundamental civil and human rights. These and other issues are intertwined and should be assessed in a holistic framework. All are addressed from multiple perspectives in this book. By examining a range of these issues within a single volume, we hope to contribute to a more comprehensive and integrated understanding of the implications of drone warfare.

While drone technology is racing ahead, efforts to develop common standards and guidelines for the use of these systems are lagging behind. US and global security would benefit from the development of international rules for the use of these weapons. The prospect of other nations utilizing these systems in an unregulated manner poses a threat to the provisions of international law that place constraints on the use of force. The Obama administration has announced new policy guidance on the use of these weapons and has reduced the number of drone strikes and reported civilian casualties in Pakistan. These developments suggest that the administration is adjusting its policies and is not averse to the creation of stricter guidelines for the use of these weapons. To date, however, it has given no indication of a willingness to share these guidelines with other states or to participate in an international process to forge common standards. We believe such a step would be beneficial to the United States and international security. This book identifies some of the key principles and themes that should undergird such a process. We offer this volume as a contribution toward the creation of common standards that respect ethical and legal principles while enhancing security and human rights.

The Morality of “Drone Warfare”

Jennifer M. Welsh

While much of the recent analysis of drone technology focuses on its employment in counterterrorism, drones have had—and are likely to continue to have—three main uses: to kill (through the practice of targeted killing), to watch (through their powers of surveillance), and to aid (i.e., through their use in delivering humanitarian assistance¹). Ethical issues arise in all three of these domains, although the focus of this chapter will be on drones as instruments of killing.

It is crucial to set the stage for the following discussion by challenging two claims made about drone technology.

First, while one of the key ethical benefits of drones is alleged to be their low risk—that is, their capacity to kill without putting pilots or ground troops at risk of injury, capture, or death—it is misleading to imply that drones (such as the Predator or Reaper) are completely “unmanned.” They are not stand-alone platforms but rather require, for their operation, extended networks encompassing pilots, sensor operators, technicians, launch and recovery crews, mission commanders, legal advisors, and video analysts. In short, the deployment of drones remains a “human heavy” activity—even if much less so, relatively, than tools of conventional warfare. As Derek Gregory has argued, drones, as objects, are not inherently good or bad, nor are they fixed and determinate. Rather, the capacities, purposes, and dispositions of drones depend on the human network within which they are embedded.² Furthermore, as I will suggest later, their much-celebrated precision and discrimination are only as good as the supporting intelligence on which their use is based.

The second important clarification is that drones are not the first (and will not be the last) weapons to kill from a distance. They represent a continuation of technological evolution in advanced societies, beginning with tools such as the English longbow and running through to airplanes and cruise missiles. To reiterate, the fact that drones kill from a distance does not necessarily make them particularly good or bad. In fact, we should resist the tendency to become too preoccupied with distance as a factor that completely alters the ethical framework. As Gregory asks, “If you insist that it is wrong to kill somebody from 7,500 miles away, then over what distance do you think it *is* acceptable?”³

This is not to say that drones are not novel in some important respects. Indeed, one of the prized features, and comparative advantages, of a drone is its capacity to hover for extended periods of time—allowing for what Micah Zenko has called “sustained persistence” over the target area.⁴ Moreover, drones have broken down accessibility barriers, enabling the selection of new targets.

Nor do I wish to deny that drones raise crucial issues for the ethics of war. Many scholars have concluded that they are ethically preferable to other military means (such as bombers, missiles, or special forces) because they allow for a more careful and prolonged view of the target, limit collateral damage, and decrease casualties on the side of those employing them.⁵ But, at the same time, there is a danger that these perceived benefits will contribute to a relaxation of the criteria for their use. As long-distance weapons, drones are being used not to bomb cities like Dresden, or rain forests in Vietnam, but rather to engage in targeted killing of particular individuals or small groups of individuals that meet a certain profile. Indeed, they have helped these practices to metastasize precisely because of their perceived low risks. In addition, the capacity of the drone has contributed—at least in the United States—to a rapid shift in the allocation of responsibilities between the intelligence services and the military, which has raised important questions about democratic accountability, particularly in situations falling outside of the traditional framework of armed conflict.

In the sections that follow, I analyze in further detail the ethical issues that arise in the context of the use of drones for targeted killing. In the first section, I assess how targeted killing in wartime and peacetime might be morally justified. In so doing, I will argue against the tendency to assume that special rules are required for terrorist suspects. In the second section, I will examine more closely the US government’s ap-

proach to the targeted killing of terrorist suspects and its reliance on a war paradigm.

As I will elaborate in these two sections, targeted killing through drones has significant implications for what just war theory calls *jus ad bellum* (the legitimacy of engaging in war—hereafter JAB), and *jus in bello* (the legitimacy of acts taken during the conduct of war—hereafter JIB). With respect to JAB, drones have the potential to change states' conception of, and adherence to, the notion of last resort (the principle stipulating that the use of force, because of its lethality and consequences, must only be contemplated after other means have proved unworkable). More specifically, they both raise the threshold for engaging in a large-scale war (since they offer an alternative means of meeting a threat) and encourage relaxation of the last-resort criterion when contemplating their use (since they are a means short of full-scale war).

With respect to JIB, drones offer a better prospect of meeting the requirement of noncombatant immunity. But ironically, as Daniel Brunstetter and Megan Braun have argued, this in turn has had a morally relevant effect: the US government's faith in drones' proportionality and discrimination has induced the United States to undertake more frequent and riskier strikes, thereby increasing the likelihood of the collateral damage drones are praised for preventing.⁶ Moreover, the US government's implementation of the discrimination principle in the context of counterterrorism (particularly in signature strikes) has led to questionable methods for defining a combatant, which in practice has meant that those who the law of armed conflict (LOAC) might define as civilians have been killed in drone strikes.⁷ These two trends suggest that so-called drone warfare may not actually eliminate risk but rather transfer much of it from one society to another—from the country authorizing drone strikes to the country in which terrorist suspects are located but which may not be harboring them deliberately. This raises ethical questions about the legitimacy of such a quest for low-cost warfare. The impact of US drone use on human rights law and international humanitarian law also raises broader questions about how other states—which are presently developing the technology—will view their legal rights and responsibilities in these evolving reciprocal regimes.

In my third and concluding section, I will argue that targeted killing through drones has observable and morally relevant effects for not only the people and societies that are targeted but also the society sponsoring

the killing (particularly if it is a constitutional democracy) and the individual operating the drone. In the former case, drones—whatever their promise about low-risk killing—are helping to undermine a recent but important commitment on the part of liberal states not to kill outside of a war context. With respect to drone operators, they are simultaneously relaxing the aversion to killing (by further removing the killer from the killed) and providing more information to these individuals than is available, for example, to bomber pilots. As a result, drone warfare may actually be more intimate than some observers have suggested.

The Morality of Killing in Wartime and Peacetime

We can begin this discussion with the simple observation that in a targeted killing the victim is precisely identified; the lethal action is directed intentionally at her. It implies, as Michael Walzer has noted, a mind-set of liability.⁸ This is what distinguishes this practice from aimless killing, which most would agree is morally reprehensible.⁹

But the default position must be that the deliberate and intentional killing of another human being, no matter who he is, is presumptively an immoral act. Let's call this position P1. So how, if at all, can we move away from this default position and allow for exceptions?

Killing in War

Let's start with the war context. As part of the historical development of the LOAC (which draws to a large degree on just war theory), sovereign states have attempted to tame the practice of war, and limit its impact on civilians, by agreeing to a qualification to this default position—let's call it P2. P2 stipulates that in the context of an armed conflict, combatants (and only combatants) may be deliberately targeted and killed. I would observe, following Jeremy Waldron, that this position has not necessarily been reached through deep moral reasoning that justifies why combatants should be killed but rather through the pragmatic experience of trying to prevent wholesale slaughter. P2, as Waldron puts it, is “one strand of normativity in an otherwise normative free zone.”¹⁰ I should also note that there is one powerful revisionist strand within the ethics of war, developed by Jeff McMahan and David Rodin, which does attempt

to provide moral reasons for why particular combatants should be liable to be killed. For reasons of space, I cannot fully analyze that strand of thinking here, although I will return to aspects of it below.¹¹

If one accepts this P2 qualification, and I do, then it seems clear that in the context of an armed conflict, drones can be used as one means, among many, to kill enemy combatants in the service of military victory—provided the moral principles associated with JIB (most notably, discrimination and proportionality) are honored. The key issues then become twofold: determining when one is in a war context (on which I will say more below) and determining who is an enemy combatant. This second task is difficult, but not impossible, in nontraditional and asymmetric conflicts. It involves a reasoned judgment, drawing on criteria from the LOAC, as to who is directly participating in hostilities. I will not elaborate further on the application of these criteria, although I recognize that it gives rise to controversial cases.¹²

But none of this is targeted killing *per se*. It is deliberate killing, but not necessarily aimed at particular, named individuals. Instead, it is killing on the basis of status: combatants (versus noncombatants).

Individualized or targeted killing also has its place in war and can in certain cases be morally justified. Think of those instances, for example, in which snipers have been sent to the front lines to kill a general or colonel visiting the enemy troops. The moral logic here is that the deliberate and targeted killing of this particular individual can advance the military objective, shorten the conflict, and save both civilian and combatant lives. It is therefore justified if JIB restrictions can be honored.

But two questions then arise. First, when, and in what context, can such individuals be killed? Can they be targeted while relaxing in their barracks, or must they be on active duty? What about when they are removed from the war theater—on vacation in a neighboring country? In these cases it seems that the criterion of “direct participation in hostilities” needs to be maintained: if the target is in reasonable proximity to the war theater (i.e., in or near the barracks), he can be targeted and killed; if he is not participating directly in hostilities, he is not a legitimate target.¹³ While geography has most often been used as a means of establishing direct participation, the so-called revolution in military affairs, which has the effect of establishing remote command and control centers, creates scenarios in which close geographical proximity to the field of battle may not necessarily be required.¹⁴

The second question is whether political leaders—rather than mili-

tary leaders—can be legitimate targets in wartime. The LOAC generally bars the practice of killing political leaders, largely because of their crucial role in peace negotiations. In addition, as Waldron has argued, many countries (including Western ones) have invested deeply in the practice of maintaining a separation between the civilian and military arms of government and in the ultimate supremacy of the civilian. Therefore, to erode this norm, by deliberately targeting key civilians, has significant consequences.¹⁵ Some moral philosophers have argued that there are morally defensible instances of targeted killing of particular civilians in leadership roles—for example, the extrajudicial killing of Hitler—on the grounds that there are some leaders with whom, in Walzer's words, "we can't imagine negotiating."¹⁶ But we should resist being carried away by the power of this single case and by the heavily subjective nature of deciding with whom we can negotiate. We would need to provide a very robust and detailed argument to justify such killing, particularly for why capture is not an option. Any targeted killing of a civilian—even if the political leader is in control of the war effort—must be the very last resort.

An interesting recent case to consider in this regard is that of Libya. We know that in the spring of 2011, unmanned aerial vehicles (UAVs) were deployed over that country to help identify targets for NATO (North Atlantic Treaty Organization) air strikes. These deployments included the air strike that hit Colonel Qaddafi's convoy and led (ultimately) to his death. However, it was not a Western drone strike that actually killed the Libyan leader. Moreover, Western countries were not technically at war with Libya; rather, the United Nations (UN) Security Council had authorized member states of the UN to use "all necessary means" to protect civilians. Added to this context is the fact that the United States government was arguing, at the time, that it was not at war (given that no ground troops were stationed in Libya) and therefore did not require congressional authorization for its action.

From this ambiguous situation a more straightforward question emerges: is it morally justifiable to deliberately kill the political leader of another country (using a drone) when we are not actually (or yet) at war with that country?¹⁷ This question could arise either in a case in which there is substantial evidence that a leader is planning a genocidal attack on a portion of the country's population or in a case in which there is substantial evidence that he is about to launch an aggressive war against "us." Again, some moral philosophers argue that such killing can in rare

cases be justified, drawing on four kinds of reasoning: an assessment of necessity (which would emphasize the very large loss of life that is about to occur); an assessment of liability (which would emphasize that it is this particular individual that is liable for conceiving of and directing the future campaign that will result in this large-scale loss of life); an assessment of alternatives (which would have to conclude that there is no viable nonlethal alternative, such as coercive diplomacy or capture); and, lastly, an assessment of consequences (which would emphasize the potential to avoid escalation to large-scale conflict through a surgical strike). The appeal of the targeted killing, as Fernando Teson argues, is that it “performs a double task: it reduces the number of victims to one, and it inflicts lethal force on the blameworthy individual.”¹⁸

Notice here, however, that threat alone is insufficient to justify such a targeted killing; there must also be clear evidence of liability (in this case, strong evidence of an organized plan to launch large-scale killing) and no reasonable possibility of capture. Furthermore, targeted killing of this kind could not be morally justified on the basis of past behavior or as a form of post facto justice. It can only be legitimate to address an imminent action about to be launched by a particular individual.

While this argument for the morality of targeted killing of civilians in very specific situations has appeal, we must also recognize that it fosters a reconceptualization of the JAB criterion of last resort.¹⁹ On the one hand, the possibility that a preemptive drone strike could take out the individual who is directing the chain of events that will create a just cause for our response seems to raise the threshold for engaging in full-scale war. Surely we should take this lower cost action first? But on the other hand, the very fact that a drone strike would not constitute war per se might tempt decision makers to relax the criterion of last resort. Why try other measures, when a pinpoint strike will do?

While I would not want to claim that a peacetime assassination of this kind could never be morally justified, I have grave concerns about legitimating such a practice of targeted killing of civilians, particularly in the absence of evidence of last resort. We have a moral obligation, given the default position, to try every other means of dissuading that individual from embarking on that particular action. And even when we have fulfilled that last-resort condition, I would argue that there are still significant agent-relative reasons (which I will return to later) for liberal governments to refrain from premeditated assassination of this kind. The moral injunction not to kill without due process applies to both citizens

and foreigners; even if the latter are not fully protected by a liberal constitution, surely they should be subject to liberal values?

Killing of Terrorist Leaders

Next we turn to the more particular context of counterterrorism. As suggested above, in a war setting the intentional killing of enemy combatants can be justified, provided the actions abide by strict standards of proportionality and there is no intentional killing of innocent bystanders. But what about particular leaders? If and when the political and military leadership can be separated (which admittedly in a terrorist situation it is difficult to maintain), only those in the second category may constitute a legitimate target for killing and only when they are directly participating in hostilities. Like Waldron, I have deep reservations, given over half a century of experiences with terrorist organizations (not just the experience of al-Qaeda), about a permissive approach to the killing of terrorist leaders.²⁰ And where, in those very rare cases, it may be morally justifiable to target a particular leader, rules of proportionality and discrimination apply, and capture—where possible—must still be the preferred option.

Once we move out of a clear war context—by which I mean a geographically defined armed conflict—judgments using this basic framework become more complex. To put it more concretely, while deliberate killing of terrorists, conceived as enemy combatants, can be justified (barring violations of JIB) in a setting such as Afghanistan, it is more problematic in countries such as Pakistan or Yemen.

I. EXTENDING THE WAR PARADIGM. Broadly speaking, there are two frameworks or paradigms open to us for assessing the moral justifiability of targeted killing in this alternative context. First, in the war paradigm, we would reason that known terrorists in these cases are all effectively enemy combatants, operating from a geographically remote base where the host government either has given consent for the operation or is incapable of acting or unwilling to act. In asymmetric conflicts, without uniformed soldiers or an identifiable front, it is often argued that we must move away from the ordinary tools of law enforcement—which are no match for the unique kind of threat to innocent life that terrorists pose. As Walzer puts it, sometimes we have to go “outside the zone of peace” and act as if we were at war.²¹ This concession includes permit-

ting targeted killing against those planning future attacks, that is, those who cannot be arrested, if the judgment is made that it is necessary to act now. In sum, terrorists can be killed on sight, regardless of the threat they currently represent.

In the hands of the US government, this position has been embedded in a larger argument that the United States is engaged in a global and ongoing war against al-Qaeda. In 2001, the joint resolution passed by the US Congress (known as the Authorization to Use Military Force [AUMF]), authorized the president “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

Nonetheless, there are significant issues associated with extrapolating this power to apply to a variety of geographical and political contexts. Such a move is based on an assertion that terrorist suspects are liable to be killed because they have violated the rules of JAB—giving rise to the collective right of self-defense. They are unlawful aggressors and are therefore liable to attack as military targets. But while this might be a relatively (although not wholly) uncontroversial assertion in the case of Afghanistan—where NATO and other states formally agreed that the US response in 2001 was a legitimate act of self-defense—this is hardly the case for the broader War on Terror. The state, especially a liberal state, cannot unilaterally override the strict moral and legal restrictions on deliberate killing by declaring a perpetual war against terrorists.

In addition, there has been notable inconsistency in the US approach. On the one hand, President Obama welcomed the killing of Osama Bin Laden on May 2, 2011, by claiming that “justice has been done.”²² But one would normally render that judgment when someone has received a just punishment—not when a combatant has been killed in a war. On the other hand, the subsequent statement by US attorney general Eric Holder insisted that the killing of Bin Laden was indeed a legitimate act of national self-defense, and “fully consistent with the laws of war.”²³ This judgment also seems difficult to pronounce without some evidence of imminent threat.

2. EXTENDING THE LAW ENFORCEMENT PARADIGM. The second way to assess the legitimacy of targeted killing is to avoid drawing on the war

paradigm and to view situations through a lens of law enforcement. In most cases, this leads to the conclusion that targeted killing of terrorists is wholly impermissible. While both Pakistan and Yemen are states that experience violence, there is no full-scale civil war (where there are rival claims to political supremacy). Nor can these countries be portrayed as at war with the United States. There are lawful and nonlethal means at their disposal (and at the disposal of the United States) to deal with terrorists, and these must presumptively apply.

This paradigm creates difficulties, of course, in those instances in which the key institutions and processes associated with law enforcement do not appear to be available. For example, the Federally Administered Tribal Areas (FATA) of Pakistan—where a majority of the US strikes have occurred during the past decade—are widely acknowledged to be run by the Pakistani Taliban.

3. A MIDDLE WAY? Is a middle position possible? Philosophers such as Teson, who are unhappy with what they perceive as weaknesses in the law enforcement paradigm, believe that it is. For these analysts, terrorism constitutes a special kind of crime, given the level of harm it threatens, the ubiquitous nature of that threat, and the presence of centers of command overseas. Yes, terrorists can be conceived as criminals (and should often be approached as such), but it is also true that they are different from other kinds of criminals. In particular, Teson reasons that the law enforcement paradigm cannot fully help us to address the dual nature of terrorists—as individuals who claim license to kill indiscriminately but who simultaneously seek the protection afforded by civilian status.²⁴

To address these weaknesses, Teson argues that we should view counterterrorism in a *sui generis* context, however, one that is still closer to the peacetime than to the wartime context. On the one hand, the war paradigm is wrong to claim that targeting known terrorists is the functional equivalent of killing in war; on the other hand, the law enforcement paradigm is wrong to claim that targeted killing of terrorists outside of a war context cannot be morally justified. Instead, he contends, we should identify those specific circumstances in which targeted killing of a terrorist can be permissible, outside the war theater, as long as the following criteria are met:

- A specific terrorist attack (which threatens a large-scale loss of life) can be avoided through the targeted killing;

- There is clear proof that the contemplated target is liable (i.e., causally connected to the impending attack); and
- Capture is not a viable option.

Two points are worth underscoring here. First, note again that threat alone is insufficient to justify the targeted killing. There must also be clear evidence that the specific individual intends to carry out or facilitate a serious act of terrorism. An individual cannot be killed simply because of his membership in a terrorist organization or because he has committed terrorist actions in the past. Targeted killing should be used only against individuals whose critical importance we have clearly established and around whom we have gathered a substantial degree of intelligence.²⁵

Amos Guiora, former legal adviser to the Israeli Defence Forces, takes this injunction a step further. Legitimate targeted killing, in his view, requires that two conditions are met: first, that the individual in question intends to carry out or facilitate a serious act of terrorism; and second, that the individual has made significant steps directly contributing to this planned attack. In other words, it is wrong to assume that once the first criterion has been met (and a legitimate target has been identified), that his or her subsequent actions cease to be relevant. The individual in question must be actively and presently involved in planning a large-scale attack.²⁶

Second, the option of capture must be seriously pursued, despite the dilemmas that it can sometimes pose. Even when confronted with terrorists, liberal states cannot be absolved from the need to respect constraints on the use of deadly force outside of a formal war context. Capture of a terrorist cannot simply be the “preferred” alternative; for Teson it is morally required, unless it proves impossible or morally prohibitive.²⁷

There is much to recommend to this position. Permission to kill a terrorist suspect in a peacetime context must remain a very rare and regrettable exception to a fundamental prohibition on state violence and must be interpreted strictly. This means that capture must be pursued—even if at cost to our “own side.” It also means that there must be “right authority” for such exceptional acts, the application of publicly debated criteria, and mechanisms of post facto accountability for mistakes.

4. AN INTERNATIONAL HUMAN RIGHTS FRAMEWORK. Despite the strengths of a middle-way position, there are two problems with Teson’s

approach. First, he has too quickly assumed that targeted killing of terrorists cannot be subsumed under a peacetime framework and requires its own special rules. This is partly due to his reliance on a narrow conception of the law enforcement paradigm. As Jeff McMahan has argued, in the domestic context, we do allow killing in law enforcement, as a last resort, when arrest is impossible or too dangerous, and there is no *a priori* reason why we could not extend this logic beyond our borders. Thus, the terrorist operating outside a potential victim's legal jurisdiction, sheltered by a host government, is in McMahan's reasoning analogous to a mass murderer (or someone threatening mass murder) resisting arrest.

But we do not have to rely on the reasoning, however elegant, of moral philosophers to arrive at this possibility. The rules encompassed under international human rights law already provide a sufficient framework for Teson's exceptional cases. They start from pronouncements about the right to life and allow for killing in two cases: first, when a state of war can be argued to exist (thereby creating jurisdiction for the LOAC²⁸); and second, when lethal force is required to protect life, as a last resort.²⁹ This latter provision, however, can only be enacted on a case-by-case basis; it could not be invoked through a blanket authorization of the killing of persons of a certain status or identity (i.e., a terrorist). Moreover, the decision to kill in such a situation cannot be taken through a consequentialist weighing of civilian deaths; if innocent bystanders' lives are threatened, the use of lethal force is prohibited.

The weakness of this position is its alleged inability to deal with the "FATA situation." As Waldron suggests, in a context like this, it is difficult to reason by analogy to justify targeted killing as an extension of individual self-defense or the power of police to kill as part of law enforcement. In FATA, the capacity of local police forces has been subjected to considerable criticism. Nor are there (yet) robust legal processes that are reliably capable of preventing misuses of the principles associated with self-defense, such as necessity, and prosecuting those who have engaged in abuse. We accept some of the problematic principles that justify killing in the self-defense paradigm, as Waldron insists, precisely because we know there will be proper legal processes that will judge what individuals have done in the heat of impending attack.³⁰

While recognizing the strength of this counterargument, I would suggest that the FATA situation is much rarer than it is commonly alleged. In dealing with terrorist suspects inside the territorial jurisdiction of another state, a government is obliged to both cooperate with that other

state's law enforcement capacity and to assist in the creation of a more robust capacity, so as to avoid the need for targeted killing. In the very rare cases in which a government cannot rely on the host state—and as I will argue later, neither Pakistan or Yemen currently fall into this category—targeted killing of particular terrorist leaders might still be justified as a preemptive use of force (short of full-scale war) and therefore subject to the requirements of international law with respect to self-defense. As I will suggest below, such a government would need a separate *ad bellum* justification in each and every case and could not justify its attack through a blanket application of JAB or the “terrorist” label.

The second problem with Teson's argument (along with that of McMahan and Walzer) is the suggestion that an “imminence test” does not need to be met in the case of targeted killing of a suspected terrorist. Indeed, McMahan has argued that while killing is the very last option in domestic law enforcement, in counterterrorism last resort comes earlier than in “routine police work,” because terrorists “operate outside the legal jurisdiction of the people they intend to kill.”³¹ What really matters in the situation of suspected terrorists, Teson et al. argue, is a demonstration of necessity and probability: that a large-scale attack is being planned and will occur at some point unless we act now. We do not need to prove that it is about to occur in order to activate the legitimate right of self-defense. We use the concept of imminence (especially in criminal law and international law) primarily to ensure that the defensive action is really necessary, since the nature of that action—particularly in the case of a war in self-defense—is so destructive. But this is not the case in targeted killing, which, as suggested by its very name, should be precise and limited in its effects.

What these thinkers are promoting, therefore, is a refinement of the relationship between two principles at the heart of any discussion of self-defense: necessity and imminence.³² Despite their importance in determining the legitimacy of acts of self-defense, there remains significant debate about what precisely both principles imply in the context of contemporary threats.³³ The test for establishing the necessity of a lethal act of self-defense has generally been the absence of a peaceful alternative. Many invocations of necessity, however, also invoke two other considerations, particularly in the context of anticipatory self-defense: the gravity of the threat and the probability that it will occur. Imminence, by contrast, has generally referred to the temporal quality that a threat must have in order to legitimize anticipatory acts of self-defense: the

likelihood that an attack will occur in a very short time frame. From a purely conceptual standpoint, Teson et al. suggest, necessity is the first-order principle, and imminence—which is linked to but not synonymous with probability—is a subservient and second-order consideration. We would not want to stipulate that in a situation in which a highly probable and severe threat existed, whose realization was still temporally remote, that no action could be taken even when it is unlikely that another opportunity to eliminate the threat will arise. In sum, when establishing necessity in the context of targeted killing, it is the nature of the terrorist threat, and the potential of other means to address it, that should be the focus of our assessment, and not the question of whether an attack is temporally close or remote.³⁴

In spite of these conceptual arguments, I question this rush to dispense with imminence and the range of preventive actions that it might justify. First, for all the reasons outlined above, targeted killing does have serious effects (and I will suggest additional moral effects below). Just because collateral damage may be limited does not mean that a targeted killing does not have profound consequences. As a result, it should remain a very last resort. Second, probability cannot be completely dissociated from temporal factors. Considerations of timing heavily affect the possibility of making a compelling and accurate statement about the likelihood and gravity of a threat. In other words, if probability increases with time (and arguably, it does), and if necessity is partly determined in relation to probability, we still need a conception of imminence. Moreover, imminence remains a highly practical method of assisting judgments. We can know, as a matter of fact, whether someone plans to commit harm and when they plan to do it. On the other hand, determining whether the current moment is the only or "best" opportunity to prevent him or her from achieving these plans is based on an interpretation of what might happen in the future and involves an infinite number of variables and is thus in many ways a more uncertain calculation.³⁵ Finally, and relatedly, the lack of temporal proximity, and reliance on probability, could mean that the military option is "kept in play" for an extended period of time, thereby calling into question the core claim at the heart of necessity: that there is no peaceful alternative available to the lethal act of self-defense.³⁶ More broadly, it means that the justification for killing becomes semipermanent, running against the notion in just war theory that the use of lethal force is to be an exceptional state.

Assessing Real-World Practice

So how do the moral arguments I have discussed so far relate to the practice and justifications of the US government with respect to targeted killings? The position taken by the Obama administration, particularly in relation to the targeted killing of US citizens,³⁷ is that it is lawful for the US government to engage in such killing if (1) the target is a senior figure in al-Qaeda who poses an “imminent threat” of violent attack against the United States; and (2) the capture of such a figure is not feasible (either because capture “could not be physically effectuated during the relevant window of opportunity,” because the host country where the figure was operating did not give its consent for the killing, or because capture would pose “undue risk” to US personnel). The rationale offered for this position comprises a mix of domestic and international principles: the constitutional responsibility of the president to protect the country, the inherent right of the United States to national self-defense under international law, the existence of a noninternational armed conflict with al-Qaeda (which legitimizes the use of force not only in hot places like Afghanistan but also in countries outside the area of active hostilities, such as Pakistan and Yemen), and Congress’s authorization of the use of force against terrorists as part of this noninternational armed conflict.³⁸

Interpretations of Imminence

The first notable aspect of the US position is its engagement with the JAB principle of imminence. Given that during the most intense period of drone strikes the United States has employed the war paradigm, viewing the 2001 AUMF as a blanket authorization for all uses of force against al-Qaeda, it would not have needed to provide an additional *ad bellum* justification for targeted killings. Instead, the war paradigm would imply that all that is required is a defense of *how* force is used in particular cases (i.e., whether it is in accordance with JIB principles). In short, if drone strikes were part of an ongoing war against clearly identifiable combatants, imminence would not need to be debated. The fact that US officials, including the president, have invoked imminence suggests that the United States itself believes—despite its invocation of the war paradigm—that it is engaged in a qualitatively different kind of activity, particularly where US citizens are involved, and that an indepen-

dent justification for every act of targeted killing is morally and legally required.

In invoking imminence to provide that independent justification, the United States has diverged from the traditional conception of the principle of imminence in international law and the ethics of war. Whereas international law has insisted that imminence implies evidence of a specific attack in the immediate future, the position of the Obama administration is that it is sufficient for a target to be “generally engaged” in terrorist activities aimed at the United States.³⁹ Relaxation of the imminence restriction stems from the claim that terrorism is not marked by one “massive attack” or “one isolated incident” but rather is “drawn out,” “patient,” and “sporadic.” To wait for firm evidence of an attack in the immediate future would leave no time for the United States to defend itself—or, at the very least, would greatly reduce its “defensive options.”⁴⁰ The position of the United States thus echoes my earlier discussion of necessity, in which lethal acts of self-defense are justified on the logic that the victim state must act now rather than later. As the US Department of Justice puts it, the United States is likely to have only “a limited window of opportunity within which to defend Americans in a manner that has both a likelihood of success and sufficiently reduces the probabilities of civilian casualties.”⁴¹

In sum, the definition of imminence that has been promoted by the United States is extraordinarily broad, opening the door to killings in cases in which there is no evidence of a specific attack being planned in the immediate future and—by implication (since more attacks would be made possible)—to a higher risk of civilian casualties.

Kill or Capture?

Second, there are probing questions to be asked about how seriously the United States has contemplated the option of capture. In press reports that coincided with Central Intelligence Agency (CIA) director John Brennan’s testimony to the US Senate in February 2013, officials in Yemen were cited as saying that they had not been given sufficient opportunities for their own counterterrorism squads (predominantly trained by the United States) to go after al-Qaeda operatives.⁴² In addition, by arguing that capture cannot be pursued when there is “undue risk” to American personnel, the United States is making a moral judgment about whose lives should be prioritized. This judgment becomes all the

more important when the deaths resulting from drone attacks are also civilian ones. Ethical debates about the conduct of war have long questioned the legitimacy of force protection as a priority principle for those engaged in armed conflict.⁴³ Both law and morality call upon military (and civilian) leaders to take civilian protection seriously.

Interpretations of Sovereignty

Third, the United States has at times applied what Rosa Brooks calls an elastic conception of sovereignty⁴⁴ in its dealings with states such as Pakistan over drone strikes. Under international law, the right of the US government to launch drone strikes on the territory of another state (thereby impacting upon its sovereignty) could be justified through three lines of argument: (1) an extended concept of self-defense; (2) evidence that the state in question is unable or unwilling to deal with the terrorist threat; and/or (3) the presence of host-state consent.

In the first case, as I have shown above, there are legitimate questions to be raised about the extension of the war paradigm to countries such as Pakistan. More broadly, it can be argued that the United States has diverged from the pre-9/11 jurisprudence on self-defense (exemplified by the International Court of Justice decision in the 1986 *Nicaragua Case*⁴⁵ and the International Law Commission's Articles on State Responsibility, Article 8) by arguing that states forfeit their sovereign right to non-intervention if they fail to live up to their responsibility to control their territory and prevent it from being used as a haven for terrorist activity.⁴⁶

Second, a US claim to the right of extraterritorial self-defense could be made by persuasively demonstrating that the state in which the attacks are occurring is "unable or unwilling" to address the threat posed by suspected terrorists.⁴⁷ Washington's claims in this regard have been contested on two grounds.

To begin, international law currently gives very little guidance about what factors are relevant in assessing capacity and willingness. For example, it is unclear whether the United States must first ask the government of Pakistan to take measures to apprehend before the United States may act or whether it can simply act on the basis of its own (unilateral) judgment. Similarly, there are no temporal parameters for determining how long the United States should wait before acting. Without any clear standards of assessment, or an impartial body to make determinations, the judgment concerning capacity and willingness is highly

subjective and does not act as an effective break on violations of other states' sovereignty.⁴⁸ The victim state effectively decides for itself.

In addition, in the specific case of Pakistan, there is empirical evidence that can be used to counteract US contentions about the legitimacy of its coercive response. In 2013, during the visit to Pakistan by the UN Special Rapporteur for counter-terrorism and human rights, the government of Pakistan rejected the notion that it was unable or unwilling to address the terrorist challenge in its sovereign territory by noting the variety of measures it was taking to tackle the problem.⁴⁹ Furthermore, it insisted that, unlike the United States, it did not view the situation in its border regions as constituting an armed conflict and that it considered its own military forces operating in the region as engaged in law enforcement activities aimed at counterterrorism.

With respect to the final justification for the use of force, host-state consent, the United States has claimed that the government of Pakistan has tacitly given its consent for drone strikes—a claim that has been substantiated by some journalists' accounts of the origins of the CIA's targeted-killing program.⁵⁰ Again, however, members of the government of Pakistan have disputed this claim by pointing to the official protests against drone attacks sent by its Ministry of Foreign Affairs to the US embassy in Islamabad and the unanimous resolution adopted by both houses of the Pakistani parliament in April 2012 calling for an end to the US use of drones over Pakistan's territory. As a result of these counter-arguments, and his reading of international law with respect to state responsibility,⁵¹ the UN Special Rapporteur concluded his report by declaring the use of force by the United States to be a violation of Pakistani sovereignty: "As a matter of international law the US drone campaign in Pakistan is . . . being conducted without the consent of the elected representatives of the people or the legitimate Government of the State."⁵²

Defining Combatants

Finally, US practice during the first term of the Obama presidency drew on questionable methods of defining combatants and civilians. This is particularly true with respect to the strategy of killing individuals whose identities are not known but who are alleged to match a profile (i.e., the signature strikes launched in Pakistan and Yemen). Here the logic of the LOAC was turned on its head: fighting-age males were presumed to be combatants, unless there was specific evidence to the contrary, in or-

der for the United States to meet the proportionality criterion. This permissive approach to defining targets⁵³ not only runs against the spirit of the Additional Protocol to the Geneva Conventions but also challenges the core normative advance outlined earlier—namely, the immunity of civilians to acts of deliberate killing.⁵⁴

The Moral Effects of Killing

When we evaluate the morality of targeted killing through drones, we need to weigh not only the factors I have thus far outlined (such as the threat and culpability of those identified as targets and the viability of capture) but also the effects on those doing the killing. To put it another way, while we might agree that it is a good thing that person X is killed, we may not want to create a state of affairs where “we”—our leaders, or our drone operators—do the killing.⁵⁵ These agent-relative concerns can and do apply to governments, not just individuals. After all, the US prohibition on assassinations was primarily motivated by the view that liberal governments should behave in accordance with the values and virtues for which they stand. Teson writes that

in a liberal democracy the morality of state coercion is not determined solely by the blameworthiness or dangerousness of bad persons, but by the values, goals, and purposes of the liberal state itself. The terrorist is a public danger and a moral monster, but those facts do not exhaust the relevant reasons for justifying state deadly violence. What *we* are, and what we may become, also matters.⁵⁶

This discussion of agent-relative factors also extends to the individuals who operate remotely controlled weapons systems. As Peter Singer has observed in his work, “the introduction of unmanned systems to the battlefield doesn’t change simply how we fight, but for the first time changes who fights at the most fundamental level. It transforms the very agent of war, rather than just its capabilities.”⁵⁷ We need to consider—just as we do with traditional combat—what kind of warriors are being created and what the aftereffects of battle will be. It is often assumed that the use of drones is easier, morally speaking, than engaging in traditional combat because it removes the killer from close proximity to the killed.

But these assumptions need to be interrogated further. To begin, it

could be argued that drones are eliminating one of the traditional restraints on the conduct of war. Psychological literature shows quite convincingly that people find it difficult to kill their fellow human beings at close range and that particular training and conditioning is needed to overcome this aversion. Drones effectively do away with these effects of proximity. In so doing, some have argued, they also promote a change in perspective regarding the target of violence. As it becomes easier to kill the enemy, there is a subtle but important shift in the reasoning for that killing: the enemy becomes depicted as criminal and ruthless, thereby deserving of direct attack. Second, the use of drones does take a toll on those who operate them. As philosopher and psychoanalyst Nancy Sherman has argued in her book *The Untold War*, soldiers carry all "the moral weight of war,"⁵⁸ exempting the citizens of democratic states from having to do that "heavy-lifting." We might be tempted to think that drone operators, who work from a safe civilian space far away from any battlefield, do not bear the same level of guilt as more formal combatants who engage in killing of the enemy at closer range.⁵⁹

In fact, because of drone technology, operators are actually quite close to their potential victims—much closer than pilots of manned aircraft. They are heavily immersed for sustained periods in the environment of the target, even if that immersion is technologically and culturally conditioned. In addition, they often stay on to carry out the bomb damage assessments, so they see the full effects of their decisions. As one current drone operator explains,

I used to fly my own air missions . . . I dropped bombs, hit my target load, but had no idea who I hit. Here I can look at their faces. I watch them for hours, see these guys playing with their kids and wives. When I get them alone, I have no compunction about blowing them to bits. But I wouldn't touch them with civilians around. After the strike, I see the bodies being carried out of the house. I see the women weeping and in positions of mourning. That's not PlayStation; that's real. My job is to watch after the strike too. I count the bodies and watch the funerals. I don't let others clean up the mess.⁶⁰

These features also mean that drones have mixed effects on actors' moral perceptions—their knowledge of morally relevant facts in a particular situation. This knowledge is critical to determine whether any notion of moral or legal responsibility for actions is to be applied. Indeed, since the Nuremberg trials, combatants have had to meet a moral

perception criterion in order to be excused from wrongdoing (in other words, they have to prove that they believed an order from their superiors was legitimate, on the basis of the knowledge that they had at the time).⁶¹

As scholars have noted, UAVs transform the way in which combatants acquire this knowledge of morally relevant facts.⁶² While they remove operators from the battlefield, their capacity to remain airborne for long periods of time facilitates an understanding of patterns of life, and their sophisticated sensors allow for a richer situational understanding than other long-distance weapons. These sensors also provide a high-resolution image of a combat situation in real time (as opposed to a blip on a screen). Taken together, one might therefore argue that drones produce better targeting decisions, because operators, and their superiors, will have more knowledge and hence a stronger appreciation of morally relevant factors.

On the other hand, distance does have an impact, particularly on surveillance. Operators rely on the sensors' bird's-eye view, rather than on facial expressions or gestures, which are often important in determining a threat. Moreover, onboard sensors do not enable operators to understand the social dynamics of a conflict. Although they reveal who is participating, they do not probe into why (a task that on-the-ground intelligence can undertake). Thus, while some might argue that UAVs have the potential to overload the operator with information, it is also possible that operators will pick up too little morally relevant information (particularly if UAVs process and filter data before passing them on). In other words, despite the capacity for precision and discrimination, drones can only fulfill that capacity if supported with compelling intelligence.

Conclusions

This chapter has argued that drones are neither good nor bad in themselves but rather are a means, used in a variety of circumstances. Their most discussed use is in support of the practice of killing, whether more generally against enemy combatants in a war context or against particular individuals deemed to be liable for substantial threats (either against their own people, or against the US). As such, drones raise a series of significant ethical issues related to the justification for going to war

(JAB) and to the justification of particular acts carried out in the context of war (JIB). More specifically, their use has affected how decision makers conceive of last resort and how they honor the normative principle of distinction between combatants and noncombatants. However, one of the key questions associated with the use of drones in targeted killing of suspected terrorists is whether the strict war paradigm is always appropriate or applicable.

Whether used in peacetime or in wartime, drones in the service of targeted killing have significant moral effects, both on the institutions that authorize such acts and on the particular individuals tasked with operating them. These agent-relative factors, I have suggested, should remain front and center when thinking about the morality of drone warfare or the more specific practice of targeted killing. Our actions reflect who we are, and who we are is of the utmost moral importance.

CHAPTER THREE

Drone Warfare and Military Ethics

Dr. Martin L. Cook

The introduction of remotely piloted combat vehicles (drones)¹ to modern war raises novel ethical and legal questions. Many of these are familiar questions of just war, such as the proportionality of the destruction drone strikes cause in relation to the military value of the target and the ability of drone platforms and operators to be at least as careful to discriminate between military and civilian targets as other weapons systems. In addition, however, the complete impunity of drone operators to direct attack on the battlefield seems somehow distasteful, perhaps even dishonorable, to the conventional warrior ethos. The relative low cost of drones may lower the bar to the use of force at all, since one is more willing to risk or even lose an unmanned platform than one would be prepared to do with the lives of one's own military personnel. This chapter will explore some of these questions in light of the use of these platforms by the United States in recent years. It traces the nexus between evolving technology and changing conflict and how these developments have influenced military culture. This is followed by an analysis of the ethical and legal legitimacy of drones from a military perspective, considering their advantages from the levels of tactics, operational utility, strategy, and the international system. In particular, the chapter will explore the use of drone technologies from the perspective of professional military ethics, asking when and how drone use is consistent with achieving legitimate and ethically permissible military purposes.

New Technologies

The technology of warfare is continually evolving. And as it does, inevitably law and ethics lag behind and scurry to catch up to those changes. Unfortunately, the new technology is often first used in horrific ways. Only after the full danger of the technology is clear do law and custom manage to put the genie back in the bottle. Examples of this pattern include chemical weapons, inaccurate area bombing from airplanes, and nuclear weapons.

A range of new technologies is rapidly converging in the contemporary era to make possible a whole new category of weapon and to dramatically extend the trend toward asymmetrical warfare and war virtually free of risk to human life for one side of the conflict. Computing technology, electronic navigation, and robotics combine to make possible remotely operated and even fully autonomous systems and vehicles that operate in the air, on and under the sea, and on land. The rates of technological advance in these areas, and the enormous benefits of their use in many operating environments, virtually assure that the technology will continue to develop and be applied in myriad novel ways.

New Missions

It is significant that these technologies have become available precisely when the nature of armed conflict is also fundamentally changing. Immediately after the end of the Vietnam War, the US military focused almost entirely on planning for a major state-on-state fight with the Soviet Union. The Army rebuilt itself to be the world's most powerful combined arms force, requiring over one thousand square miles at Ft. Irwin, California, to practice battalion- and brigade-size maneuvers against an opposition force equipped and trained to look and act like Russians.² The Air Force as an independent military service was founded on a concept of strategic bombing against entire nations and, particularly after World War II, on nuclear strike at short notice against the Soviet Union. The Navy emerged from WWII as a force centered on aircraft carriers deployed primarily as carrier strike groups, comprising the carrier, cruisers, a destroyer squadron, and sometimes submarines, logistics support vessels, and minesweepers. It too trained and practiced on the as-

sumption that it would fight another navy similarly equipped and of similar size.

After the fall of the Soviet Union—and well before the attacks of 9/11—it was becoming increasingly obvious that these traditional force structures were poorly adapted for likely future conflict. But since the cultures of the services were wedded to them, and their leaders were themselves the most successful products of those cultures, resistance to fundamental rethinking was great. Historically speaking, experience would suggest that only demonstrated failure of the existing force structures would leverage a need to change.

The 9/11 attacks by al-Qaeda pitched the United States and its allies into a fundamentally different kind of war than that for which they had trained and equipped themselves. Afghanistan in the initial stages was conducted unconventionally, but only because then secretary of defense Rumsfeld rejected the conventional Army's war plan in favor of his own ideas of a "transformed" force of special forces and Central Intelligence Agency (CIA) operatives, augmented by technology.³ By the time the United States entered Iraq, however, it behaved and continued to behave in its preferred ways, long past the point where it was obviously not succeeding. Only slowly did the ground forces rediscover and implement a counterinsurgency approach appropriate to the task at hand. Only slowly did the Air Force and naval aviation adapt to provide tactical close air support to conventional Army forces in close coordination with embedded Joint Forward Air Controllers on the ground.⁴

This was a conflict in which stand-up, force-on-force combat rarely occurred—and even that almost entirely at the small unit level. More typically, combat was a cat-and-mouse game of trying to identify individual combatants and small groups who were doing their very best to covertly operate in the shadows, to plant explosive devices and terrorize the local inhabitants into silence or cooperation. Furthermore, it was clear that some individuals and groups, who were active in remote areas that were often inside the sovereign territory of a nation with which the United States was not at war, were planning terrorist attacks against the United States, Europe, the Philippines, and many other places. In general, the governments of the states where cells and groups were located were either unable or unwilling to disrupt those activities and often were unreliable or hostile to a degree that made intelligence sharing, let alone joint Special Operations raids, unlikely or impossible.

In short, this was a kind of conflict for which the training, mind-set,

and equipment of the US military was poorly adapted. What was required was a way to engage these actors without bringing the big footprint of US or allied ground forces—or even of large and noisy human piloted aircraft that might provoke a military response and risk aircraft being shot down and pilots killed or captured. This unique set of operational requirements motivated the CIA to take a relatively new platform, the Predator Remotely Piloted Vehicle (RPV), and arm it with Hellfire missiles for attacks into Afghanistan and Yemen in 2002. That the CIA was willing and able to weaponize the Predator, whereas the Air Force (for reasons I will explore in a moment) was reluctant to do so, accounts for the fact that we now have both the CIA and the Air Force operating large weaponized RPVs in various theaters. This division of labor will also be significant when I turn to the ethical and legal issues, because military drones are expected to comply with the laws of war, whereas CIA activities are by definition clandestine and generally illegal, which is why spies lack the legal protections of the Geneva Convention and immunity from legal liability for killing done in compliance with the law on armed conflict (LOAC).⁵

All military services have strong cultures and traditions, grounded in the branches of the service and the platforms that are perceived to be the “pointy end of the spear.” For the Air Force, since the 1970s, that pointy end was the fighter bomber. Although initially the heavy strategic bombers focused on the nuclear strategic bombing mission had dominated the service, after Vietnam the leadership of the Air Force had been dominated by general officers from the fighter community, brought up on the platforms of the F-16, F-15, and now the F-22 and F-35.⁶ A result of this strong fighter culture is that the Air Force was initially extremely reluctant to embrace RPVs. Indeed, the fact that the Air Force insists on calling them RPVs is testimony to that fact—even if dragged kicking and screaming into having them in the inventory, they at least make sure the word “pilot” still appears.

Even now, the Air Force struggles culturally to accommodate these platforms. Initially, RPV pilots were chosen from among already trained fighter pilots (who generally disliked the assignment). But it became clear that officers without previous pilot experience are actually easier to train, so individuals go directly to RPV training. Another cultural challenge is that the Air Force insists that RPV pilots be officers, but the Army allows enlisted personnel to fly them—raising the obvious question: Why must the pilots be officers?

Other cultural challenges remain. Do RPV pilots earn combat decorations?⁷ How career-enhancing is time in the RPV community? How far will RPV pilots be promoted? Is it conceivable that the Air Force will eventually have general officers who have “grown up” inside the RPV community? Or, even more radically, that Air Force leadership will eventually fall to cyber and drone warriors, replacing the single-seat fighter pilots who now dominate Air Force leadership—just as the fighter pilots replaced the strategic bomber pilots in the 1970s? To what degree does the long-loiter time of the RPV increase combat stress for the operators because the individuals they kill have been under surveillance by them for considerable time and they observe closely the effects of their attacks?⁸ How will the culture continue to adapt as the technology improves and the actual piloting of the vehicle becomes more and more autonomous? How will a cadre of officers grow up and be promoted who have mastered not just the operation of single vehicles but the management of swarms of them? What will an RPV squadron and wing commander need to know?

All these background issues are, I believe, important contextual elements to consider as we move into the more direct question of how we think about the ethical and legal issues of drone warfare, now and into the future.

Because the question of the ethical and legal legitimacy from a military perspective is many-faceted and many-leveled, I propose to approach it through five different lenses: tactical, operational, strategic, from the angle of sovereignty law and the international system, and finally, as a grand strategy in terms of the precedents and norms being established for the future international system as RPVs enter the inventories of many states and possible nonstate actors as well. I will finish with some thoughts about the long-term implications of drones and other emerging weapons systems and forms of combat for the moral meaning of war and the warrior of the future. Although I have mentioned the possibility of fully autonomous weaponized systems, including them in this analysis would make the project simply too large. Therefore I will confine my treatment to the existing weaponized RPVs such as the Predator and the Reaper. Further, it will be important to differentiate a number of different contexts in which drones are used: in areas where an armed conflict is in progress (i.e., they are merely one weapon system among others in use in the theater, along with artillery, mortars, small arms fire, etc.), outside of recognized armed conflicts but within sovereign terri-

tory (e.g., “targeted killings” of individuals), and as part of ongoing and to some degree tacitly acknowledged (although technically illegal) counterterrorist operations such as against al-Qaeda and Taliban leadership in the tribal areas of Pakistan.

The Tactical View

The first level of analysis from which to approach the legal and ethical legitimacy of the use of RPVs is as just another weapons system. In other words, in what way, if at all, is the use of a weaponized drone different, better, or worse than other means of attack such as a bomb dropped from a humanly piloted aircraft, a missile from a helicopter, a round of artillery, or rifle fire from ground forces?

In the simplest case, we know for certain that the individuals in the target area are, indeed, terrorists actively engaged in planning attacks: either in the theater or in the United States. Although they are not conventional soldiers, and we are not in a conventional war, we are engaged in an ongoing armed conflict with this group, so they are legally legitimate targets. The drone will fire a precision-guided missile with a small circular error probable (the standard military measure of accuracy).

In this fairly straightforward tactical case, the drone/Hellfire system is a perfectly acceptable approach. Obviously, it is governed by standard *jus in bello* requirements of discrimination and proportionality, but it is in fact superior by those criteria to most of the alternative means of attacking the target. It is certainly more accurate than artillery fire or machine gun fire from an AC-130 gunship. It is probably more accurate, and the blast effect (and therefore collateral damage) smaller than a precision-guided munition dropped from a humanly piloted aircraft such as an F-15. Only close ground attack with eyes on the target might be even more discriminate and proportionate. However, that approach would bring vastly increased risk to friendly forces and therefore a somewhat lower probability of success. Furthermore, even attack by ground forces may often be more likely to cause undesired casualties because the situational awareness of ground forces will arguably not be as good as that of a long-loiter drone, which is able to see the entire scene from above and for an extended period of time. Also, as Bradley Jay Strawser argues, one has a moral obligation to protect one’s own forces from unnecessary harm when doing so does not impose disproportionate risk on

noncombatants.⁹ Therefore, there is a strong *prima facie* case for using the weapons system that best protects one's own forces: a drone.

In this first case, we presumed that the individuals to be attacked were personally identified as legitimate targets. How does the case vary for a signature strike (i.e., a strike justified by observing a pattern of action that indicates the individuals, although not known specifically or personally, are preparing an attack)? This variant complicates the ethical questions considerably. There is more room for error in signature strikes, since patterns of activity are subject to interpretation. And indeed, there are cases in which observers felt certain they had determined what groups were doing and were found to have been in error after they were struck. On the other hand, the long-loiter capability of the RPV makes it the best possible platform for careful observation of the target for a long enough period to make a good faith determination regarding threatening behavior and preparation.¹⁰ Clearly, targeting all fighting-age males in an area where some individuals are known to be actively planning attacks is far too permissive a standard—and one that unfortunately appears to have been used in some cases. But if one observes a group preparing, for example, IEDs (improvised explosive devices), loading them on vehicles, and beginning to drive them toward American forces, that is probably a sufficient and reasonable “signature” warranting and justifying a strike. In this case as well, tactically the drone may well be, ethically and legally, the best weapons option.

The Operational View

The operational view approaches the question of the justification and utility of drone strikes with a somewhat larger aperture than does the tactical view. The operational view only pertains when there is an ongoing military operation in a theater, as there was in Afghanistan and Iraq. As conventional operations in those theaters draw down or cease, there will be no ongoing operational requirement because there is no sustained combat operational plan that drone strikes would be supporting. Nevertheless, it is important to consider the operational level of war to see the applicability of the analysis of the utility of drones in the midst of such conflicts. At the operational level, we are concerned with the utility of drone strikes as advancing the military objective in the context

of an ongoing theater of conflict. For example, given the ongoing issue of IEDs and terror attacks against coalition forces and Afghan government forces in Afghanistan, how do we assess the military legitimacy of attacking groups supporting those ongoing attacks from inside Pakistan, or even in areas of Afghanistan not readily accessible to other forces? For the purpose of this level of analysis, I set aside considerations of Pakistani sovereignty for later discussion. Here I analyze only the military utility of an ongoing program of drone strikes in advancing the operational goals in the theater.

Clearly there are groups situated inside the territorial boundary of Pakistan that are not under the effective governance of the Pakistani government (or with which elements of the Pakistani government are complicit) supplying weapons, personnel, and ideological support to the ongoing struggle in Afghanistan. One ground rule of counterinsurgency campaigns is that, if the insurgents have effective sanctuary into which to retreat, counterinsurgency is not likely to be effective.¹¹ Therefore, the operational logic for attempting to eliminate that sanctuary is clear.

The logic is similar for disrupting ongoing plans for attacks directly against the United States being hatched in remote areas of Yemen, Mali, and soon perhaps on the Horn of Africa (which is about to get its own drone base, although, at least initially, for intelligence, surveillance and reconnaissance and not for weaponized drones). The goal of all such attacks is not to defeat the group in question decisively but to continuously disrupt its plans and to place its leadership at risk at all times. Insofar as an ongoing pattern of attack and threat of attack forces the adversary to devote ever-larger resources and time to defense and evasion, these strikes serve a very valuable purpose.

In all of these cases, the ethical issue rests on proportionality. In the case of Afghanistan, the author's opinion is that, while these drone attacks might have been justified when there was some reasonable hope that the Afghan government would emerge strong enough to handle insurgency on its own, it is now clear that this will not be the case and that the United States will largely be withdrawing from the region. So if the question is whether drone strikes are advancing the theater operational goals, I would have to make the judgment that they are not. Much, of course, depends on what the Afghan-US pattern of cooperation will be after the United States has officially ceased all combat operations in the theater. If we are still committed to defense of what passes

for an Afghan central government, the legitimate targets are considerably broader than if the sole purpose is disrupting and preventing attacks directly on the United States or on US forces in the region.

On the other hand, the “whack-a-mole” aspect of the global threat posed by al-Qaeda is probably a feature of the ongoing conflict as far down the road as we can see. One would have to be privy to highly classified information to know how to do the proportionality calculation necessary to justify the killing of emerging leaders of al-Qaeda affiliates versus the civilian deaths involved and the impetus such strikes provide to recruitment of new participants. But it certainly does not seem likely that the threat will be eliminated by the use of air power because, as long as the will to attack remains, some capability will always escape intelligence gathering and therefore function free from attack. President Obama essentially acknowledged all these points in his National Defense University address on drone use policy in May 2013.¹² “We must define the nature and scope of this struggle,” he said on that occasion. “Neither I, nor any President, can promise the total defeat of terror. We will never . . . stamp out every danger to our society. What we can do—what we must do—is dismantle networks that pose a direct danger, and make it less likely for new groups to gain a foothold, all the while maintaining the freedom and ideals we defend.”

The Strategic View

If we now shift to the larger strategic view, the effects of drone warfare take on yet another aspect. When one asks strategic questions, one is inquiring into the long-term effects on the global system of one’s actions and whether one is achieving national and international goals by those actions.

The global threats to the international system posed by al-Qaeda and similar groups are endemic and probably long lasting. They do not depend on any single location or leader—or even, at this point, on the existence of “al-Qaeda central,” as Bin Laden’s original organization is usually called. The threat they pose is not only to the United States but also to most developed nations as well as the many weak or failed states where these groups seek to find a foothold. While there is clearly a military dimension to responding to this threat, getting the balance right between the properly military aspect and all other aspects of national

and international power is a significant challenge. There are economic, diplomatic, law enforcement, and even soft-power cultural influence factors that all play a part in isolating, disrupting, and disempowering terror threats to the globalized international system.

While it is hard to know the extent to which drone strikes recruit and motivate new members to join in with al-Qaeda and its affiliates, intuitively it seems plausible that such effects are likely. The Stanford study *Living under Drones* suggests that the mere presence of drones over an area in a sustained manner stresses populations in ways that are likely to induce fear and hatred in them, regardless of whether they are actually at risk of direct attack.¹³ Presumably that fear will motivate some number of otherwise innocent civilians to take up the cause and join the fight.

From a strategic perspective, the main goals of US actions are to disrupt pending attacks directly on the United States and US assets and in the long run to reduce or eliminate the threat posed by al-Qaeda and similar groups globally. What is the role of drone warfare in advancing those goals?

If reliable intelligence shows that a specific group or individual is actively planning or preparing a specific attack, direct action to disrupt or eliminate that threat is legally and ethically legitimate as anticipatory self-defense in any reasonable interpretation of legitimate preemption in just war thought (again, setting aside questions of the sovereignty of the state into which the attack must be made). Whether a weaponized drone is the preferred mode of attack (as opposed to direct action by special forces or the armed forces of the country within whose borders the attackers reside) is, ethically speaking, a matter of balancing concerns with collateral damage, proportionality, and risk to one's own forces. It is likely that often the weight will tip in favor of use of the drone.

Regarding the longer range strategic goal of reducing or eliminating the threat posed by such groups, however, this is not a goal that is achievable by use of the military element of national power. That goal is achieved only when the will and intent to mount such attacks is dissipated at its root—that is, it is a political and cultural goal. To the extent that drone attacks perpetuate the political environment that sustains the will of the adversary to continue to plan attacks or, still worse, recruits new attackers to the cause, drone attacks at some point are strategically unwise, regardless of their more short-term tactical and operational effectiveness. To the extent that the adversary perceives drone warfare as

dishonorable or cowardly, it may indeed perpetuate negative images of the United States and its allies that prolong the conflict at the strategic level. The degree to which a possible perception of a “dishonorable” means of war on the part of adversaries affects conflict is largely speculative at this point. But it is certainly an issue worthy of study and consideration since ultimately the strategic goals have to be elimination of the root causes of the conflict. If the means chosen, no matter how attractive they may be tactically and operationally, undermine that strategic goal, they are ultimately not useful and there is some *prima facie* reason to suspect drones may indeed have that effect. It certainly is an area worthy of further study and analysis.

Sovereignty Law, the International System, and Emergent Norms

So far, I have avoided the fundamental legal question regarding the larger framework of international law within which drone warfare is being conducted. Since the Peace of Westphalia, the baseline ethical and legal framework for the use of military force has worked within the assumption of state sovereignty. Michael Walzer has usefully characterized that framework as the “legalist paradigm” in which nothing but aggression (attack by one state upon another) justifies recourse to war and military attack as a means of redressing political disagreement.¹⁴ Throughout the twentieth century, there were attempts to render state sovereignty more porous than the Westphalian model suggested, but those efforts were driven largely by a felt need to protect individual human beings and their rights from violations by their state (the trajectory from the Genocide Convention of 1949 through Responsibility to Protect, signed at the United Nations [UN] in 2005). In other words, those efforts imagined intervention into sovereign states not for the self-defense or national interests of the intervening state or coalition but on behalf of the oppressed of the state against which the intervention was mounted. That entire framework, however, provides little legal or ethical guidance for the kind of threat posed by al-Qaeda and similar groups.

Because al-Qaeda is not a state, it rather obviously does not fit well into the existing international legal framework. But al-Qaeda and similar groups are inside of, or control a portion of, sovereign states and would normally be considered, in the words of the UN Charter, “es-

entially within the domestic jurisdiction” (Chapter I, Article 2) of that state. Attempts to control or attack such a group, however, can be well assimilated to the international legal framework insofar as it is located within the boundaries of a state that is willing and able to pursue it with the military or law enforcement agencies of the state—perhaps with assistance from the United States and other nations. In other words, attacks against al-Qaeda and similar groups conform to the existing legal framework insofar as the appearance of respect for state sovereignty is maintained, even if the cooperation of that state is the product of political or military pressure by other states intervening inside its sovereign territory.

The real ethical challenge concerns branches of al-Qaeda and similar groups that operate inside the territory of states unwilling or unable to act against them. This is the situation in Yemen, Mali, Somalia, Pakistan, and many other places. The actual practice of the United States has been to attack when, in the sole judgment of the US government, the situation warranted it. In many of these cases, it is impossible to know the actual attitude of the state within whose borders the attack takes place. In some cases, the government of the state in question is weak or virtually nonexistent. In others, there is very likely considerable divergence between the state’s public pronouncements regarding these attacks and what they might be saying privately to the United States (e.g., despite public protests regarding drone attacks, Pakistan allowed the CIA to operate drone bases within its sovereign territory—hardly the action of a state genuinely upset by drone strikes within its territory).¹⁵

Insofar as these attacks are conducted by the CIA, one might argue they are in the same legal territory as all clandestine operations: illegal, and not governed by LOAC but recognized by international custom as the kind of activity states conduct.

The legal situation is murkier, however, when the attacks are conducted by the regular armed forces of the state. Such armed forces are expected and required to conform to existing international law. In the National Security Strategy of 2002 (NSS), the Bush administration famously labored to stretch the concept of legitimate anticipatory self-defense under existing international law to cover unilateral US actions to eliminate the capabilities of adversaries, even in the absence of specific information regarding imminent attack or knowledge of a specific threat. The argument was that, because adversaries were not states, the traditional indicia of imminent threat probably would not be available

and that the possible use of weapons of mass destruction made waiting until an actual attack had occurred unacceptably risky.¹⁶

The standard articulated by the 2002 NSS was not one that could reasonably be universalized as acceptable for all states. As a general rule, it would allow each state to make its own judgments regarding threat and to act on them without any requirement to demonstrate that their actions conformed to some publicly agreed legal principle. Indeed, if such practices were allowed to become international norms, they would radically undermine the principles of available international law.

Nevertheless, the issues examined by the NSS of 2002 were legitimate ones. The emergence of nonstate actors with aspirations to conduct attacks on states by means inherently very difficult or impossible to deter, and often hard to attribute to specific perpetrators even after the fact, do pose novel challenges to the existing international system that cry out for emergent norms.

The United States is the leader in developing drone technologies, and the practices it develops regarding their use will inevitably both work toward establishing customary international law in this area and also, insofar as it is perceived as overreaching, precipitate reaction. Since the technology required for weaponized drones is not especially sophisticated, US dominance in this field is sure to be short-lived. Indeed, it is already fading as evidenced by the fact that in 2013 the Chinese considered a weaponized drone attack to kill drug lord Naw Kham in an inaccessible region of Myanmar, before electing to capture and try him instead.¹⁷ As drone technology becomes widely available to many states and nonstate actors, it would be unacceptable that they all may, on their sole authority, use them for surveillance and lethal attack inside the sovereign territory of states with which they are not at war. Such an international standard would be radically destabilizing to any notion of an international legal regime.

Also important to consider is the fact that the immunity of drone operators from direct attack due to geographic distance is not something to be taken for granted. A uniformed Reaper operator is a combatant, liable to attack at any time. Such an operator, driving his children to soccer practice in Nevada, is a completely legitimate military target, and should his children be injured when he is attacked, they may well be counted as acceptable collateral damage secondary to that legitimate attack. How long will it take a thinking adversary to realize that attacking drone

operators is one of the most effective means of coping with the threat drones pose in their area of operations?

Furthermore, the precedent of the president authorizing lethal attacks on US citizens deemed to be dangerous combatants but outside the control or territory of the United States raises important constitutional questions regarding due process. Recent suggestions to establish some form of judicial review of all such decisions may be an appropriate response to that felt need for greater oversight and review. Do such courts reside in the judiciary? Are these tasks we want judges to undertake? What real oversight is provided if the review resides primarily in the executive branch?

In any case, the precedents of actions taken thus far clearly raise troubling questions both of international and constitutional law. But merely to note this issue is to raise a host of troubling questions about the separation of powers and the trajectory of at least customary—if not treaty-based—international law.

Drones and the Moral Meaning of War and the Warrior

The issue of the use of drones (and in the not too distant future, quite possibly fully autonomous lethal systems) places strain on the most fundamental understanding we might have of the nature of war and of the warrior ethos.

Air Force colonel Shane Riza addresses these questions thoughtfully and in depth in his 2013 book, *Killing without Heart*.¹⁸ As the war fighter comes into possession of weapons such as drones, the risk to civilians is increasingly higher than that to the combatant. As he writes, “The drive for impunity in warfare has granted us, as military officers, the ability to provide to the legitimate authority ‘unusually useable’ options for military force—or whatever force they believe it to be. In doing so we have crossed, or at least are slowly extending a toe across, a line between *ad bellum* determinations and *in bello* uses of our means of war.”¹⁹ Riza worries that because the means of war become easier to use (because of the reduction of risk to our forces to something approaching zero), the barrier to their use on the *ad bellum* side (especially the last-resort criterion) risks disappearing altogether from the calculus of political leaders contemplating using force.

Riza continues,

Remote warfare enhances the dream of near-total impunity, but it also adds ambiguity to the legitimate authority's views that such remote strikes are even considered warfare at all. The most troubling aspect of the psychology of the leaders is whether they even consider the use of lethal unmanned operations as acts of military force. . . . The U.S. citizenry and military are increasingly less reflective of each other in a time when the public is no longer required to feel the weight of responsibility for its nation's forays into war. Because the public has not been required to feel the full cost of our recent wars, they are less inclined to engage in the civic duty of reasonable discourse on uses of force. When the executive can decide to use force of its own accord, possibly characterizing it as something other than war, the public is further removed from the decision process. Add impunity to the mix where there is a decreasing chance of casualties and the public virtually secedes from its responsibilities. A disengaged and disconnected electorate fuels the most ominous prospect in the dimension of impunity and the politics of war.²⁰

At one level, Colonel Riza's concerns are simply that the existence of drones blurs the line between *jus ad bellum* and *jus in bello* and in particular threatens to erase the bright last-resort requirement for the use of military force. That such weapons do so is, I think, already clear for the reasons I indicated above.

Ultimately, however, Colonel Riza is struggling to articulate concerns only the true warrior brings to the table. As he puts it, "Our sense of the warrior and his sense of his place in war are not trivial matters, for it is the aesthetic quality of war which helps ground it as a human activity. . . . The degree to which automated warfare removes us from this sense of the tragic alters our ability to understand the essence of what we do in war."²¹

Without risk, tragedy, and the heroic, Riza worries, the activity of killing loses some of the "aesthetic" qualities that make war morally and emotionally weighty for the warrior. Admittedly, we have been on a long path of distancing warriors from the full moral weight of what they do and from the suffering they inflict. These are difficult matters to articulate without sounding, as Riza acknowledges, like cavalry officers lamenting the loss of the horse on the battlefield. But he is right to suggest there are deeper questions to be asked about the moral meaning of war

than are captured merely by asking about acceptable rates of collateral damage and the accuracy of the weapons.

Such questions were posed decades ago in a memorable episode of *Star Trek* called “A Taste of Armageddon.”²² In that episode, the Enterprise crew comes upon a civilization that has long settled into a pattern of computer-on-computer warfare. At the end of each computer simulation, the computers declare the winners and the losers, and the requisite numbers of citizens on both sides dutifully present themselves to disintegration machines. This arrangement has been stable for so long (five hundred years) that the contending sides are completely content with it. Only when the disintegration centers are destroyed and the Enterprise crew reinstates the possibility of the full reality of the destructiveness of war do the opposing sides realize they should seek peace.

Although a work of science fiction, the episode raises profound questions. The leaders of the *Star Trek* world argue rather persuasively that their arrangement is rational and better. Why experience the disruption of civilization and the destruction of infrastructure inherent in real war? The cost to the lives of individuals killed is obviously significant. Dutifully reporting to the disintegration center when the computer simulation has declared an individual “killed” in the last round of computer attack becomes a patriotic duty. But, they argue plausibly, the routine deaths of individuals is an acceptable “cost,” since this pattern preserves both cultures’ civilization and infrastructure.

Only when the full cost of fighting a real war is restored in the narrative do all the players reflect on the alternative of peaceful solutions to conflict. If one extrapolates drone war trends, one might usefully reflect on a scenario where collateral damage of innocent lives is reduced to almost nothing. Everyone killed, in this imaginary scenario, is a legitimate military target. Damage to infrastructure and disruption of normal life is minimal. Colonel Riza’s fears and *Star Trek*’s imaginative scenario start to become plausible: Is there a point at which war is so genuinely antiseptic that the barrier to engaging in it in the first place is virtually erased? If we imagine that the conflict between the United States and other nations with al-Qaeda-like groups extends to the indefinite future, might a perpetuation of this pattern of practice settle into precisely this kind of sustained targeted killings without any meaningful way to assess whether strategic progress is being made or not?

This is a legitimate fear. This is a struggle against widely dispersed

covert groups engaged in continuous planning for attack against the United States and other states. Some of that planning will be detected and disrupted, but inevitably not all of it. Because that is the case, there is necessarily no point at which one can say definitively that the conflict is over and that attacks should cease. The temptation for leaders will be to continue to attack indefinitely when it appears warranted by intelligence. But no number of such attacks will ever eliminate the threat as long as the political will persists. Further, ongoing drone attacks are also quite probably recruiting new members to the cause.

In light of that reality (and the rapid spread of this technology to other states and even nonstate actors), this brief window of the United States' ability to conduct drone warfare as it has will inevitably pass. The United States and other states will assimilate drones as merely one more military tool in the box. Then we can begin to think more systematically about their role in advancing strategic, and not merely tactical and operational, purposes. Further, as the technology spreads and evolves, agreed international standards for its use will become apparent and urgent. It is critical that the international conversation about norms begins sooner rather than later, and before the pattern the United States has established in recent years is allowed to become the de facto international standard.

The views expressed in this article are solely those of the author and do not necessarily reflect the official policy or position of the Naval War College, the United States Navy, the Department of Defense, or the US government.

International Law and Drone Attacks beyond Armed Conflict Zones

Mary Ellen O'Connell

Following the terrorist attacks in the United States on September 11, 2001, President George W. Bush authorized a range of responses that have included a campaign of missile and bomb attacks beyond armed conflict zones. These attacks have been launched using a variety of means but gained international attention owing to the use of a new technology: unmanned aerial vehicles, known as drones. Within days of taking office in January 2009, President Barack Obama dramatically increased the number of drone attacks. By July 2013, several thousand people had been killed through drone attacks beyond armed conflict zones.¹ The campaign conflicts with fundamental international law and long-time US policy opposing targeted killing.

In July 2001, the United States was on record as rejecting the intentional killing of persons outside theaters of armed conflict hostilities.² The term “targeted killing” is now being used to describe such intentional killing when the means used is military force. By contrast, “assassination” is typically reserved for extrajudicial intentional killing of persons regardless of the means used to attack. Assassination is usually linked to a political motive, such as removing an individual from a leadership position whose policies are objectionable. The term targeted killing may be used for the same reason. The real distinction in current terminology is in the means of force used. Lawyers and other officials of both the Bush and Obama administrations have insisted that the United States has not altered its opposition to assassination or targeted killing.

Rather, as occurred in the attempt to justify the use of water boarding and other forms of torture, officials of both administrations have sought to characterize post-9/11 drone attacks beyond battle zones as fitting within accepted legal justifications for intentional killing.³

Since 9/11, no fewer than eight different legal justifications have appeared in administration speeches and documents or in the writing of scholars sympathetic to the practice. These include the following:

1. After 9/11, President Bush declared that the United States was in a “global war on terrorism,” meaning that the entire world is a battle zone with respect to members of certain groups. The Obama administration gave a new name to basically the same justification: The United States is in an “armed conflict against al Qaida, the Taliban, and associated forces” that began on 9/11.
2. The United States is exercising its “inherent right of self-defense” under Article 51 of the United Nations Charter when it attacks persons posing an “imminent” threat.
3. The United States is attacking terrorism suspects in nation-states “unable or unwilling” to counter terrorism.
4. National officials in target states have consented to the attacks.
5. The use of drones means targeted killing is precise and kills few “civilians.”
6. The use of drones is better than the alternative of boots on the ground.
7. The target is a person or persons directly participating in actual armed conflict hostilities—combat—involving the United States, such as the combat that has occurred since 9/11 in Afghanistan, Iraq, or Libya. Further, the target may be a person or persons no longer participating directly in hostilities, so long as the person is in a “continuous combat function.”
8. In the Afghanistan-Pakistan border region, drone attacks in Pakistan have been part of the Afghanistan counterinsurgency war.

This complicated set of propositions has appeared in speeches, official documents, scholarly articles, media reports, and commentary.⁴ Whereas it is common for lawyers in the United States to adopt a litigation strategy that provides multiple arguments to gain a greater accumulated affect, this is not appropriate in the law on the use of force, which requires a state to invoke at least one wholly sufficient exception to the general prohibition on the use of force. Combining parts of the three permissible exceptions to create one strong exception is not a recognized form of argument for providing a valid basis for the lawful use of force. Moreover, many of the United States’ arguments are irrelevant to justifying resort

to force. Matters such as the precision of weapons systems, the alternatives to ground invasions, or the inability or unwillingness of a state to control terrorism are not defenses in current international law to violations of the prohibition on resort to military force. The fact that so many arguments have been proffered suggests that the policy is on weak legal grounds.⁵ President Obama indirectly acknowledged problems with the legality of drone attacks in his May 2013 speech on counterterrorism policy. There he expressed concern about other governments taking up the practice of drone attacks beyond armed conflict zones.⁶ Viewing the US practice from the perspective of other states doing the same reveals how the policy falls short of international law's global rules on the use of force. The United States simply has no special right to resort to force.

This chapter will briefly review all eight of the justifications listed above and in the course of doing so will set out the actual international law regulating the right of government authorities to carry out lethal operations. The chapter's conclusion will briefly summarize the current law and recommend that the United States, and all states, return to full compliance with legal obligations, renouncing all past attempts to justify unlawful killing.

Global War and Self-Defense

Within hours of the 9/11 attacks, President Bush said the nation was "at war" with those responsible for the attacks.⁷ This statement evolved into what President Bush and his officials termed a "global war on terrorism" that "will not end until every terrorist group of global reach has been found, stopped and defeated."⁸ Many in the international law community assumed the declaration of "war" was a rhetorical device to assure the American people and people around the globe that strong measures would be taken to apprehend and bring to justice those responsible for the attacks that resulted in the loss of almost three thousand lives, injury to thousands more, damage to the environment, and extraordinary financial losses.

The impression that the Global War on Terror was a mere rhetorical device received support when the United States and the United Kingdom (UK) launched a war of self-defense against Afghanistan on October 7, 2001. The United States and the UK sent thousands of ground troops as well as aircraft into combat aimed at forcing the Taliban gov-

ernment from power. Under the United Nations Charter, a treaty binding on all fully sovereign states in the world today, states are generally prohibited from resorting to military force.⁹ Only three narrow exceptions to this prohibition exist—two in the charter itself and one in general international law. The charter provides for the right to use force in self-defense in Article 51. The charter also provides in Articles 39 and 41 for the United Nations Security Council to authorize the use of force. General international law provides some support to the right of a government to invite assistance when that government is facing an armed rebellion or insurgency on its territory. These are the three categories of lawful resort to armed force found in the *jus ad bellum* subfield of international law.

Prior to the resort to force against Afghanistan on October 7, 2001, the United States and UK sent letters to the United Nations Security Council as required by United Nations Charter Article 51 on the right of self-defense.¹⁰ The US letter explained that the use of force against Afghanistan was justified by that state's "support" of al-Qaeda. The Security Council had already adopted Resolution 1368, finding that the 9/11 attacks were serious enough to trigger the central condition precedent to a war in self-defense: Article 51 permits the use of major military force in self-defense "if an armed attack occurs." The Security Council found that such an attack had occurred. The council did not, however, address the other conditions of lawful self-defense: attribution, necessity, and proportionality. The right of self-defense restricts the exercise of military force in self-defense to the territory, ships, and planes of a state responsible for the attack. The use of force must be necessary to achieve defense in a way that is not disproportionate in terms of lives and property destroyed when weighed against the military objective. The use of force must also be a last resort and have a chance to succeed in accomplishing the legitimate military objective.¹¹ Following the 9/11 attacks, the United States and UK put forward what appeared at the time to be a solid case for self-defense under Article 51.

Nevertheless, in November 2001, the Bush administration began to promulgate policies and executive orders based on the legal position that the United States was at war around the globe and not just in Afghanistan. The argument seemed to be that the post-9/11 world was comparable to the situation pertaining globally during World War II. The first concrete evidence of this policy came in the form of an executive order stating that certain persons could be detained indefinitely or be subjected to trial by military commission regardless of where the individ-

ual was captured.¹² One year later, in November 2002, the Bush administration reportedly used military force to kill six persons in Yemen, a state with no legal responsibility for the 9/11 attacks.¹³ The Central Intelligence Agency (CIA), operating from the African nation of Djibouti, had launched Hellfire missiles from a drone at a passenger vehicle carrying six men in a rural part of Yemen.

The only possible legal justification for the intentional killing of these people was the global war on terrorism argument. In theory, a global war could exist that would give rise to the right to kill combatants worldwide. In reality, no such war materialized. Following 9/11, the United States was engaged in actual combat in Afghanistan, Iraq, and Libya—all clearly limited conflicts in terms of geography. Moreover, the only conflict actually connected with 9/11 for the United States was in Afghanistan, but by December 2001, the fighting in Afghanistan had evolved from a war of self-defense to a counterinsurgency war in support of Hamid Karzai against the Taliban. Killing people with no tie at all to that counterinsurgency clearly could not be justified on the basis of US self-defense to the 9/11 attacks.

To the extent that the United States was invited by certain governments to carry out drone strikes on their territory, the use of military force could only be justified if that government was waging its own counterinsurgency or civil war. A situation of war or armed conflict exists if and only if organized armed groups are engaged in fighting of some intensity. These are the legal characteristics defining an armed conflict and triggering the law governing the conduct of military operations.¹⁴ Under this law, members of the regular forces of a state party to a conflict will not be charged with a crime for killing enemy fighters, so long as the killing respects the principles of international humanitarian law, most importantly the obligation to distinguish noncombatants, necessity, proportionality, and humanity.

The Bush administration claimed that because the United States was in a global war, the combatant's privilege to kill without warning applied to US forces. Were it not for the "war," the United States would be restricted to pursuing terrorism suspects under law enforcement rules regulating resort to lethal force. Such resort is lawful outside armed conflict zones only if "absolutely necessary in the defence of persons from unlawful violence."¹⁵ Similarly, the United Nations Basic Principles for the Use of Force and Firearms by Law Enforcement Officials, which are widely adopted by police throughout the world, provide in Article 9

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.¹⁶

In 2008, presidential candidate Barack Obama campaigned against the Bush administration's claim that the United States was involved in a global war on terrorism where it could ignore peacetime human rights restrictions on the use of lethal force. Yet, once in office, Obama not only authorized drone strikes far from Afghanistan—the one place where the United States was plausibly justified in exercising military force¹⁷—he increased the number of such attacks dramatically. In March 2010, the State Department's legal adviser, Harold Koh, said that while the United States no longer uses the term “global war on terror,”¹⁸ drone strikes, detention without trial, and military commissions in the case of persons not involved in the hostilities in Afghanistan would continue. Koh argued “as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law.”¹⁹

As already explained, however, under Article 51, the use of force in self-defense is restricted to a state responsible for an armed attack. By December 2001, the only government that bore any legal responsibility for 9/11, Afghanistan's Taliban regime, had been removed from power. While it is possible that the war of self-defense in Afghanistan could have spilled beyond the borders of Afghanistan, in fact it did not. From October 7, 2001, to mid-2002, organized armed groups were engaged in intense fighting within Afghanistan. When Karzai became Afghanistan's leader in June 2002, the nature of the armed conflict changed. The war became an internal armed conflict, a contention for control of Afghanistan. Some cross-border action did occur but nothing significant enough to permit military attacks on Pakistan.²⁰ Finally, to the extent that there is doubt about a situation rising to the level of armed conflict or armed attack, human rights protections require that governments restrict the use of force to law enforcement standards.²¹

Consent and the “Unable or Unwilling”

Perhaps the first and most popular argument put forward to justify extra-battlefield drone attacks has been consent. Evidence has emerged from Wikileaks and other sources that leaders of both Pakistan and Yemen have given some sort of consent to attacks on their territory.²² In other respects, however, Pakistan and Yemen have clearly withdrawn consent.²³ Commanders of Pakistan’s Directorate of Inter-Services Intelligence (ISI) may have accepted US drone strikes on their country’s territory, but the ISI has no legal authority to invite the United States to fight in a civil war. The only person in Pakistan, Yemen, the United States, or any sovereign state with legal authority to consent to the use of military force on sovereign territory is the head of government. In international law, it is clear that waiver of a state’s right to be free of military intervention must come from the highest national authority. Moreover, even an express invitation by the elected president of Pakistan would not be sufficient to justify killing with military force outside of the hostilities of a civil war in Pakistan.

If the situation were reversed, the rule would be self-evident even to those few who assert the contrary. Consider the legal situation if an official at the CIA was asked by a Yemeni general for permission to carry out a drone strike in Lackawanna, New York. Lackawanna is a small town near Buffalo. Young people there have been known to have ties to Islamic militant groups. A twenty-three-year-old from Lackawanna was killed in the first US drone attack in Yemen in 2002. The Yemeni general could justify the request using the same reasoning the United States uses for drone attacks in Yemen and Pakistan—police access to places where suspects live is difficult. The Yemeni general might also offer to continue cooperating with the United States in allowing drone strikes in Yemen as a *quid pro quo*. If a CIA official gave permission to the Yemenis, he would violate numerous US laws and international legal principles. International law, which treats all sovereign states as equal before the law, with equal sovereign privileges including the right of territorial integrity and nonintervention, consistently requires that only those with evident national authority may waive a state’s rights or bind a state as in adopting treaty obligations.

The claim of consent would have limited meaning in the context of drone strikes in the case of Somalia, which has not had a government in

effective control to provide consent for much of the period under review. Nevertheless, even if clear consent from the top leadership of a country has been provided, consent that is anything less than an invitation to join in a counterinsurgency or civil war would be an unlawful invitation to use excessive force. Further, the United Nations (UN) Charter provides no express guidance on the right of a state to use major military force on the territory of another state at the invitation of the government of the other state. It is possible to interpret the charter as prohibiting such force. Article 2(4) is a general prohibition on the use of force by states that allows for only one exception for the unauthorized use of force, self-defense in Article 51. Article 51 provides that states may join in collective self-defense, so the only exception to Article 2(4) deals expressly with the case of assistance. Prior to the adoption of the charter, all states wishing to retain neutral rights had to withdraw assistance even to the government once insurgents reached the stage where they could potentially defeat the government.²⁴

Consent is a problematic basis for justifying drone attacks, which may account for why scholars have proposed a new justification. The suggestion is made that states have the right to attack a state “unwilling or unable” to respond to the problem of terrorism on its territory. The proposal was originally developed at Chatham House, a UK international affairs think tank.²⁵ The “unable or unwilling” claim is not based on any treaty, rule of customary international law, or general principle of law—the three primary sources of international law. The proposal is, therefore, not the law governing drone strikes and is unlikely ever to become the law. Why would sovereign states agree to such an open-ended right to intervene, leaving the critical legal condition of whether a state is unable or unwilling to control violence to the attacking state to decide?²⁶

Precision, Boots on the Ground, Direct Participation, and the Afghanistan-Pakistan Border

President Obama has also tried to defend drone attacks by describing them as “precise” and a better alternative than “boots on the ground”:

Obama then said he wanted to make sure people understood drones have *not* caused a huge number of casualties. The government has only been using “precise” strikes against al Qaeda and their affiliates. He said there’s a

“perception” that the US is engaging in a bunch of strikes “willy nilly” when what is happening is a “targeted effort” to get people on a list, who want to hit Americans and American facilities.²⁷

Apparently, if the public perceives that only “bad guys” are being killed, the killing is more likely to be accepted. The problem with this justification is that the standard to judge precision in targeting depends on whether the resort to lethal force is within an armed conflict or a law enforcement situation. The UN Charter, which governs resort to force, has no exception to Article 2(4) for armed attacks that are precise. Similarly, it is a false dichotomy to compare drone strikes and a ground invasion. Drone strikes may cost fewer US resources, but they are just as much a use of military force as ground troops. The cost is irrelevant to legality.

The final two asserted justifications both relate to the fighting in Afghanistan. To the extent these were ever viable arguments, they will become obsolete with the end of the US combat role. President Obama did not refer to them in his May 2013 speech on counterterrorism. Under the law governing the conduct of armed conflict, a combatant may target and kill civilians taking a direct part in armed conflict hostilities “for such time as” that direct participation is occurring.²⁸ The rule provides little if any support for drone attacks outside armed conflict zones given the unlikelihood that the United States will ever have any evidence that a person is directly participating in distant hostilities at the exact time the United States targets and kills the person. Moreover, outside of an actual zone of armed conflict hostilities, there is no tolerance for killing bystanders.

More plausibly, the United States may have had evidence of direct participation respecting persons based in Pakistan who have crossed into Afghanistan.²⁹ Under current law, the right to kill these individuals under international humanitarian law is the same as the argument just discussed—the individual must be directly participating in armed conflict hostilities and then may be targeted “for such time as” the participation continues.³⁰ In 2009, the International Committee of the Red Cross (ICRC) in its Interpretative Guidance on Direct Participation in Hostilities introduced the term “continuous combat function” (CCF) to allow for the killing of civilians who are no longer directly participating in hostilities but who are likely to resume participation. The ICRC also made it clear, however, that killing someone suspected of being CCF is only justifiable in a situation of necessity.³¹ With this new status category, pre-

sumably, any member of al-Qaeda or an al-Qaeda affiliate may be lawfully targeted wherever found because of fighting in Afghanistan. The argument extends to persons who have never even been part of fighting, so long as they are in a CCF.³² We should doubt whether this ICRC concept can change the treaty-based rules on targeting in armed conflict, which restricts targeting to civilians for such time as they are directly participating in hostilities. Even if CCF is part of the law, it is unlikely ever to permit the killing of persons outside armed conflict zones. The ICRC explains that persons who are CCF may only be killed in compliance with the principle of necessity. The standard of necessity depends on the choice of law principles. The peacetime standard applies if the person is not in a situation of armed conflict hostilities.³³

Not surprisingly, US officials do not rely on CCF status to justify targeted killing, since this would limit the permissible uses of force.³⁴ First, the CCF status applies only to those fighting in the recognized armed conflict in Afghanistan. Persons killed in Yemen and Somalia are not in a CCF status relative to Afghanistan. Second, when the US combat role ends in Afghanistan, so will any basis for CCF status. Finally, the argument is based on a misperception of the nature of the Afghanistan armed conflict since the selection of Hamid Karzai to lead the country. As discussed above, the United States and other states have been fighting the Taliban to keep President Karzai in power since mid-2002. Since that time, therefore, the armed conflict has been an internal armed conflict or civil war. The United States and other states are fighting on the legal basis of an invitation from President Karzai. To the extent that fighters cross from Pakistan into Afghanistan to join the Taliban by fighting regular Afghan forces and their allies, it is a security problem for Afghanistan and its leadership, not for the United States.

Afghanistan has limited options respecting how it may deal with cross-border incursions into Afghanistan for reasons already discussed. Under the law of self-defense, Afghanistan has no right to attack Pakistan because the incursions have not been significant enough to amount to an armed attack under Article 51 of the UN Charter, nor does Pakistan bear legal responsibility for them.³⁵ Afghanistan and Pakistan are not at war. Afghanistan has not gone to the Security Council to complain about the incursions. Afghanistan has not requested authorization to use force against Pakistan or reported to the Security Council that it is acting in self-defense, as required under Article 51. Pakistan has stationed large numbers of troops along the border to prevent incursions. It

could ask for assistance, presumably, in securing the border. The type of assistance it could request would be border security measures. Pakistan could not invite the United States to attack with drones or other military means in a situation in which Pakistan's own troops are not fighting a civil war.³⁶

Conclusion

Since the terrorist attacks of 9/11, no less than eight legal justifications have been proffered in support of the Bush and Obama administrations' use of weaponized drones. As demonstrated in this chapter, these reasons do not amount to a legal justification for the resort to military force, as prescribed by the UN Charter and international law. Drones that fire missiles and drop bombs are weapons of war. A state has the right to deploy such weapons under international law if it meets the conditions for the right to resort to military force under the law of self-defense, if the Security Council authorizes force or, perhaps, if a government in effective control invites the state to intervene in a civil war. The United States' use of drones outside of the armed conflict in Afghanistan that began in 2002 with an attack in Yemen cannot be justified under any of the three legal justifications for resort to military force. The United States should renounce attempts to justify unlawful killing and ensure that its drone warfare policy is in full compliance with its international legal obligations.

Drone Strikes and the Law: From Bush-Era Detention to Obama-Era Targeted Killing

Karen J. Greenberg

President Obama came into office tackling national security questions immediately, even before he delivered his State of the Union Address. On January 22, 2009, his first full day in office, he issued three executive orders. The first ended the practice of torture as a US policy. The second promised that Guantanamo would close within a year. The third called for a new detention policy. His message was clear. As he reaffirmed in his famous National Archives speech on national security in May 2009, “We are indeed at war with al Qaeda and its affiliates. We do need to update our institutions to deal with this threat. But we must do so with an abiding confidence in the rule of law and due process . . .” The assertion was a not so subtle rebuke to the Bush administration’s excesses in the name of national security. Obama, in doing it his way, was not about to shy away from the struggle, but he was determined to abide by the law. No torture, no quasi-legal prison system, no detention without due process.¹

The expectation of this express commitment to the rule of law was that the United States would take a sharp turn away from Bush-era policies by ensuring an end to policies that were seen to have either violated the law or stretched it beyond its accepted parameters. And in some ways it has—by ending torture, creating new legal processes for detainees, and insisting that military commissions comply as far as possible with the evidentiary standards and due process guaranteed by the federal court

system. Yet, although many of the old policies were dispensed with or diminished—particularly in regard to detention—the principles underlying them persisted elsewhere, namely, in the targeted-killing policy.

This essay looks at the intellectual and domestic legal underpinnings of national security policy that have developed since the early years of the War on Terror and traces the ways in which these statements of policy and US legal doctrine, once focused on detention policy, have come to provide the legal justification for targeted killings. In particular, the essay focuses on the evolution of the justifications for the use of force in the name of self-defense and argues that the drone strike policy that the United States has developed is but a refocused and incrementally more legally rationalized version of standards and assumptions that have persisted since the beginning of the War on Terror.

The Bush Years

The legal premise for the war against terrorism began with the Authorization to Use Military Force (AUMF). Passed by Congress on September 19, 2001, the AUMF was based on a notion of self-defense promulgated by the attacks of 9/11, that “such acts rendered it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad.”

Accordingly, the administration developed a definition of the enemy that was unprecedented in its breadth. In its final version, the AUMF was not only broad in the powers it conferred to the executive but also in the definitions it relied upon as a basis for its policies. It defined the enemy as “those nations, organizations, or persons [whom the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.” In addition, the category of “enemy” in the founding document did not separate out citizens from noncitizens as the November 13 Military Order on Detention would. It expanded the notion of the enemy beyond nations for the first time in American history by extending the notion of military force against “persons or organizations.”² Moreover, it did not provide geographical limitations on the definition of the enemy. It was a troubling, if understandable, beginning for an era that was launched in a state of self-defense and in the spirit of emergency.

The path toward new legal territory continued in the wake of the

AUMF. Beyond the AUMF, the notion of who constituted the enemy was further expanded by the vagueness of the Bush administration's use of the term "enemy combatant," a term that was premised on the notion of an unlawful combatant, that is, an individual without insignia, bearing arms, acting on the orders of a commander, and acting in violation of the laws of war. For this new category of prisoners, the Bush lawyers stepped further outside accepted terms and definitions via the work of the Office of Legal Counsel (OLC). In the series of memos penned in 2002 by the OLC's Jay Bybee and John Yoo, the administration established terms of detention and standards of treatment that further disregarded standards of constitutional law, statutory law, and international law, including the definitional standards set out by the Geneva Conventions. The intent was to exempt the United States from these legal standards. According to OLC memos, the Taliban and al-Qaeda were nonlawful combatants—as failed state actors and nonstate actors, respectively—and thus were not protected by US treaty obligations including the Geneva Conventions and the federal War Crimes Act. Redefining the legally protected category of lawful combatants, the administration's lawyers evaded the legal requirements for treating prisoners of war humanely. Pushing aside any legal constraints on the president when it came to matters related to the detainees, the Bybee memo of January 22, 2002, concluded further that "customary international law has no binding legal effect on either the president or the military."³

The results of these legal exemptions laid a foundation, which could and did evolve into interrogation policies that defied the law. In the case of torture, the OLC memos redefined the notion of torture to include only that which led intentionally to organ failure and death. Many legal experts argued that this redefinition violated the Fourth, Fifth, and Eighth Amendments to the Constitution as well as the Convention against Torture and the US Torture Statute.⁴ Sidestepping the law in another way, the administration created the Guantanamo Bay detention facility offshore, intentionally outside the purview of domestic law. As one former attorney for the Bush administration summed it up, the OLC memo "contains a painstakingly detailed analysis designed to show that a US detention center at Guantanamo Bay would not fall within the jurisdiction of any federal court. Thus, it was ideally suited for detaining, interrogating, and trying suspected terrorists without fear of jurisdictional oversight."⁵

Yet, for all of the expansiveness of the Bush policies, there were some

limits and revocations on the powers conferred to the executive. The pushback began with Congress. At the outset, Congress reined in the Bush administration's initial and extraordinarily broad concept of the president's right to define and use force against the enemy. The Bush administration had asked for an AUMF that was almost unlimited in its designation of the enemy against whom force could be used.

The original White House draft proposed that the president be given statutory authority "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, harbored, committed, or aided in the planning or commission of the attacks against the United States that occurred on September 11, 2001, and to deter and preempt any related future acts of terrorism or aggression against the United States." This would have essentially empowered the president to take preemptive action against any and all whom he deemed to be an enemy.

As then Senator Russ Feingold responded, "I had wondered whether our initial response to the shock of 9/11 would be measured or reckless and this was a first sign that it could be heartbreakingly reckless."⁶ Under protests led by the Democratic caucus, based on what they argued was the unnecessary breadth of the initial draft of the AUMF, Congress amended the original draft and cut out this potential for the unbounded use of force by the president. In the final draft, the president was accorded the use of necessary and appropriate force against a much more specific enemy—al-Qaeda, the Taliban, and those who aided and harbored them, but not against any and all aggressors.⁷ Senator Feingold explained the change in language as correcting "the obvious flaws in passing a resolution using open-ended terms like terrorism, rather than focusing the language on those who actually had attacked us."

Later on there were additional checks on the breadth of the powers conferred by the AUMF and subsequent documents such as the November 13 Military Order and the USA Patriot Act. Notably, the Supreme Court would strike down some of the powers assumed under the authorities of the AUMF. The Court, in *Hamdan v. Bush*, declared the original military commissions unconstitutional, rejecting the argument that the AUMF could authorize them in their current form. More pushback came in October 2003, when Jack Goldsmith became the head of OLC and revoked the memos that had authorized the enhanced interrogation policies.⁸ And eventually, in 2008, in *Boumediene v. Bush*, the Supreme Court held that the detainees had constitutional habeas rights, which

represented yet another setback to the new legal standards set up by the Bush administration as part of the post-9/11 War on Terror.⁹

There was, then, from the very beginning of the War on Terror, a push and pull over executive authority, leading to some limitations and constraints. But even with these limitations, the AUMF, the foundational document in the War on Terror, continued to set a tone of expansive executive power into the detention and treatment of enemies. Although the interagency process, the Court, and Congress tried to constrain the breadth of the powers conferred initially by the AUMF, the authorization—and the further legal authorizations—remained uncomfortably broad by the end of Bush's tenure. Guantanamo remained open, and its detainees for the most part remained in legal limbo; and the enhanced interrogation techniques had not been considered lawless to the point of prosecuting those who designed and authorized the program. Furthermore, throughout the Bush administration, policies exceeded the constraints of the AUMF, defying constitutional and legal norms and empowering the administration to act unilaterally to evade widely held legal norms, including the humane treatment of prisoners and the separation of powers doctrine. The result was that when Obama came into office, the spirit of the AUMF, and in some cases, the laws and the policies that it had initially authorized, remained.

The Obama Years

The new administration began with the clear intent of reasserting a more firm, transparent legal basis for the fight against terrorism. At the outset, the president made it evident that he was incensed by the disrespect for constitutional and statutory law that had characterized Bush's War on Terror and pledged to put things aright. On his first full day in office, President Obama declared an official end to the use of enhanced interrogation techniques and promised to close the Guantanamo Bay detention facility within a year and to establish a detention policy for the future. The mandate for the future involved a new reliance upon the rule of law. As the Executive Order on Ensuring Lawful Interrogations declared, the intent was "to ensure compliance with the treaty obligations of the United States . . . and to take care that the laws of the United States are faithfully executed."¹⁰

A first articulation of what that policy, rooted henceforth in law,

would look like became apparent in March 2009 in the first active step the Obama administration took on detention policy. The administration filed a Supplemental Brief, written in response to the filing of writs of habeas corpus on behalf of several Guantanamo detainees.

According to the Supplemental Brief, the government accepted the AUMF as a foundational document for their War on Terror policies of detention. While a few months later the administration would seek to “end the war on terror” as a leaked email trail evidenced,¹¹ the administration embraced the terms of the Bush AUMF almost immediately and administration spokespersons often predicated their speeches throughout Obama’s first term with the assertion that the nation was at war. In the brief, the government cited self-defense and the need to protect US citizens as the reasons for the subsequently described authorities.¹²

At first blush, the Supplemental Brief, like the three executive orders issued before it, seemed to seek limits to the authorities that the Bush administration’s War on Terror had claimed. Specifically, the Supplemental Brief went beyond the AUMF and invoked the laws of armed conflict as a means of putting a check on any overreaching policies, declaring that “[t]he AUMF gives the executive power to detain consistent with the law of armed conflict.” It was a potentially constructive step, given the fact that the architects of the Bush administration’s legal policies, especially John Yoo, had explicitly disdained any regard for the laws of war and for customary international law. But in an odd way, by employing not only the AUMF but now also the international laws of war, the Supplemental Brief held within it the possibility of conferring additional authorities for US conduct in the War on Terror.¹³

In several regards, the Supplemental Brief did seek to curtail any impulse to expand the definition of the enemy that had marked the Bush administration. According to the document, the definition—that is, the threshold for guilt by association with al-Qaeda, the Taliban, and those who supported them—was refined and narrowed. Rather than “support” as the standard for detaining terrorist suspects, “substantial support” would provide the standard. The Supplemental Brief’s authors acknowledged that they were not quite sure what this would mean, admitting that “the contours of the ‘substantial support’ and ‘associated forces’ as bases of detention will need to be further developed.” But the intention was clearly to establish new limitations on the definition of the enemy.¹⁴ Similarly, in their task forces on detention policy and their case-by-case approach to the detainees at Guantanamo, the Obama administration

reinforced its intentions to set things right by incorporating focus and limits into the policy.

But at the same time that the Supplemental Brief was limiting authorities by reference to international law and by setting up a review of each detainee, it was expanding its authorities in other ways. Much as it was meant as a declaration of differences from Bush, the Supplemental Brief asserted certain notions that mitigated against an early sigh of relief on the part of those who had opposed what they saw as the extralegal policies of the Bush era. To begin with, while the standard for the enemy was made more specific via the substantial-support reasoning, the concept of the enemy was broadened in other ways. In the March habeas brief, the government expanded the notion of the enemy to include not just al-Qaeda, the Taliban, and those who aided and abetted them, but those who “fought alongside al-Qaida and the Taliban.” According to the brief, the AUMF was an authority that did not “limit the ‘organizations’ it covers to just al-Qaida or the Taliban.” This was a catchall loophole that explicitly left room for an increasingly vague definition of the enemy in the War on Terror.

The language did not come out of nowhere. Instead, it followed on the heels of a trend in which the concept of associated forces had been incrementally broadened over time. The notion had begun with the language used at the Combatant Status Review Tribunals at Guantanamo where an enemy combatant was defined more broadly than in the AUMF as “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.”¹⁵ This language appeared as well in a district court decision over habeas that accepted that an “‘enemy combatant’ is an individual who was part of or supporting Taliban or al-Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”¹⁶

By the end of Obama’s first term, the language that expanded the definition of the enemy had found its way into the National Defense Authorization Act (NDAA) for Fiscal Year 2012 and in so doing sanctioned a potentially limitless definition of enemy. This language recalled the original draft of the AUMF, which had been dismissed by Congress even in the wake of 9/11 as conferring too much power on the president in matters of defining the enemy. The 2012 NDAA’s section on detention

authorities specified that in order “to prevent any future acts of international terrorism against the United States, the United States has authority to detain individuals who, in analogous circumstances in a traditional international armed conflict between the armed forces of opposing governments, would be detainable under principles of co-belligerency.”¹⁷ The incrementally expansive legal language had crept into definitional usage without any prior public vetting or agreement on the legal basis for the expansion. In a similar vein, the Supplemental Brief also interpreted the AUMF as providing an expansive definition of the AUMF’s geographical applicability. “Finally, the AUMF is not limited to persons captured on the battlefields of Afghanistan,” the brief reasoned.¹⁸

All told, the Supplemental Brief, accepting the self-defense rationale, did not challenge either the need for the AUMF or the spirit of the AUMF, and it accepted the expanded notion of the enemy and the battlefield when it came to matters of detention. True, it acknowledged the authorities of international law as a check on US policies, but in a special irony, it ultimately bowed to the legitimacy of international law not solely as a restraint on the AUMF but as an additional tool in the struggle to win the War on Terror. Thus, the Supplemental Brief, though checking the powers of the AUMF, also reinforced the war against terror itself, amounting to an acceptance of the status quo rather than a significant departure from it.

Two months later, President Obama further demonstrated that although he intended to dispense with the excesses of the Bush administration, he had made a pragmatic decision to retain some of those powers and policies.

In his National Archives speech, delivered in May 2009, Obama noted that in fact after 9/11, “our government would need new tools to protect the American people.” The country, he acknowledged, referring to torture, had initially gone rogue—“off course.” He explained his reasons for rejecting torture: “[Enhanced interrogation techniques] undermine the rule of law. They alienate us in the world. They serve as a recruitment tool for terrorists, and increase the will of our enemies to fight us, while decreasing the will of others to work with America. . . . In short, they did not advance our war and counterterrorism efforts—they undermined them, and that is why I ended them once and for all.” Guantanamo, too, as he described it, had weakened the country’s position in the world. His focus would be the mandate to “update our institutions to deal with this threat.” The remedy was to reform the use of the law in the

War on Terror and to end what the president called the “ad hoc legal approach for fighting terrorism that was neither effective nor sustainable.” Obama went on to state his belief in the federal court system and in “due process rights” when it came to terrorism suspects at Guantanamo. The Guantanamo detainees illustrated his plans for the use of law going forward: “our goal is to construct a legitimate legal framework for the remaining Guantanamo detainees that cannot be transferred”—to make the laws catch up with the reality of indefinite detention. Like the reliance on international law as an additional authorization for the AUMF, so the detention policy would continue to include indefinite detention, now strengthened by the constraints of international and constitutional norms.¹⁹

There were several worrisome signs in the Archives speech. First, Obama echoed the Supplemental Brief’s idea of associated forces by focusing on “al Qaeda terrorists and their affiliates.” Second, he accepted the notion of indefinite detention on the grounds of prevention and self-defense: “those we capture . . . must be prevented from attacking us again.” Third, within this concept of prevention, he alluded to a wide, preemptive window of suspicion for determining the likelihood of violence against the United States. According to the president, indefinite detention was predicated upon the fact that there were individuals in US custody at Guantanamo who had the potential to be terrorists due to their training at al-Qaeda camps, their allegiance to the Taliban or al-Qaeda, or their making it “clear that they want to kill Americans.” “These are people who, in effect, remain at war with the United States.”²⁰

By the summer of 2009, the intention to push back in the matter of detention seemed clear, but it was also apparent that the reforms would not be wholesale and that the acceptance of executive power to define the enemy and the battlefield would persist. This meant continuing the Bush doctrine of unreviewable presidential directive and accepting a weakened notion of separation of powers in the name of national security. Even as the administration sought to curtail and revoke the theory and practice of Bush administration detention, interrogation, and Guantanamo-related policies, it ramped up a less frequently used part of the Bush arsenal in the War on Terror—the use of drone strikes for targeted killings. In so doing, the Obama administration appropriated for itself the modes of thinking and behavior that had characterized the Bush detention policy and against which the Obama team had initially sought to draw a line in the sand.

Targeted Killings

The targeted-killing policy began slowly under President Bush and expanded exponentially under President Obama. Drone strikes include both targeted killings of specific individuals and crowd killing or signature strikes against males of military age who are in combat zones considered to be places where al-Qaeda or associated forces congregate.²¹ Over the years, leading administration lawyers and officials have presented the rationale for the policy. It is worthwhile to go through the major documents outlining this policy to see its legal evolution.

The March 2010 speech by Harold Koh, the legal adviser to the State Department, paved the way for a legal bridge from detention to targeted killing. First, Koh focused on detention policy. He reiterated the dual authorities of the AUMF and international legal principles as forming the basis of the US right to self-defense in the War on Terror. For Koh, this authority provided the rationale for the policy of indefinite detention—the continued detention of those who, if released, would return to hostilities. When he broached the topic of targeted killings, Koh used parallel reasoning. According to Koh, as with detention, the AUMF and international law authorized the use of drones on the grounds of self-defense. Echoing Obama's Archives speech, the former Yale Law School dean referred to the limitations of a pre-9/11 approach to understanding the enemy. "As you know, this is a conflict with an organized terrorist enemy that does not have conventional forces, but that plans and executes its attacks against us and our allies while hiding among civilian populations. That behavior simultaneously makes the application of international law more difficult and more critical for the protection of innocent civilians." According to Koh, then, the drone strike policy was premised, as the Bush administration's indefinite detention had been, on the notion of self-defense as a justification for preventive policies.²²

Having laid out the legal foundation of the drone strike program, Koh took on the task of defining more concretely the definition of the enemy and the battlefield when it came to targeted killings. He began by following up on the definitional challenge posed by the Supplemental Brief. Koh described for the first time what was meant by "substantial support," the concept cited in the Supplemental Brief as the standard for detention. Koh defined a belligerent as an individual who belonged to al-Qaeda's leadership, "a particular leader of an enemy force in an armed

conflict.” These were the individuals whom the administration claimed could justifiably and lawfully be targeted to be killed.²³

But not until the killing of US citizen Anwar al-Awlaki did the more complete explanation for the Obama drone strike policy become clear. In September 2011, al-Awlaki was killed by a targeted strike in Yemen. Two documents give us insights into the rationale behind the killing: Attorney General Eric Holder’s March 2012 speech, delivered nearly three years to the date of the Supplemental Brief, amidst public outcry against what was seen as the extrajudicial killing of an American citizen; and a white paper prepared, according to the *New York Times*, “months after the al-Awlaki and Khan killings,” as a summary of an OLC opinion that had apparently been written to justify the legality of the strike.²⁴

Holder’s speech reiterated the growing tenets of the Obama doctrine in the War on Terror. The first premise was that the nation was at war with an enemy “that cannot be underestimated.” A second premise was that “we are a nation of laws and values,” a declaration that cited Obama’s National Archives speech and that referred implicitly to the distinction between the Bush and the Obama administrations. With the justifications for the war as the beginning argument for the targeting killing policy in place, Holder reasserted the broader application of the fact of being at war and insisted on the legality of each of the elements of the Obama policy. He began with the defense of an expanded battlefield, insisting that “our legal authority is not limited to the battlefields in Afghanistan. . . . We are at war with a stateless enemy, prone to shifting operations from country to country.”

Holder, however, added some new criteria to the government’s reasoning. American citizens needed to be accorded due process before being targeted. According to the attorney general, it was allowable under law to target an American citizen when the threat was “imminent,” capture was not feasible, and the law of war principles were adhered to²⁵: “The Constitution’s guarantee of due process is ironclad, and it is essential—but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war—even if that individual happens to be a U.S. citizen.”²⁶

Not only did Holder, like the authors of the Supplemental Brief along with the president and Koh, further detail and defend the restrictions and limitations adhered to by US policy, but he followed his predecessors in embracing the necessity of redefining terms as a means of find-

ing things lawful. In Holder's words, "'Due process' and 'judicial process' are not one and the same, particularly when it comes to national security."

In the spirit of redefining legal terms, Holder moved on to the concept of imminence. The attorney general's concept of imminence veered far from a restrictive or customary definition, suggesting that a suspect's engagement in planning a concrete, immediate threat or a specific attack was not necessary for the notion of imminence to apply; instead the focus was on someone who is deemed to be "actively engaged in planning to kill Americans," without necessarily planning a specific attack or invoking a specific time frame.²⁷

The white paper, leaked to the public on February 5, 2013, furthers each of these explanatory strategies. It clarifies the specific arguments of the Obama administration in regard to the fight against terrorism when it comes to the law. As with the earlier speeches of Obama officials, the white paper relies on the joint legal authorities of the AUMF and international law to authorize the policies of the Obama administration. Like the Supplemental Brief, the white paper asserts that US policy against terrorism is based on the principle of self-defense. Further, the white paper adopts the expanded idea of the battlefield, citing both Bush- and Obama-era legal authorities for doing so, claiming "the AUMF itself does not set forth an express geographic limitation on the use of force it authorizes" and adding, "None of the three branches of the U.S. Government has identified a strict geographical limit on the permissible scope of the AUMF's authorization." It echoes Koh's explanation of "substantial support," referred to in both the detention and targeted-killing context, by reasserting Holder's focus on targeting "senior operational leaders." So, too, the white paper accepts the principle of "associated forces" that had been employed initially by Bush and later by the Obama administration's legal spokespersons, referring continuously to "al-Qa'ida and its associated forces."

Most significantly, the white paper, after building upon these precedents, explores in greater depth the notion of imminence, which in customary usage assumes a near and present threat. In the words of the American Civil Liberties Union's Jameel Jaffer, it sought "to redefine the word imminence in a way that deprives the word of its ordinary meaning."²⁸ The white paper asserts, "First, the condition that an operational leader present an 'imminent' threat of violent attack against the United States does not require the United States to have clear evidence

that a specific attack on U.S. persons and interests will take place in the immediate future.” To justify this claim to a rethinking of the original meaning of *imminence*, the white paper claims that a less elastic definition of imminence brings to mind the threat of another 9/11. It “would not allow the United States sufficient time to defend itself.” The conclusion the white paper draws is that “the threat posed by al-Qai’da and its associated forces demands a broader concept of imminence in judging when a person continually planning terror attacks presents an imminent threat, making the use of force appropriate.”²⁹

As the targeted-killing policy has developed, there are some clear reminders of Bush-era detention policy. Substituting continual threats for immediacy as the standard definition of imminence has become a leading talking point of the Obama administration in its defense of the drone policy. The redefinition of terms cannot but remind lawyers and others of the redefinitions employed by the Bush administration to justify their detention and interrogation policies. As President Obama told the nation in a national security speech delivered on May 23, 2013, nearly four years to the day of his Archives speech, Anwar al-Awlaki was “continually trying to kill people.”³⁰ From using force against those who planned, committed, and supported the attacks of 9/11, to using law enforcement and military engagement to prevent new attacks by al-Qaeda, to using military force—targeted killings—on a growing battlefield against a broadly defined enemy with general intent to harm Americans rather than a specific plot, the Obama administration came full circle. It now has come to accept language and principles reminiscent of the rejected original AUMF, pushing to expand the notion of the enemy and to lower the constitutional barriers to using force as the executive desires. Having begun by forcing the detention policy to become more directly tethered to legal processes, more focused in its definition of the enemy, and more attentive to accepted definitions of the law, the Obama administration nonetheless came to rely upon a Bush-style expansiveness when it came to the targets of the targeted-killing policy—where associated forces tended toward the broad powers the Bush White House had initially invoked; where legal terms—in this case imminence—were altered to fit the policy needs of the day; and where a tolerance for the growing battlefield persisted. Ultimately, then, the detention policy that began at the outset of Bush’s War on Terror found its future in the targeted-killing program of Barack Obama. And surprisingly, the push for restraint when it came to allowing the executive to have unfettered and

unreviewable discretion in matters of national security has been quieter under Obama than under Bush. Not Congress, nor self-correction, nor the Supreme Court has limited the president's powers in the matter of targeted killings, as they did with the detention authorities.

Incrementally, then, through two successive and very different administrations, the United States has moved into the twenty-first century with a continually expanding sense of the requirements of national security, as demonstrated in both the detention policy of the Bush administration and the evolving targeted-killing policy of the Obama administration. At the base of this evolving policy is the persistent sense that an ineradicable threat hovers over the United States, evolving in such a way as to challenge the precision and restraints of prior laws and constitutional guarantees.

In his May 2013 speech, President Obama told the nation that "we are safer because of our [counterterrorism] efforts," only to add, "Now, make no mistake, our nation is still threatened by terrorists." In this nebulous space between safety and danger, President Obama has pledged to uphold the law in the targeted-killing policy as elsewhere in his counterterrorism strategy. But the trajectory of legal reasoning for the use of lethal drone attacks in the War on Terror has brought into sharp relief the fragility of the law, as insecure it seems as the times in which we live.

Justifying the Right to Kill: Problems of Law, Transparency, and Accountability

Pardiss Kebriaei

In January 2010, the *Washington Post* reported that the Obama administration had secretly authorized the “targeted killing” of US citizen Anwar Al-Aulaqi¹ in Yemen.² Anonymous administration officials leaked additional information to the press over the ensuing months: that the Central Intelligence Agency (CIA) and the Joint Special Operations Command (JSOC) of the military maintained secret “kill lists” of individuals suspected of terrorism to which Al-Aulaqi had been added,³ that suspects were authorized for killing after a unilateral executive branch process,⁴ and that Al-Aulaqi was believed to have become an “operational figure” for al-Qaeda in the Arabian Peninsula and had already been the target of multiple unsuccessful strikes.⁵

The reported authorization gave rise to the first legal challenge to the administration’s “targeted-killing” program, when Al-Aulaqi’s father filed a lawsuit alleging that his son’s killing without due process, outside circumstances where lethal force would be a last resort to address a specific and imminent threat, would violate his fundamental rights.⁶ The government moved to dismiss the lawsuit, arguing, inter alia, that Al-Aulaqi’s father did not have standing and that the claims raised non-justiciable “political questions.” The district court in Washington, DC, granted the motion.⁷ Approximately one year later, in September 2011, US drone strikes killed Al-Aulaqi, along with another US citizen, Samir Khan.⁸ Two weeks later, US drones fired at an outdoor eating area in

a southern province of Yemen, killing Al-Aulaqi's sixteen-year-old son, Abdulrahman, also an American citizen, and six others, including another teenage boy.⁹ A subsequent lawsuit was filed alleging that the killings of Anwar Al-Aulaqi, Samir Khan, and Abdulrahman Al-Aulaqi had violated their constitutional rights.¹⁰ The DC district court dismissed that lawsuit in April 2014.¹¹

The administration has generally defended its actions in conducting these operations on the premise that the United States is engaged in an ongoing global armed conflict with al-Qaeda, the Taliban, and "associated forces" and may use lethal military force in the course of that armed conflict and as an exercise of its right to national self-defense.¹² At the same time, the administration has withheld all but selective disclosures about the strikes and opposed judicial review of its actions.¹³

These responses are characteristic of the administration's position with respect to its targeted-killing operations outside of the battlefields in Afghanistan and Iraq more broadly, which have resulted in the deaths of several thousand people since 2009.¹⁴ This chapter will examine three concerns with the administration's position, which remain despite indications in 2013 of a policy shift toward narrower targeting criteria and a promise of efforts to enable greater oversight.¹⁵ These questions concern the administration's legal rationale for these operations, its continued withholding of basic information about the program, and its opposition to judicial review.

Legal Rationale

The Obama administration has asserted two principal rationales for its targeted-killing program. The first is that the United States has been engaged in an armed conflict against al-Qaeda, the Taliban, and associated forces since 9/11 and that under the 2001 Authorization for the Use of Military Force (AUMF) passed by Congress and the laws of war, it may under certain conditions target individuals suspected of terrorism worldwide. The second is that the United States has the authority to conduct these operations as an exercise of its right to national self-defense under the US Constitution and international law.¹⁶ For example, in a March 2012 address at Northwestern University Law School, Attorney General Eric Holder stated,

In response to the attacks perpetrated . . . by al Qaeda, the Taliban, and associated forces, Congress has authorized the President to use all necessary and appropriate force against those groups. Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law. The Constitution empowers the President to protect the nation from any imminent threat of violent attack. And international law recognizes the inherent right of national self-defense.¹⁷

The administration has, however, consistently blurred the lines between these two justifications and has yet to clarify when each applies.¹⁸ To the extent it is relying on national self-defense as an independent basis for some of its targeting operations, the right of states to use armed force under the United Nations Charter may justify the use of force vis-à-vis the *state* in which the targeting occurs¹⁹; but the legality of the use of force against targeted *individuals* and bystanders is a separate and distinct inquiry. As stated by the former UN Special Rapporteur on extrajudicial, summary or arbitrary executions, “[E]ven if the use of interstate force is offered as a justification for a targeted killing, it does not dispose of the further question of whether the killing of the particular targeted individual . . . is lawful.”²⁰ Moreover, force is only permissible in response to an “armed attack” or the imminent threat of one.²¹ The administration’s interpretations have ostensibly gone further. For example, a Department of Justice white paper that was leaked to the press in 2013, which discusses the legal basis for the targeted killing of American citizens, effectively negates this requirement by interpreting imminence as not requiring “clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.”²² Senior administration officials have similarly indicated that the administration has “a more flexible understanding of imminence”: in a 2011 speech at Harvard Law School, then Assistant to the President for Homeland Security and Counterterrorism John Brennan argued that “the traditional conception of what constitutes an ‘imminent’ attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.”²³

The administration’s armed conflict rationale is arguably even more tenuous. While President Obama stated in a major national security address in May 2013 that he plans to engage in efforts to “refine and, ultimately repeal” the AUMF and draw down more than a decade of “con-

tinual warfare,” the administration has also made clear its view that the United States continues to be at war with al-Qaeda and associated groups for now and the indeterminate future.²⁴ And while the administration has acknowledged that armed conflict hostilities do not exist in all of the areas where it is nonetheless using lethal military force,²⁵ its position remains that the laws of war are not limited to actual war zones. In a May 22, 2013, letter from Attorney General Holder to Chairman of the Senate Judiciary Committee Patrick Leahy, Holder openly confirmed the killings of four American citizens in US counterterrorism operations “outside of areas of active hostilities,” while stating that such operations are to be conducted, *inter alia*, “in a manner consistent with applicable law of war principles.”²⁶ The administration’s position on the global scope of its conflict with al-Qaeda is highly contested legally.²⁷ The International Committee of the Red Cross (ICRC), the international authority on the laws of war, has reiterated in response to the US position of a worldwide armed conflict against al-Qaeda and associated groups that it “does not share the view that a conflict of global dimensions is or has been taking place.”²⁸ The current UN Special Rapporteur on counter-terrorism and human rights has gone so far as to state that

The global war paradigm was always based on the flimsiest of reasoning, and was not supported even by close allies of the US. The first term Obama administration initially retreated from this approach, but . . . it has begun to rear its head once again, in briefings by administration officials seeking to provide a legal justification for the drone programme of targeted killing in Pakistan, Yemen and Somalia.²⁹

The application of the laws of war beyond actual battlefields such as Afghanistan also carries great risk of harm to civilians. According to ICRC, “The notion that a person ‘carries’ a [noninternational armed conflict] with him when he moves to the territory of a nonbelligerent state should not be accepted,” in part because of the attendant proposition “that harm or damage could lawfully be inflicted on [civilians or civilian objects] in operation of the [international humanitarian law] principle of proportionality because an individual sought by another state is in their midst.”³⁰

Even assuming for the sake of argument that an al-Qaeda member plotting a specific attack against US forces in Afghanistan is targetable if

he continues his activities from outside that recognized battlefield, many of the individuals targeted by the United States do not fit that description. Indeed, one of the main reasons for the program's dramatic expansion is that many US strikes are not directed against members of "core" al-Qaeda. Rather, outside of Afghanistan, the armed conflict is largely one against "associated forces of al-Qaeda." In a speech in April 2012, Brennan identified at least four "affiliates" and "adherents" of al-Qaeda that have been or may be targeted—in Yemen, Somalia, North and West Africa, and Nigeria.³¹ Since then, administration officials have suggested that more groups—"associates of associates" in Mali, Libya, and Syria—could also be brought into the fold.³² While President Obama has stated that the United States "must define our effort not as a boundless war on terror,"³³ the administration is currently conducting or believes it can conduct drone strikes in more than half a dozen countries.

Tethering all these groups to the same conflict is both legally and factually problematic. The administration's position is that, under international law, it may target "associated forces" of al-Qaeda as "co-belligerents,"³⁴ borrowing controversially from the nineteenth-century law of neutrality, which was developed to regulate the conduct of states during international armed conflict.³⁵ As some scholars have noted, applying the concept to irregular terrorist groups in this context finds no support in state practice or *opinio juris*.³⁶

Even assuming that the concept applies here, there are questions about whether the cobelligerent relationship actually exists between al-Qaeda and the various groups being targeted. The administration has stated that more than a shared ideology is required to establish the requisite nexus,³⁷ but the groups the administration has targeted or indicated it is authorized to target call into question how much more is required.³⁸ The relationship of "co-belligerency" between al-Qaeda and Al Shabab, for example, has been questioned by some experts, who point out that "most analysts believe al-Shabaab's organizational links to al-Qaeda are weak . . . the strongest tie between al-Shabaab and al-Qaeda seems to be ideological."³⁹

To the extent these groups are untethered to the armed conflict between the United States and al-Qaeda, the laws of war do not apply. Rather, domestic laws and international human rights law provide the appropriate framework, which prohibit the deprivation of life without due process except when strictly necessary—when a threat is imminent, as a last resort.⁴⁰ Moreover, as the United States plans for with-

drawal from Afghanistan and ends its conflict with the core group to which these associates are purportedly attached, the use of military force against these other groups can only be sustained as a matter of international law if conditions of armed conflict are satisfied between each group and the United States.⁴¹

In addition to the problem of the administration's legal rationale for targeting groups, its standards for targeting individuals also raise questions and concerns. In his April 2012 speech, Brennan asserted that the government has the authority to target individuals who are "part of" al-Qaeda or associated forces "just as we targeted enemy leaders in past conflicts, such as German and Japanese commanders in WWII."⁴² But this argument ostensibly goes further than the laws of war allow. In situations of international armed conflict, states may target each other's soldiers by virtue of their status as members of the state's armed forces. By contrast, the relevant inquiry in armed conflict involving nonstate groups, where the line distinguishing civilian from fighter is less clear, is not about status but conduct. In noninternational armed conflict, the question is not whether individuals are "part of" a fighting force but whether they are "directly participating in hostilities."⁴³ The administration's stated legal position seemingly casts a far wider net.

The administration announced a new Policy Guidance in May 2013 for targeting operations "outside of areas of active hostilities" that is ostensibly narrower, permitting lethal force if, *inter alia*, (1) a target poses a continuing, imminent threat to US persons; (2) capture is not feasible at the time of the operation; and (3) there is near certainty that non-combatants will not be injured or killed.⁴⁴ As discussed below, however, questions remain about whether the administration's interpretation of these policy criteria equates to direct participation in hostilities (at least) and whether, as a matter of law, the administration believes its targeting authority is broader. Indeed, a spate of drone strikes in Yemen and Pakistan in July and August 2013 suggested that the new standards are discretionary and that the administration views its legal authority more broadly.⁴⁵

Transparency

While there is significant disagreement about the merits of the targeted-killing program, there is relatively wide, bipartisan consensus on the

need for greater transparency about it.⁴⁶ In comments at Fordham Law School in March 2013, former Defense Department General Counsel Jeh Johnson, who publicly defended the program during his tenure,⁴⁷ acknowledged concerns about the official secrecy still surrounding the program and called on the Obama administration to make continued efforts at transparency—“and not just to keep the press, Congress and the courts off its back, when its back is against the wall.”⁴⁸

The administration has taken some modest steps toward greater transparency. In his April 2012 address, which followed a series of increasingly detailed official speeches, Brennan unambiguously acknowledged targeted killings by the United States outside of “hot battlefields” and outlined the legal rationale for the program.⁴⁹ In his May 2013 letter to Congress, Attorney General Holder explicitly acknowledged the United States’ responsibility for the killings of Anwar Al-Aulaqi, Samir Khan, Abdulrahman Al-Aulaqi, and one other American citizen, Jude Kenan Mohammed.⁵⁰ And in his major counterterrorism speech the next day, President Obama himself discussed the administration’s new Policy Guidance and promised to make efforts toward greater transparency.⁵¹

The new Guidance, however, is classified, and the limited information the administration has made available raises as many questions as it answers, including how the policy standards will be interpreted and where they will apply. As some scholars have noted, given that the administration “doesn’t tell you how it decides when and where places of active hostilities exist . . . it is possible that the ‘new’ rules may leave completely untouched some of the most significant parts of the existing drone program.”⁵² It also remains unclear whether, as a legal matter, the administration still believes lethal force is permissible against a broader category of individuals. The administration has repeatedly distinguished between its criteria for targeting as a policy matter and its targeting authority as a matter of law, as it does in the Policy Guidance.⁵³

In addition, while the administration has, after repeated demands,⁵⁴ allowed specific Senate and House committees to review its secret legal memoranda authorizing targeted killings of US citizens⁵⁵ and more recently allowed the full Senate access to one of those memos,⁵⁶ it has fought to withhold all of its legal memos—as well as basic information about the scope and impact of the program, including the government’s tally of how many have been killed and injured, where, and how many were “civilian” versus “combatants”—from the public.⁵⁷ Until recently the CIA refused to confirm or deny even an interest in the program in

response to requests for information under the Freedom of Information Act. In an important decision last year, the DC Circuit rejected the CIA's position, finding that the courts were being asked to give "their imprimatur to a fiction of deniability that no reasonable person would regard as plausible."⁵⁸

The administration's claims about the legality and wisdom of its program, supported by selective disclosures, have to a certain extent allowed it to make its case to the public while avoiding meaningful scrutiny and accountability. As one critic put it, "There is no doubt that the executive branch has manipulated the secrecy system to permit it to tell the public a lot about a classified program without (as yet) suffering any of the disclosure obligations that normally come from talking about a classified program."⁵⁹ That is beginning to change. In a breakthrough decision by a federal appeals court in April 2014, the court ordered the release of a secret Justice Department memorandum that provides the legal justification for Al-Aulaqi's killing.⁶⁰ The unanimous ruling by the Second Circuit Court of Appeals rejected the administration's argument for withholding the document. "Whatever protection the legal analysis might once have had," the panel held, "has been lost by virtue of public statements of public officials at the highest levels and official disclosure of the D.O.J. White Paper."⁶¹ The Administration released a redacted version of the memo in June 2014.⁶²

Judicial Review

The administration's long-standing position has been that targeting decisions are not appropriate for judicial review.⁶³ Implicit in this position is the suggestion that judicial review is not only inappropriate but also unnecessary. Lawyers on the president's national security team debate and scrutinize each other's opinions, the administration insists, so all targeting decisions are subject to robust review.⁶⁴ It also professes that its actions are not unchecked because Congress retains oversight. As Attorney General Holder stated in his March 2012 speech, "[O]pposing judicial review is not to say that the Executive Branch has . . . the ability to target any such individuals without robust oversight. . . . [T]he Executive Branch regularly informs the appropriate members of Congress about our counterterrorism activities, including the legal framework."⁶⁵

The Obama administration's position is not unfamiliar. In the detention context, the Bush administration argued after 9/11 that the United States was engaged in a global armed conflict against al-Qaeda and its supporters and that judicial review of the status of detainees designated as "enemy combatants," both US and foreign citizens alike, would be improper and put the courts in the "unprecedented position of micro-managing" the military's decisions.⁶⁶ The Supreme Court roundly and repeatedly rejected the position that the courts should have no role at all alongside the political branches when fundamental liberty interests are at stake.⁶⁷ Yet in the *Al-Aulaqi* litigation, the Justice Department maintained fundamentally the same position.⁶⁸

In the absence of judicial review, meaningful congressional oversight of the program is also still lacking. The reporting of CIA and JSOC operations is generally limited to intelligence and armed services committees in the House and Senate—and sometimes only to the leaders of those committees.⁶⁹ While covert actions by the CIA must be reported to the intelligence committees, unacknowledged military operations by JSOC are not subject to this requirement⁷⁰—they may be reported to the armed services committees, but such reports are not mandatory. As a result, the majority of lawmakers are in the dark about the program. Moreover, those members of Congress who do receive information have far from a complete and unobstructed view.

These concerns about the lack of judicial review and congressional oversight came into sharp focus during the confirmation process for John Brennan as head of the CIA, when the administration handed over Justice Department memos discussing the legal authority to target US citizens only after a major push by members of one of the very congressional committees tasked with oversight of the program. Moreover, the administration's disclosures did not include all of its legal memos, including those discussing the authority to kill foreign citizens, who make up the vast majority of those killed.⁷¹ And they were ultimately released only to the Intelligence and Judiciary Committees of the House and Senate, not to other members of Congress. More recently, during the confirmation process for David Barron to the United States Court of Appeals for the First Circuit, the White House provided the full Senate with access to one memorandum about the targeted killing of US citizens that Mr. Barron signed while serving in the Justice Department's Office of Legal Counsel—but only one, and only after senators threatened to veto the nomination.

The administration has by now recognized public and congressional concerns about oversight. President Obama stated in his May 2013 address that he has given instructions to the “administration to review proposals to extend oversight of lethal actions outside of warzones that go beyond our reporting to Congress.”⁷² To date, however, the administration has still only taken modest steps toward addressing those concerns, and arguably only when Congress and the courts have compelled it to do so.⁷³ The administration can go further by permitting one of the more obvious mechanisms for oversight and accountability to function—judicial review by federal courts, at least *ex post*. Certain other proposals that have previously surfaced, however—namely, for the creation of a special “drone court” to review the government’s requests for targeted killing *ex ante*, *ex parte*, and in secret, much the way the much-criticized Foreign Intelligence Surveillance Court operates in reviewing requests for surveillance warrants—are misguided.⁷⁴ Putting to one side whether there can be effective judicial oversight without an open and adversarial process, such a court would ostensibly only review the government’s requests; it would not question the premise of—and the root problem with—the program. Indeed, if the administration were following the law for the use of lethal force outside of war zones—meaning that it were refraining from such force except in the face of a truly imminent threat—then judicial process *ex ante* would be infeasible.

Conclusion

Bringing the targeted-killing program into conformity with the law would mean limiting the application of the laws of war to direct participants in actual war zones. It would mean refraining from killing without charge and trial in all other instances, except where lethal force is a last resort in response to an imminent threat—where imminence means imminence. These are not controversial propositions. They are rules that are meant—wisely so—to limit the violence of war and prevent arbitrary deprivations of life. They are standards we should want strictly interpreted, not only as a matter of law but also as protection against potential abuses by unscrupulous leaders in the future. Ensuring compliance with these standards and accountability for violations requires more than internal processes; it requires meaningful, independent checks and greater transparency.

The targeted-killing program has resulted in incalculable damage to human lives, to the rule of law, and to US credibility as an advocate for human rights. It raises the prospect of a world in which other countries, citing US precedent, assert a similar license to kill. These grave costs should compel the United States to make urgent changes to its policy.

The Strategic Implications of Targeted Drone Strikes for US Global Counterterrorism

Audrey Kurth Cronin

Using armed unmanned aerial vehicles (UAVs or drones)¹ to kill terrorist operatives poses key questions of strategic effectiveness for US counterterrorism. America's increasing reliance upon the use of drones makes confronting those questions more urgent than ever. Like any other weapon, armed drones are tactical tools that may or may not achieve strategic results. Government policy makers must think through the relationship between means and ends when employing them. Whether or not targeted drone strikes are legal or ethical, do they work? Are they wise? In other words, what is the strategic logic of the US counterterrorist campaign, and are targeted drone strikes advancing it?

Terrorism is a tactic designed to elicit strategic results. It succeeds by leveraging a shocking event to win the support or acquiescence of an audience so as to gain a political objective. To be effective, counterterrorism must respond at the strategic level, where the state has unparalleled advantage and much greater staying power than any terrorist group. Success demands a steady, comprehensive response integrating all of the resources of the government (diplomatic, military, legal, intelligence, informational, economic) in a balanced way, so as to prevail in multiple dimensions over time. Drones and related technologies may or may not be a part of this response, because they are tactical rather than strategic tools for the state. The dramatic increase in US reliance upon them

in recent years (and the very widespread reaction to that use) has meant that a technology has assumed a life of its own, overshadowing questions about the logic and overarching framework of US counterterrorism strategy going forward. The overuse of drones has been propelled by their loiter capacity, precision, and ease of employment, as well as by a public that remains fearful of terrorist attack, rather than by long-term strategic wisdom. In short, terrorism sits at the tactical level of warfare. The US response began at the operational level, with two major conventional wars, and is now drifting to the tactical level. Drone tactics are currently driving US strategy rather than the other way around, and there is no end in sight.

The scope of research here is on US use of armed drones to target suspected terrorists separate from major combat, such as the military campaigns the United States helped to lead in recent years in Afghanistan and Iraq. UAVs perform a range of useful purposes for the US military, including intelligence, surveillance, and reconnaissance in war zones and elsewhere. The use of robots in these settings is not new, although it is becoming more widespread and sophisticated. Where US troops are deployed, there are rules of engagement, numerous sources of intelligence on targeting, and an assessment of the outcome by military forces on the ground. Integrated into an active counterinsurgency campaign, drones are discriminatory weapons meant to minimize civilian deaths and avoid turning the population against the government. This chapter does not analyze the pros and cons of battlefield use of armed drones.² Likewise, it does not consider unarmed Central Intelligence Agency (CIA) UAVs that carry out intelligence collection missions, such as the drone that circled helplessly above the US Consulate in Benghazi, Libya, in September 2012 while Ambassador Chris Stevens and the men trying to protect him were murdered. Intelligence collection through aerial means is equally old news and not addressed here. Here I am focusing strictly upon US reliance on armed drones to target terrorist groups or individuals, in places such as Pakistan, Yemen, and Somalia, in attacks commonly referred to as decapitation strikes or targeted killings.³

To consider the strategic effects of targeted drone strikes requires interpreting US counterterrorism objectives. How American counterterrorism strategy is framed makes a difference to the outcome. These goals, both explicit and implicit in government documents, speeches, and actions, appear to be threefold:

1. The strategic defeat or end of al-Qaeda and associated forces;
2. The deflection of jihadist violence away from the United States through the conservation of enemies;
3. The preservation of the safety and security of the American people.

What follows addresses each of these three US strategic objectives, assessing how weaponized drones contribute to each objective, how they detract from it (including unintended consequences), and the strengths and weaknesses of the empirical evidence either way.

First Objective: The Strategic Defeat or End of al-Qaeda

First and foremost, we seek nothing less than the strategic defeat of al-Qa'ida—dismantling and defeating core al-Qa'ida in the Pakistan-Afghanistan region, defeating its affiliates on the Arabian Peninsula, in Iraq and Syria, and in East and North Africa, and preventing the group from reconstituting. —Michael G. Vickers, *US Undersecretary of Defense for Intelligence*⁴

Ending al-Qaeda has been a core strategic interest of the United States since at least 9/11, and US counterterrorism policy has been (or should have been) focused on mobilizing all instruments of policy to achieve this objective. Every terrorist group ends, and recognizing long-established patterns of endings gives us insight into which counterterrorism tactics will most likely succeed or fail to eliminate the problem. This objective also offers US policy makers a clear mental framework to judge US progress in this war against the enemy and to conceptualize how it will draw to a close. Focusing our energies on the “strategic defeat” of the entity that attacked the United States in 2001 shifts the focus above the level of tactics and the action/reaction dynamic of every terrorist campaign toward a specific vision of an endpoint where the state can prevail.

Terrorist campaigns meet their demise for a variety of reasons, often multiple ones; in earlier research studies I have identified six not mutually exclusive pathways by which these campaigns have ended.⁵ Decapitation—meaning the capturing or killing of a leader—is one of the classic patterns that emerge out of careful analytical study. The other five are negotiations (the entry of the group into a legitimate political process), success (achievement of the group's aims), failure (implosion or loss of the group's popular support), repression (defeat and elimina-

tion by brute force), and reorientation (transition from terrorism into other forms of violence). These six pathways are not necessarily separate and distinct; individual case studies of campaigns may reflect more than one dynamic for their demise. It is a mistake in any counterterrorist campaign to focus exclusively on one dynamic and ignore the potential interplay with the other things that may be happening at the same time. Nonetheless, decapitation is a well-established pathway toward the ending of some terrorist groups, and we will consider its efficacy for al-Qaeda.

A few terrorist campaigns have ended through the elimination of their leadership, although for certain groups the humiliating arrest of a leader was more effective than attempts at assassination. My own research for the 2006 *International Security* article “How al-Qaeda Ends” and the 2009 book *How Terrorism Ends* examined many historical case studies where removal of a leader had huge implications for the decline or demise of his organization.⁶ Cases of arrest included Peru’s Abimael Guzmán and the Shining Path, France’s Action Directe, and Japan’s Shoko Asahara and Aum Shinrikyo. Cases of assassination included the Philippines’ Abu Sayyaf, Russian and Chechen separatist leaders, and Israel’s campaign of targeted killings against Palestinian groups, among others. On the basis of that study, I concluded that parading a captured leader before cameras, delegitimizing him in the eyes of his followers or potential supporters, was strategically more effective than killing him. Through painstaking military and police work, an effective capture avoided creating a martyr (as with Che Guevara), yielded a storehouse of intelligence (as with Peru’s Guzmán), and publicly deromanticized a popular cause (as with Indonesia’s Nazir Abbas). Sometimes killing a leader was unavoidable, but groups that ended through assassination were hierarchically structured, characterized by a cult of personality, and lacking a succession plan. Although the intense US campaign of targeted drone attacks has clearly been damaging the group, none of these traits suits al-Qaeda.

How Do Targeted Drone Strikes Contribute to the Goal of Ending al-Qaeda?

Killer drones have depleted the number of core al-Qaeda leaders, decreased local violence, disrupted al-Qaeda operations, and spared the United States much more costly interventions. They have forced mem-

bers and associates of al-Qaeda to alter their daily behavior so as to avoid being targeted from the air, thus distracting them from other activities and reducing their effectiveness.

Drone strikes in Pakistan have had the most dramatic results. President Obama and other members of his administration frequently claim that twenty-two of al-Qaeda's thirty top leaders have been killed, many apparently by drone attacks.⁷ According to former CIA Director Leon Panetta, the number of al-Qaeda members still in the tribal areas has diminished to between fifty and one hundred.⁸ So apart from Osama bin Laden's successor, Ayman al-Zawahiri, there are but a small number of people left who are directly connected to the attacks of 9/11. Drone strikes in Pakistan's tribal areas are credited with having cut the number of core al-Qaeda members by about 75 percent, a powerful answer to the 2001 attacks they planned and orchestrated nearby.

The CIA argues that al-Qaeda's center of gravity has shifted away from Pakistan to Yemen and North Africa, and the pattern of recent drone strikes has conformed to this footprint.⁹ In Yemen, high-profile leaders of the al-Qaeda affiliate, al-Qaeda in the Arabian Peninsula (AQAP), have been killed.¹⁰ Casualties have included Said Ali al-Shihri, a deputy leader of the group, and the broadly influential American cleric, Anwar al-Awlaki, and his son. The campaign in Yemen is not just using drones but also Special Operations and cruise missiles as well; the drone that killed al-Awlaki was reportedly flown from a base in Saudi Arabia.¹¹ Some drone strikes have been reported in Somalia, launched from a base in the Seychelles.¹² The campaign against Al Shabab in Somalia has been accompanied by conventional attacks by American-backed African Union troops in Mogadishu. Policy makers argue that the drone strikes are reducing al-Qaeda affiliates, grinding toward the movement's defeat. According to Undersecretary of Defense Michael Vickers, in September 2011, there were "perhaps four important Qaeda leaders left in Pakistan, and 10 to 20 leaders over all [sic] in Pakistan, Yemen and Somalia."¹³

Drone strikes have ruthlessly decreased the overall level of violence in specified areas. For example, a 2013 analysis by Patrick Johnston and Anoop Sarbahi studied the impact of US drones and drone strikes in Pakistan and Afghanistan between 2007 and 2011.¹⁴ They concluded that the strikes resulted in a decrease in the number and lethality of militant attacks (in this case by many groups, not just al-Qaeda) in the areas where they were conducted. They have, in turn, had measurable ef-

fects in the so-called Af-Pak theater, reducing the threat of attacks on US and allied soldiers. Strategic gains were much harder to assess, however. The decrease in militant violence detected by the authors was short term and of narrow geographical scope.¹⁵ The strikes often “simply [led] the militants to shift their operations elsewhere.” The study concluded, “To the extent that drone strikes ‘work,’ their effectiveness is more likely to lie in disrupting militant operations at the tactical level than as a ‘silver bullet’ that will reverse the course of the war and singlehandedly defeat al-Qa’ida.”¹⁶

The drone threat has disrupted and altered terrorist operations. It has forced al-Qaeda and its associates to dramatically change their behavior, keeping them preoccupied with survival and hindering their ability to move, plan, and carry out operations. This undermines the viability of the movement because it cannot carry out complex, high-profile operations. Still, the militants have proven remarkably adaptable. In February 2013, a document left behind by fleeing Islamist extremists in Mali detailed twenty-two insightful tips for avoiding drone attacks. The list had been photocopied from a June 2011 posting on an Islamist website originally written by Abdallah bin Muhammad, a senior commander of AQAP, and republished numerous times on other jihadist forums. Tip number 10, explaining how to use trees as cover, came directly from a letter originally written by Osama bin Laden to Abdelmalek Droukdel, the head of al-Qaeda in the Islamic Maghreb (AQIM). Other tips advised fighters to move at night, place dolls and statues outside to mislead aerial intelligence, cover vehicles with straw mats, paint them with mud, and dive out of them if they are targeted.¹⁷ Terrorist groups always compare operational methods; the sharing of defensive tactics between al-Qaeda affiliates shows that the drone war has become just another dimension of the ongoing terrorism/counterterrorism dynamic. Still, the prospect of living under the threat of instant death from the sky probably keeps operatives from building close ties with local civilians who fear they might also be killed.

How Do Targeted Drone Strikes Undermine the Goal of Ending al-Qaeda?

Despite lowering the number of al-Qaeda operatives, especially in the Afghanistan/Pakistan border region, drone strikes have not thwarted leadership succession, ongoing propaganda operations, or local attacks.

Decapitation of the leadership has certainly not worked thus far; the killing of Osama bin Laden, although accomplished through different means, did not end al-Qaeda. Further, the lethality, frequency, and efficiency of operations are not the only ways to measure a terrorist campaign's effectiveness and viability. Particularly for groups under military pressure, information operations can reach potential supporters, threaten potential victims, and show strength and viability. Indeed, reaching followers through propaganda can be more important than carrying out deadly terrorist attacks, as it plants longer term seeds for future operations. If al-Qaeda's ability to perpetuate its message continues, including by mischaracterizing actions taken against it, then the killing of members may not further the long-term goal of ending the group.

According to recent academic research, killer drone strikes have had no impact upon al-Qaeda's ability to generate propaganda.¹⁸ As-Sahab ('the cloud') Media, the propaganda branch of al-Qaeda, has continued its sophisticated operations throughout the drone campaign, building rapport with sympathizers, attracting recruits and resources, showing footage of American mistakes and failures, and undermining the legitimacy of US policy. Drone strikes that actually (or allegedly) result in large numbers of civilian deaths in Pakistan provide al-Qaeda's propaganda arm an opportunity to frame Americans as immoral bullies that care less about ordinary people than al-Qaeda does. Al-Qaeda leaders who are killed by drones are regularly portrayed as martyrs on As-Sahab.¹⁹ Picking off al-Qaeda's operational members does not advance the demise of a movement led by younger, savvier media spokesmen whose Internet presence is immortal.

If the goal were truly to end this movement, there would be significant merit for the United States to publicly discredit it with a well-informed political strategy aimed at dividing followers along obvious fault lines. Al-Qaeda and its various affiliates and associates are not a strong, unified movement. There are deep disagreements about long-term objectives and short-term tactics, including whether or not al-Qaeda has the right to engage in suicide attacks, label other Muslims apostates, attack the economy, or kill other Muslims. For the Muslim community, the toll of al-Qaeda's violence has been painful and steep. About 85 percent of those killed by al-Qaeda terrorist attacks have been Muslims.²⁰ When al-Qaeda kills the people it purports to protect, it causes revulsion among potential constituents and a loss of legitimacy. This kind of backlash is a long-standing historical phenomenon that has damaged count-

less other terrorist organizations, from the Real Irish Republican Army to the Basque group Euskadi Ta Askatasuna, to the Egyptian al-Gama'a al-Islamiyya.²¹ For effective counterterrorism, the key is to avoid making mistakes that distract from the group's culpability and interfere with the backlash.

Drones are not helping to discredit al-Qaeda tactics of indiscriminately killing Muslims; our "collateral" damage obscures which actor is doing more of that. Instead of highlighting the illegitimacy of al-Qaeda's violence, US policy makers are forced to defend the legitimacy of US drone attacks, a tactic that, whatever its short-term efficacy, is drawing attention away from al-Qaeda's behavior and causing outrage among US allies and enemies alike. The secrecy of the program lends itself to suspicion and conspiracy theories. The failure to share the logic and outcome of drone attacks leaves the field open for others to fill the void. Objectively, the two phenomena are in sharp contrast: under the Obama administration, armed drones avoid civilians about 85 percent of the time, according to the New America Foundation (see further discussion by Woods in chapter eleven), while al-Qaeda terrorist attacks purposefully target them.²² But it doesn't matter. The lack of US transparency means that observers draw bitter parallels and our enemies whip up additional outrage. Whatever the truth is, the United States is losing the war of political perceptions, a key part of any counterterrorism campaign. Drones have shifted much of the burden of defending the use of force from al-Qaeda to us. Instead of ending al-Qaeda by dividing its supporters, we are dividing our own.

The Limits of the Empirical Evidence

We must recognize the challenge of collecting authoritative evidence on the efficacy of this campaign. Spurred in part by the increased US reliance on killer drones, a number of quantitative academic studies that examine the viability and effectiveness of decapitation have been recently published. For example, a 2009 *Security Studies* article by Jenna Jordan examined the effectiveness of decapitation as a counterterrorism tactic by comparing the lifespan of groups (existing between 1945 and 2004) that had or had not undergone it. She found that decapitation did not contribute to effective counterterrorism strategy. Her dependent variable was whether or not the group survived more than two years after experiencing a decapitation strike. Jordan argued that organizational

age, type, and size were crucial to determining whether or not it survived, with younger, smaller, nonreligious groups more susceptible to an attack on their leadership. She concluded that “[o]verall, this [sic] data indicate that decapitation has little benefit as a counterterrorism strategy and is in fact highly counterproductive for larger groups.”²³

Three years later, Bryan Price published a study in *International Security* that contested Jordan’s findings. He concluded that killing leaders can indeed have effects, although it is hard to demonstrate the causal links. (The groups studied were in existence between 1970 and 2008.) Examining group survival data over a longer time frame following a decapitation event, Price found that “terrorist groups that experienced the loss of a leader had higher mortality rates than those that did not.”²⁴ In an impressive statistical analysis, he studied the killing or capturing of top terrorist leaders or coleaders, excluding everyone else. He concluded that, over the longer run, the mortality rate of virtually every type of group increases if there is a leadership turnover and significantly increases following the killing or capturing (or capturing and *then* killing) of the top person.²⁵ But since all groups die in the long run, the direct cause and effect of this argument was shaky. Group mortality may correlate with decapitation strikes because states that successfully strike terrorist leaders tend to use a range of other counterterrorism tactics as well. And they may target only the most effective groups to begin with. The study also did not consider the likelihood that other factors intervene more over a longer time frame, including the decline or failure of the group for other reasons.

There is no empirical evidence that al-Qaeda can be defeated primarily through drone strikes. One reason is that, especially since 2010, the drone campaign has progressed well beyond decapitation. The cited research studies focus on the arrest or killing of top leaders or operational leaders only, not mid- or lower level operatives (as in the case of recent US armed drone attacks).²⁶ They examine the viability of very discriminatory tactics aimed at the leadership of a group, when in fact US killer drones are no longer strictly targeting senior al-Qaeda leaders or operational actors. The current campaign has become much broader, including signature strikes against individuals who show patterns of behavior associated with terrorist groups, including al-Qaeda. According to one estimate, only about 8 percent of strikes have been aimed at al-Qaeda, with about 51 percent directed at militants described as “Taliban,” a term that sweeps up a range of low-level insurgents and operatives including

the Afghan Taliban, the Pakistani Taliban, the Haqqani network, and enemies of the government of Pakistan.²⁷ When armed drones kill not just leaders but also followers they are more akin to remote-control repression than targeted killing or decapitation, especially if there are civilian casualties.

The long history of terrorism suggests that it is extremely difficult to end a group through military repression, because gains are usually limited to tactical and operational effects, not strategic ones.²⁸ Repression exacts a high cost and is difficult for democracies to sustain over time. It works best in places where group members can be easily separated from the general population (thus presenting a target) and, while sometimes successful in defined territories, often results in exporting the problem to neighboring countries or regions. Moreover, if the cause continues, then the group does not end merely through the use of force. All of these dynamics apply to the expanding al-Qaeda footprint in North Africa and the Middle East. The drone campaign is not helping to end al-Qaeda.

Second Objective: Security through the Conservation of Enemies

Until the United States stops drone aircraft attacks and the occupation of “Muslim lands” we will be attacking the United States and I plead guilty to that. —Faisal Shahzad in a New York courtroom, June 21, 2010²⁹

Perhaps the top strategic objective should be to prevent local actors from aligning with the al-Qaeda agenda and targeting the United States and its allies—in short, practicing the conservation of enemies. Violent radical Salafism existed long before 9/11 and will endure long after the US counterterrorism campaign ends. Perhaps the best way to prevent future acts of international terrorism against the United States is to ensure that local insurgencies remain local, to shore up allied native capacity, and to use short-term remote interventions such as air power and killer drones very rarely, selectively, transparently, and only against those who can realistically target the United States.

The problem here is that it is easier for the United States to rationalize attacking anyone or any group anywhere with some plausible al-Qaeda-like link than it is to grasp the strategic effects of a given attack.

Are we disrupting a potentially powerful network or pounding relatively harmless local jihadists, in some cases producing stronger organizations with new recruits?

This serious dilemma is built into the way the US counterterrorism campaign began more than a decade ago. In the aftermath of the September 2001 attacks, the US war on terrorism was designed to respond to “those nations, organizations or persons” responsible for the 9/11 operations. The name “al-Qaeda,” which does not appear in the original congressional authorization to use force, has since become an ill-defined shorthand, loosely employed by terrorist leaders, counterterrorism policy makers, and Western pundits alike to describe a shifting and adapting foe. The vagueness of US terminology was partly deliberate: the 2001 joint resolution was worded to sidestep the long-standing problem of terrorist groups changing their names and evading US sanctions.³⁰ But especially as the political landscape of the Arab world began to shift, the result for US policy became a reactionary response to an ill-defined foe, shifting and geographically dispersed, with diminishing connection to the 9/11 operation and fewer friendly intelligence sources to figure out who is who. While attacking anyone remotely tied to the al-Qaeda label is tempting, it forces us into a contest framed and defined by others, endlessly multiplying our enemies and heightening their incentives to attack the United States.

This second strategic objective should force the United States to respond to the threat of terrorist attacks selectively to avoid driving enemies together. US experience with insurgencies in Iraq and Afghanistan demonstrates that it is always much harder to maintain order than to disrupt it. Counterinsurgency is expensive, draws fire against American troops, and is difficult to win: historically the odds of succeeding in any counterinsurgency not directly on a state’s own territory are low. US policy makers may be weighing the short-term costs of targeted drone strikes against the high costs of two major counterinsurgencies in Iraq and Afghanistan. Going forward, however, that cost-benefit ratio will be viewed in a different light. Suddenly the relatively light footprint and low costs of global drone strikes may start to add up in terms of stoking new threats, stirring up more local disturbances or revolutions, damaging the image of the United States (especially in Muslim-majority countries), and raising endless doubts in US and allied states about the morality and effectiveness of launching an unknown number of drone attacks against

such a broad-based and indefinite target set. Following the logic of this strategy, if the movement is transitioning into a series of local and regional insurgencies, the United States should let those directly involved determine the outcome, keep itself out of the middle of those fights, provide resources only to offset aid given to radical factions, and concentrate on protecting the homeland.

How Do Drones Advance This Approach?

Yet drones can have important tactical advantages. Globalization has given terrorist groups access to powerful weapons and a potential worldwide reach, and it makes sense for the United States to attack newly emerging nodes in these networks before they can manifest new attacks. By increasing the use of killer drones, US policy makers apparently believe that killing known operatives before they target the American homeland beats suffering US civilian casualties and invading another country in its aftermath. Whatever their bad press, drone attacks are less devastating for local populations than other forms of warfare would be, such as sending US ground troops in to occupy Yemen or Somalia. They are also much more popular with US domestic audiences, especially members of the US armed forces and their families who are exhausted by more than a decade of war. They are discriminating responses to active threats against the US homeland and have had considerable success in disrupting dangerous operations by groups such as AQAP that could have killed hundreds of Americans.

Drones offer a low-cost alternative to conventional intervention, occupation, and war. Appropriately used, targeted drones are precise weapons that can enable the United States to respond quickly wherever al-Qaeda targets present themselves, without the cost and baggage of another occupation. Al-Qaeda-associated operatives have been trying to take advantage of unstable situations in Yemen, Libya, Mali, and especially Syria. With potential access to the chemical and biological weapons of the Syrian regime, this is a particularly serious threat to the region. Moreover, the situation in Syria has helped to spark the rise of the Islamic State in Iraq and Syria (ISIS), which is carrying out widespread sectarian violence in the wake of the American withdrawal as well as sending thousands of fighters to topple the Assad regime. The region is highly unstable, and the United States bears some responsibility for what we are leaving behind. With the American people tired of a de-

cade of war, however, it is unlikely that they will support another major intervention using ground troops. Using drone strikes may enable us to keep jihadists who may be aligned with al-Qaeda from coalescing and tipping the balance in sensitive places.

US officials have claimed that drone strikes have prevented or preempted numerous specific terrorist attacks that would have resulted in American casualties. Although some of these claims are hard to verify, many can be validated in the open press. For example, Najibullah Zazi, the airport shuttle bus driver who in September 2009 tried to bomb the New York subway system, was trained and equipped with TATP explosives (triacetate triperoxide, similar to those used in the deadly 7/7 London attacks) by al-Qaeda in Pakistan. Degrading that network reduced the threat that this might happen again. AQAP in Yemen has engaged directly and indirectly in attempted terrorist attacks against the United States, including the 2009 shooting rampage by US Army Major Nidal Hasan at Fort Hood, Texas, inspired by the preaching of AQAP member Anwar al-Awlaki, an American citizen killed by a drone attack in September 2011. AQAP was also responsible for “Umar Farouk” Abdullah Abdulmutallab’s effort to ignite a bomb hidden in his underwear on Christmas Day 2009. And in October 2010, it tried to blow up bombs rigged in printer cartridges packed with PETN (pentaerythritol tetranitrate, a plastic-based explosive) aboard two US cargo planes. The drone campaigns in Yemen and Pakistan directly responded to these threats against the US homeland and reduced the likelihood of them happening again.

How Do They Detract from This Goal?

Cause and effect are difficult to prove. Some threats to the US homeland have actually emerged from outrage over the drone campaign, rather than the other way around. For example, Faisal Shahzad, a naturalized American citizen, tried to blow up Times Square in May 2010 by loading a sport utility vehicle with explosives. An observant street vendor alerted police to the smoking car. A married financial analyst, Shahzad was an unlikely terrorist, but he was enraged by US policy in Muslim states, particularly widespread drone attacks in his native Pakistan.

The situation in Pakistan suggests that drone attacks exact a clear price in growing animus toward the United States. Drone strikes are wildly unpopular among Pakistanis who know about them.³¹ Pakistani

public opinion is angry and deeply critical, with most opposed to American drone strikes. This despite the fact that the United States names Pakistan a crucial partner in combating terrorism and relies on it for long-term stability in South Asia as American combat troops withdraw from Afghanistan. Pakistan has been among the top recipients of US foreign assistance (second after Afghanistan and ahead of Israel), with \$4.3 billion dollars provided in 2010 alone.³² Despite the large amount of economic and military aid that the United States provides annually, and unceasing rhetoric about the United States–Pakistan alliance in the war against al-Qaeda, nearly three-quarters of the Pakistani population consider the United States an enemy.³³

It is not just Pakistanis who are turning en masse against the United States as a result of anger about the killer drone campaign but also a wide range of people from countries who are otherwise friendly to Americans. The vast majority of people polled internationally in 2012 indicated strong opposition to the US campaign of targeted drone strikes. Muslim-majority countries reflect sharp disapproval of the program, including traditional US allies such as Turkey (81 percent against), Jordan (85 percent against), and Egypt (89 percent against). The populations of our European allies are almost as unhappy, including Poland (51 percent disapprove), Germany (59 percent disapprove), France (63 percent disapprove), Spain (76 percent disapprove), and Greece (90 percent disapprove). In sharp contrast, Americans overwhelmingly support drone attacks targeting militants in Pakistan, Yemen, and Somalia (62 percent approve and 28 percent disapprove). They are completely alone in this viewpoint. Indeed, the only states that edge a little bit closer to the American attitude are those in which opinion is virtually evenly divided, such as India, where 21 percent disapprove and 32 percent approve (but almost half will not answer the question at all), and the United Kingdom, where 47 percent disapprove and 44 percent approve.³⁴

A crucial element in the success of US counterterrorism efforts has been the remarkable ties that we have built with our partners and allies, including collaboration against terrorist financing, cooperation on best practices, extradition of terrorist suspects, and, most importantly, the sharing of vital intelligence. President Obama ran for office in 2008 with the promise that he would restore the US image in the world. He began his first term with a major speech in Cairo, Egypt, pledging to repair the damage done by the Bush administration's 2003 invasion of Iraq. But US

secretiveness, unilateralism, and lack of transparency on targeted killings are undermining connections painstakingly built over the past decade. An increase in the threat of anti–United States terrorist attacks and a decrease in the likelihood that partners will extradite or share key information are likely to result.

No one seems to be undertaking the (admittedly difficult) task of calculating the overall costs and benefits for long-term US policy. Really stopping a major attack along the lines of 9/11 might be worth the international opprobrium against the US drone campaign. But what if all we are doing is driving down international support and alienating local governments, rather than effectively halting what is almost impossible to stop—namely, a small cell of determined jihadists trying to execute a minor attack on US soil?

Finally, it is worth considering whether the drone attacks are contributing to the metastasizing of the al-Qaeda threat. In one of his last letters, Osama bin Laden urged the brothers to move from North Waziristan to escape the drones. There is an alphabet soup now of groups with long-standing local struggles, mostly local membership, and now some connection to core al-Qaeda (or its agenda), including ISIS, AQAP, AQIM, AQI, Al Shabab, and Boko Haram. This is not historically surprising. The fractionation of terrorist groups is a well-known by-product of campaigns of decapitation and repression. The aggressive Russian campaign of assassinations of Chechen leaders between 2002 and 2006, for example, resulted in a shift from a bloody separatist insurgency to an increasingly radicalized movement that spread to the broader Caucasus.³⁵ The Russians killed virtually every major Chechen leader and pummeled Grozny to rubble; but although Chechnya came firmly under Russian control, violence spread to Dagestan, Ingushetia, and North Ossetia. Today those who argue that we should stay the course tend to be the same people who warn that the al-Qaeda threat is spreading throughout the Middle East and Africa. It is worth pondering whether US use of armed drones is contributing to this dynamic.

The drones are killing operatives who aspire to attack the United States today or tomorrow. But they are probably also increasing the likelihood of attacks over the longer term, building resentment and a desire for vengeance. In short, whether or not drones are helping us conserve our enemies and deflect Islamist violence away from Americans is a mixed picture.

The Limits of the Empirical Evidence

Barring a defined and immediate threat, what the United States needs most to win the long-term fight against al-Qaeda is excellent human intelligence, a clear political strategy, and knowledgeable information operations, not kinetic operations. No one can accurately measure the hatred of relatives of victims of drone attacks, particularly civilians, and predict the blowback that might occur in three, five, or ten years as a result. Providing a short-term kinetic fix for embattled local governments will undermine their incentives to reform and reduce the likelihood of effectively tracking the evolution of this threat going forward. The state of our intelligence with respect to some al-Qaeda affiliates is weak, and we are open to manipulation by local actors.

We do not have reliable evidence on whether the drone strikes are radicalizing more enemies than they are killing. The question of whether we are making the insurgency in Yemen better or worse, for example, depends heavily on whom you ask. Our policy makers are dealing mainly with security officials wedded to the existing regime, with an inherent conflict of interest in describing the results. There are also dueling academic research studies for both Pakistan and Yemen, with some academics arguing that there is no widespread blowback against the United States (Christopher Swift on Yemen; C. Christine Fair on Pakistan), and others warning of a simmering explosion that is driving recruits to al-Qaeda affiliates (Gregory Johnsen on Yemen; “Living under Drones” report on Pakistan). Much of the evidence is highly contested. The sample sizes used to determine conclusions tend to be small and biased toward local officials and educated professionals who are easiest to interview but least likely to be prospective insurgents or terrorists.³⁶

Third Objective: To Protect the American People

Senator, I live this every day and night. I go to bed at night worrying that I didn't do enough that day to make sure I protect the American people. —John O. Brennan, *nominee for Director, CIA*³⁷

The attacks of 9/11 awakened the United States to the vulnerability of the homeland. In the post-Iraq/Afghanistan war period, the US forward presence and desire to take the fight to the enemy, especially at a time of fiscal austerity, makes UAVs and Special Operations forces the pre-

ferred instruments of hard power. In popular perceptions, the killing of US Ambassador Chris Stevens in Benghazi was only the most dramatic reminder of the threat to American civilians and interests overseas. Rightly or wrongly, there is a reason the tragedy in Libya became a political liability for the Obama administration during the 2012 election campaign. For many Americans, the two are connected: it was, after all, al-Qaeda attacks on two US embassies in Africa and on our interests in Saudi Arabia that preceded the devastating terrorist attacks on US soil in 2001. The nature of terrorism puts a premium on early action, even preemption, if Americans are to be protected; but early action invariably means striking before you know for certain that an imminent threat is in the offing.

Zero risk has become a putative policy, however unrealistic. Given the shocking nature of terrorist attacks, US counterterrorism policy depends not just upon objective measures of effectiveness but also upon audience perceptions. For good or ill, the American public strongly influences the aims, character, and time frame of this campaign. Indeed, if US counterterrorism were made by popular ballot, overseas drones against belligerent foreign nationals would be exactly the kind of tactic we would be using: low cost and low risk for Americans, discriminate, apparently effective, and faraway. Most Americans demand zero risk, and the use of targeted drone killings outside the United States seems to offer it.

Do Drones Protect Americans?

Protecting the American people is the top objective regularly expressed by the president, CIA head John Brennan, and countless other executive branch officials. And by virtually every quantifiable measure, the US government has been remarkably effective at protecting the American people from terrorist attacks in recent years.³⁸

Examining the history of terrorism, the United States has been in a remarkably safe period. After the tragedy of 9/11, the number of people who died from terrorist attacks in the United States from September 12, 2001, to the end of the decade was only fourteen (in 129 incidents, including unsuccessful attempts), a remarkable achievement.³⁹ While each death was regrettable, it was a tiny figure compared with earlier decades. During the 1970s, 160 people died in terrorist attacks in the United States, in 1,328 terrorist incidents.⁴⁰ In the 1980s, there were

forty-four fatalities (389 incidents); and in the 1990s, 202 fatalities (328 incidents). In other words, following the 9/11 attacks, the number of people who died from terrorist attacks (and attempted terrorist attacks) in the United States plummeted to the lowest number ever seen since these statistics began to be collected—possibly because of increased public vigilance and heightened defenses at home but also due to US counterterrorism policy, including targeted drone attacks, abroad.⁴¹ It is impossible to determine exactly what contribution killer drones have made to the outcome; however, from the perspective of results at home, our senior officials have every reason to believe that what they are doing is working.

Our leaders are not thinking about the terrorist threat to the United States five years from now, they are focused on avoiding a significant terrorist incident during their watch. Most agree that the ability to mount another 9/11-type, mass-casualty attack on the US homeland has diminished; however, the smaller caliber incidents attempted by AQAP and the Tehreek-e-Taliban Pakistan in 2009–2010 seemed to be just as alarming to them. President Obama was furious about the 2009 Christmas Day bombing attempt, and he pressured his counterterrorism team to do more to prevent any attack on US soil. A dramatic increase in numbers and scope of targeted drone killings followed in 2010.

As dangerous as the near misses on US soil were, fears that these individuals posed the same level of threat as the original al-Qaeda organization were not corroborated by the facts. But because the threat was only limited by our darkest nightmares, the incidents had widespread effects even in failure. In 2009–2010, each United States–based incident (whether it succeeded or not) increased public anxiety and reduced the popular tolerance of risk. In May 2010, a CNN public opinion poll indicated that American fear of a terrorist attack had returned to 2002 levels. Fifty-five percent of those questioned said that an act of terrorism on US soil was likely in the next few weeks—a surge of 21 percentage points from August 2009.⁴² And that effect persisted: Americans are still highly anxious about terrorism. A 2011 Pew poll indicated that 61 percent of Americans felt that the terrorists' ability to launch another major attack on US soil was the same or greater than in 2001.⁴³ A Pew poll in the aftermath of the 2013 Boston marathon bombing showed that 75 percent of Americans believed that occasional acts of terrorism would persist on US soil, up from 64 percent the year before.⁴⁴ Statistically, Amer-

icans may still be safer from terrorism than they used to be, but they do not feel safer.

How Do They Detract from the Goal?

We do not know the longer term impact of these policies, only short-term, past results. As terrorism is meant to surprise and leverage a position of weakness, such trends are never reliably linear; the United States could yet experience another major attack on US soil. And US law enforcement agencies continue to monitor potentially dangerous individuals: in June 2012, the Federal Bureau of Investigation revealed that it had conducted more than one hundred investigations into suspected Islamic extremists within the US military, for example.⁴⁵ But if individual jihadists posed a terrorist threat to the United States, it was not accompanied by a groundswell in the number of radicalized Muslim Americans. There was little evidence that widespread radicalization of the population was underway, and indeed, alert community members had brought numerous plots and attempts to the attention of law enforcement.⁴⁶ Instead, beginning in 2009 the number of radical right-wing US white supremacist and militia groups sharply increased, from 149 groups in 2008 to 1,274 in 2011. This development portends future domestic violence from a different, more familiar threat.⁴⁷ In the post-9/11 period, the focus on Islamist terrorism could blind US officials to threats to Americans from other quarters.

There is also the question of the opportunity costs of devoting a large percentage of US military and intelligence resources to the drone campaign. The use of drones is a tactic, not a strategy; yet it is having important strategic effects, beyond the parameters of the current counterterrorism campaign. The US Air Force trained 350 drone pilots in 2011, which was more than the total number of conventional fighter and bomber pilots being trained over the course of that year (250). There are sixteen drone operational and training sites across the United States (including California, North Dakota, Ohio, and New York), and a seventeenth is being planned. There are also twelve US drone bases stationed throughout the world, often in politically sensitive areas.⁴⁸ It is changing both our long-term force structure and global posture and may be ill suited for other emerging threats.

Finally, the drone campaign is fundamentally challenging our legal

framework, especially with the controversial killing of four US citizens abroad since 2009. Those Americans were not protected.

The Limits of the Empirical Evidence

Israel's policy of targeted killings is sometimes cited as a model for the US armed drone campaign, and it offers ample empirical evidence that may be relevant here. As Daniel Byman argues, "Targeted killings are a necessary tool of Israeli counterterrorism and can be useful for other countries fighting terrorists based out of sanctuaries they do not control."⁴⁹ The benefits have included keeping terrorist leaders on the run, reducing their ability to carry out attacks, eliminating skilled operatives who were difficult to replace, and providing some means for Israeli political leaders to respond to domestic pressure. They have prevented specific strikes and saved some Israeli lives; some officials also claim that they deter future terrorist action. There has been a sharp drop-off in the frequency and lethality of terrorist attacks, although that may be more attributable to the new border fence between the Israeli and Palestinian populations. The targeted-killing policy is extremely popular with the Israeli public.⁵⁰

On the other hand, its longer term effectiveness has been a source of contention and international condemnation. Targeted killings have created Palestinian martyrs, drawn recruits to terrorist organizations, and resulted in retaliatory attacks against Israeli civilians.⁵¹ Mohammed Hafez and Joseph Hatfield undertook a statistical analysis of the al-Aqsa uprising violence, concluding that "targeted assassinations ha[d] no significant impact on the rates of Palestinian violence, even when time lags associated with possible retaliations are taken into account" and that the military utility of the tactic was therefore nil.⁵² Byman is more complimentary, asserting that "targeted killings work. The strikes have disrupted Hamas, Palestine Islamic Jihad (PIJ), the al-Aqsa Martyrs Brigade, and other Palestinian terrorist groups; they have depleted the number of skilled operatives; and they have forced the remaining militants to spend more time in hiding than in plotting future attacks."⁵³ But long-term costs are ignored, including (in the example of Hamas) the undercutting of moderates, election of a Hamas government in the Gaza strip, and the absence of a credible negotiating partner for the future.⁵⁴ There is no question that the Israeli population is more protected from terrorist attacks in the short term. But it is hard to conclude that tar-

geted killings have made Israel more secure—that is, that they “work”—without also pondering Israel’s long-term strategic interests.

For the United States, one of the key limitations of this approach is the destruction of evidence that can make the campaign smarter and more effective. When you kill a suspected terrorist, you may never know whether he was indeed a terrorist or what he was planning, how and with whom. You are eliminating the information on which an understanding might be built. Armed drones remove the possibility of arresting and interrogating those who are targeted, meaning that a well-established means of undermining a group is eliminated. The most dramatic recent decapitation—the killing of Osama bin Laden—used humans, not drones; but the most important outcome of the Abbottabad operation was the treasure trove of intelligence it yielded, not the killing of bin Laden. Drones do not capture hard drives, organizational charts, strategic plans, or secret correspondence; and their tactical effectiveness is entirely dependent upon the caliber of human intelligence on the ground. They may make it more difficult to persuade local actors to work with the United States, giving decision makers limited access to the kind of human intelligence needed for effective targeting by any means. With less knowledge of local conditions, the use of killer drones can become an opportunity for rivals to manipulate US assets to settle scores. The disruption of imminent operations saves lives, but so does the effective interrogation of members of terrorist groups.

Conclusion

Drones are tactically effective in the short term but perilous for American counterterrorism in the long term. With respect to the first strategic objective, drone strikes do not advance the goal of ending al-Qaeda and its affiliates and associates. Armed drones kill known members, degrade al-Qaeda operations, and reduce the level of violence in the areas where they occur; but they also increase the incentives for members and associates to disperse and to participate in ongoing campaigns in other parts of the Middle East and North Africa. They do not affect the on-line presence of the jihadist movement, much of which is being disseminated by younger, newer, savvier participants who tend to be especially angry about the US use of killer drones and their actual or alleged civilian casualties. The lack of transparency of this program is damaging US

counterterrorism effectiveness. One result of ignoring the strategic effects of the killer drone campaign may be that we are not only deferring al-Qaeda's demise but actually extending its life by diverting attention away from its despicable violence against innocent victims and toward the United States.

With respect to the second strategic objective—averting the alignment of local actors with the al-Qaeda agenda—the use of targeted drone strikes has a mixed record. Armed UAVs have greatly damaged known affiliates in Pakistan and Yemen and prevented attacks against the United States that might have been orchestrated by operatives now distracted by staying alive. Yet al-Qaeda affiliates are learning and to some extent successfully adapting to this challenge by sharing defensive measures. More broadly, targeted drone strikes are eliciting widespread popular anger against the United States that is undermining ties with friends in Muslim-majority states and European allies alike. Instead of dividing the al-Qaeda movement, we are potentially splitting the counterterrorism coalition that formed in the wake of 9/11.

Finally, the third strategic objective of protecting Americans from terrorist attacks is being accomplished very well, at least for now. Despite the global opprobrium against US armed drone strikes, particularly when they strike civilians, Americans are uniquely enthusiastic in their overwhelming support. Our policy makers are human beings responding to widespread political pressure that the United States homeland be kept completely invulnerable, even beyond the typical levels of terrorism that existed in past decades. The demand for zero risk assigns them an impossible task, while setting the bar for al-Qaeda associates much too low. Popular resilience is a key part of any winning strategy against al-Qaeda; yet the levels of public anxiety in the wake of even low-level, failed attempts drive US policy makers to use every possible tactic to respond, even when strategically ill advised. As they challenge long-standing legal and moral frameworks, US killer drones are ripe targets for criticism, but we must also acknowledge the role that unrealistic public expectations are playing in their use. The popular demand for perfect security against al-Qaeda terrorist attacks at home without more conventional military engagements abroad is fueling this technology-driven, tactical approach. But it is never wise to let either gadgets or fear determine strategy.

Security Implications of Drones in Warfare

Patrick B. Johnston

Drones have attracted their fair share of critics as the United States grows increasingly reliant on them in its counterterrorism campaign against al-Qaeda. Yet they have also garnered supporters who see them not only as critical tools in the fight against al-Qaeda and related groups but also as essential elements of future war-fighting strategies. Drones are in the process of radically altering—potentially even revolutionizing—the way wars are fought. In 2009, then CIA director Leon Panetta called drone warfare “the only game in town” for US counterterrorism against al-Qaeda’s leadership in northwestern Pakistan.¹

Drones offer the United States considerable advantages, in the short to medium term and possibly longer. However, a critical question is how the United States can use these advantages without unintended consequences, particularly its adversaries’ acquisition and use of the same technologies. Unmanned systems are already beginning to transform the conduct of war and other military operations because of their ability to provide persistent surveillance and to execute targeted strikes at relatively low risk to the United States. In the future, drones are almost certain to play an even more transformational role, with many experts predicting, for example, the potential for clashes between swarms of autonomous unmanned systems.

In addition, the contemporary impact of drone technologies in irregular warfare (particularly in counterterrorism and counterinsurgency) has been widely noted. While unmanned technologies have been criti-

cal in countering improvised explosive devices, the developments made in intelligence, surveillance, and reconnaissance (ISR) for targeted killings have radically changed the conduct of irregular warfare. Targeted killings in counterterrorism and counterinsurgency are not themselves transformational; indeed, they are an extension of long-used tactics. But the advantages drones offer and the frequency with which such strikes may be conducted represent significant shifts in the conduct of these targeted-killing operations. Moreover, drones dramatically improve the feasibility of targeted killings in sovereign states with which the United States is not at war.

At present, the United States is dominant in unmanned technologies, both in general and especially in their military applications; today, Israel is the only other power that rivals the United States in certain aspects of military unmanned technology. These technologies, however, are rapidly diffusing. Currently, more than seventy-five countries worldwide reportedly operate unmanned aerial vehicles (UAVs). That number is expected to grow rapidly, as is the sophistication of these other countries' technologies. The proliferation of these technologies makes it critical for the United States to evaluate its current development and use of unmanned systems in anticipation of other actors' future capabilities and their responses to US actions. Even if other countries are unable to deploy lethal unmanned systems outside of their own borders, the US use of drones today may influence its adversaries in counterproductive ways.

Overview of Drone Use

Compared with other military instruments, the advantages of drones—particularly, that they avoid direct risks to members of the US military—outweigh the limited costs and consequences. Since 9/11, drones have carried out more than 95 percent of all nonbattlefield targeted killings—the remaining attacks were by Special Operations forces (SOF) raids, AC-130 gunships, and offshore sea- or air-launched cruise missiles. And in recent years, decision makers have become more likely to use lethal force against a range of perceived threats than they were in the past.² In short, the evidence points to the fact that drones are here to stay, even if their lethal use is curtailed, as it has been in 2014 compared with previous years.

History of Drones in Warfare

Drone operations are not new. Operation Desert Storm in 1991 saw the rollout of the Israeli-designed Pioneer UAV, which was used in more than three hundred reconnaissance missions. That year, the navy used Pioneers to locate Iraqi targets, resulting in the Iraqis famously “surrendering” to Pioneer aircraft. Indeed, much of the United States’ modern drone technology and tactics stem from developments in Israel, particularly from its use of UAVs in Lebanon in 1983.³

The Hunter was developed in the late 1980s by Israel Aircraft Industries and TRW (now owned by Northrop Grumman) and was deployed in the Kosovo war as part of Operation Allied Force in 1999. Operation Allied Force marked the largest rollout of drones in military history, as Pioneers, Predators, and Hunters were all used against Serbian forces.⁴ The Predator, which emerged from its predecessor the Amber, created by Leading Systems and later developed by General Atomics in 1994, was first flown in the Balkans conflict in 1995. The CIA then deployed its own Predator in 2000 during the hunt for Osama bin Laden in Afghanistan. Analysts at the CIA’s National Counterterrorism Center believed they had spotted him at al-Qaeda’s Tarnak Farms training camp near Kandahar, but a drone was not immediately deployed for a targeted-killing mission, reportedly because of infighting between the CIA and the air force over who would assume responsibility.

The Predator was only considered for weaponized use after the events of September 11, 2001. Its design remained largely intact, but the major change was that two Hellfire missiles were added under its wings. On February 4, 2002, the CIA struck who they believed to be Osama bin Laden near the city of Khost. Unlike previous joint operations with the military, this was a “pure” CIA kill. As it turned out, the victims were not Osama bin Laden and his bodyguards but innocent civilians gathering scrap metal. Ironically, the site of the strike was Zhawar Kili, a mujahedeen base built by Jalaludin Haqqani in the 1980s with CIA and Saudi support.

The Evolution of Drone Technology and Use in the War on Terror

Drones were first used for battlefield reconnaissance, but over the last ten years, they have evolved into America’s preferred weapons system

for locations where the US military does not operate openly on the ground. The evolution of drone technology has been quick, with new developments allowing for longer flight, heavier payloads, vertical takeoff from ships, and deployment to more areas of the world. While the Predator MQ-1 and Predator (Reaper) MQ-9 have carried out most surveillance missions and attacks, new platforms have been deployed that will likely engage targets in the near future. The most recent evolution of UAVs comprises the RQ-4 Global Hawk (designed and used for surveillance only) and the MQ-8B Fire Scout. The latter is currently deployed on ships located off the Horn of Africa and in the Caribbean. With basic models starting at \$4.5 million, these aircraft are cost efficient and carry little risk burden, especially since human pilots are removed from the equation.⁵

In parallel with drone technology itself, the United States' use of drones in counterterrorism operations has evolved over the last decade. The program's evolution can be usefully viewed as having five phases.

Phase I, 2002–2004, was primarily an experimental test period, in which both the technologies and the authorizations associated with lethal drone strikes were in question. During this period, drone strikes were rare and appear to have been limited to high-value targets that were beyond the United States' reach via other means. The first use of remotely piloted drones for missile attacks outside identified war zones took place in 2002. This attack, in northeastern Yemen, killed al-Qaeda member Salim Sinan al-Harethi, who was suspected of masterminding the 2000 USS *Cole* bombing in Aden. The next attack, in 2004, targeted Nek Mohammad, a former mujahed who became an influential member of the Taliban and fled to Pakistan after the 2001 US invasion of Afghanistan.⁶ The Pakistani government considered Mohammad a greater threat than did the United States, and, in exchange for Mohammad's killing by the United States, allowed the United States to fly its drones over the Federally Administered Tribal Areas (FATA) in northwest Pakistan and to conduct lethal strikes against agreed-upon targets, so long as the Pakistani government retained deniability for the attacks.⁷ Pakistan's secret assent to US drone strikes inside its territory ushered in Phase II of the United States' post-9/11 drone wars.

Phase II, 2005–2007, saw a slight increase in the number of strikes, which were conducted extremely selectively and only against targets considered to be of very high value to al-Qaeda. All of the drone attacks

carried out during phase II were conducted in Pakistan and followed the initial success of the program, defined by eliminating high-value targets. In 2005, the United States claimed it killed al-Qaeda's number three lieutenant, Abu Hamza Rabia, but conflicting reports cast doubts on Rabia's actual position and foreshadowed the ambiguity involved in targeting and identifying high-value targets.

Phase III took place during the latter part of the Bush administration and marked the beginning of a significant escalation in strikes: thirty-seven during 2008, compared with a total of nine in the first two periods. The success of the drone program during its infancy, as defined by its ability to kill high-value targets like Harethi and Nek Mohammad, gave the Bush administration the impression that if limited drone strikes were successful, then more strikes in an expanded drone program would be feasible. The Bush administration's increased reliance on the program started in 2008; however, it is under the Obama administration that the number of strikes has expanded most rapidly.

Phase IV of the drone program is characterized by an even greater increase in attack frequency and an expansion of the target list to include unidentified militants of dubious rank. As of May 2011, the CIA under the Obama administration had conducted nearly two hundred drone strikes, suggesting that the drone target list began to include targets of opportunity, with some likely selected in consultation with the Pakistani authorities. This development, in turn, has arguably decreased the effectiveness of the program when assessed in terms of the ratio of high-value to non-high-value kills.⁸

Phase V, which began in 2013, is characterized by a drawing down in drone strike numbers in Pakistan, a reduction of so-called signature strikes, and a move—however minimal in practice—toward greater transparency, starting with the White House's acknowledgement of the drone program's existence.

The Effectiveness of Drone Strikes in Counterterrorism

The Obama administration relies on drones because of one fundamental premise: that they work. Drone strike proponents cite three main reasons for their success: leadership degradation, disruption of terrorist training and operations, and the denial of safe havens for terrorists.

Leadership Degradation

Previous research by a RAND Corporation analyst suggests that targeted killings—including those conducted by drones—can make important contributions to degrading nationally based insurgent and terrorist groups in their home countries and stronghold areas.⁹ Moreover, a growing literature in political science suggests that leadership decapitation—the killing or capture of key militant figures—has a significant impact on military effectiveness in counterterrorism and counterinsurgency.¹⁰ A recent study of 207 terrorist organizations from 1970 to 2008, which compared terrorist groups whose top leader had been killed or captured with groups whose top leader or leaders had not, found that killing or capturing top terrorists significantly increased group mortality rates, effectively reducing the average length of time that terrorist groups could sustain campaigns of violence.¹¹

Another recent study of ninety insurgencies from 1975 to 2003 similarly found that decapitation had a substantial impact on insurgencies whose top leader or leaders were killed or captured by government or third-party security forces. Such insurgencies were more likely not only to be defeated but also defeated quickly. Moreover, these groups tended to conduct fewer attacks and kill fewer people than groups whose leadership remained intact. The study also found no evidence that the military advantages associated with leadership decapitation depended on the aims or ideologies of the groups involved.¹²

Another study of the removal of rebel leaders—broadly defined as those identified as leaders of militant groups engaged in violent conflict against one or more states in which a sufficient threshold of violence is satisfied to meet the criteria to be coded as a “civil war”—finds three main results that are consistent with previous results from the counterterrorism and counterinsurgency literatures. First, when the leader of a rebel group is captured or killed, civil wars are four times more likely to end than when the leader is not captured or killed. Second, conflicts were less likely to end while rebel groups were being led by their founding leader. Third, the leader of a state that presided over the beginning of the conflict was significantly more likely to end the conflict than a replacement leader.

Drone strikes have taken a significant toll on al-Qaeda’s core leadership in Pakistan and on al-Qaeda-affiliated groups in Yemen and, to a

lesser degree, Somalia. In Pakistan, where al-Qaeda's core leadership is located, the United States has conducted a reported 408 drone strikes from 2004 through 2014. According to researchers at the New America Foundation, including al-Qaeda expert Peter Bergen, fifty-eight al-Qaeda, al-Qaeda-affiliated, and Taliban group leaders have been killed in drone strikes in Pakistan.¹³

Also according to the New America Foundation, the United States has conducted 109 drone strikes in Yemen since 2002, which have killed thirty-five al-Qaeda in the Arabian Peninsula (AQAP) senior leaders.¹⁴ In Somalia, the US drone campaign targeting Al Shabab, another al-Qaeda affiliate, has been more circumscribed, with fewer than ten documented strikes.¹⁵ But US drone strikes have reportedly killed several Al Shabab senior leaders, including Adan Hashi Farah Ayro and Sheikh Muhyadin Omar in May 2008, and, in January 2012, Bilal al-Barjawi, a British citizen who masterminded the 2010 bombing in Kampala, Uganda, that killed seventy-four soccer fans.¹⁶ Other key leaders, including al-Qaeda commanders Fazul Abdullah Mohammad and Abu Tala al Sudani, have also been killed in nondrone operations.¹⁷

Anecdotal evidence from bin Laden himself supports the effectiveness of leadership decapitation through drones or other means. For example, bin Laden in 2010 told his chief aide, Atiyah Abd al-Rahman, that when al-Qaeda's more experienced, top-level leaders are killed, lower level, less skilled leaders take over, leaving the organization more vulnerable to errors. In a twist of fate, al-Rahman was later killed in a drone strike in Pakistan's Waziristan region. In addition, drones can weaken terrorist groups by killing lower level operatives who specialize in such skills as bomb making, recruiting, and passport forging.¹⁸

Disrupting Terrorist Training and Operations

Drones are also efficient in disrupting communications between terrorist operatives, as well as their training efforts, making it difficult for leaders to take charge directly. Indeed, al-Qaeda and Taliban members are known to avoid gathering in large crowds and refrain from using electronic devices for fear of being targeted by drone technology.¹⁹ Included in a document cache from a vacated al-Qaeda building in Timbuktu, Mali, was a "tip sheet" that showed the extent to which al-Qaeda directed its members to adjust their behavior in order to avoid the reach of

drones. The directive advised militants to “maintain complete silence” in their communications (probably meaning to rely on trusted human couriers instead of any type of electronic communications, as Osama bin Laden had done while hiding in his compound in Abbottabad, Pakistan). It also directed members to “avoid gathering in open areas” and “not to use permanent headquarters.” Members were to instead use “underground shelters”—assuming such structures could be securely built—because “the missiles fired by these planes are usually of the fragmented anti-personnel and not anti-buildings type.”²⁰

Such examples illustrate the extent to which drones can enable the United States to affect militant behavior, forcing insurgents and terrorists to redouble their efforts to ensure secrecy and rely on operational security measures that limit the efficiency of their communications and mobility—two key factors for groups that must plan, organize, train for, and ultimately conduct complex attacks.

Denial of Terrorist Safe Havens

Proponents of drone strikes argue that drones assist government or third-party efforts to deny safe havens to terrorist groups in specific areas. Long before striking a target, drones can fly overhead in otherwise denied or hostile areas, providing the government or a third-party country (or both) with valuable ISR capabilities. Recent estimates suggest that, as of 2013, armed drones, fully loaded with munitions, can loiter over a potential target for as long as fourteen hours.²¹

The capabilities of drones are useful for denying safe haven to terrorist groups in two ways. First, their collection capabilities give governments extended, detailed, views of areas that are believed to be used by militants, and second, they validate intelligence collected from other sources, such as human intelligence, which helps US decision makers to verify that drones strike designated militant targets and not civilians. Drones’ persistent ISR capabilities are helpful in diagnosing whether action in deteriorating areas is warranted. Such action may consist of lethal strikes, SOF raids, military or nonmilitary assistance to the host-nation government, or it may take other forms. But absent the overhead ISR that drones provide, policy makers have considerably less situational awareness and knowledge of what the “ground truth” looks like in real time to help them make an informed decision about an appropriate course of action.

Evidence of drones' effectiveness at denying terrorist groups a safe haven can be found in multiple theaters. In Mali, for example, a captured document published by the Associated Press revealed that the local al-Qaeda affiliate, al-Qaeda in the Islamic Maghreb (AQIM), corresponded with operatives assigned to Mali to state the following: "Gaining a region under our control and a people fighting for us and a refuge for our members that allows us to move forward with our program at this stage is no small thing and nothing to be underestimated. *The enemy's constant, persistent effort now is to not leave any safe havens for the Mujahedeen. So take that into account.*"²² And in Pakistan, captured internal al-Qaeda correspondence shows that the group views the drone program as successful at dismantling its leadership and weakening its capabilities.²³ This can also be seen in the group's reduced attack frequency and lethality in the aftermath of drone strikes in Pakistan's tribal areas.

The Ineffectiveness of Drone Strikes?

Some criticize drone strikes by saying their military utility is dubious at best or that drones have little strategic utility against al-Qaeda and its affiliates.²⁴ More specifically, critics of drone strikes' effectiveness argue that drones do not "work" for four main reasons: removing terrorist leadership is largely inconsequential, drone strikes have proven ineffective at denying terrorists a safe haven, strikes have a negative effect on foreign relations, and drone strikes ultimately end up creating more new terrorists than they kill. Each argument is described and critiqued below.

Removing Terrorist Leaders Is Inconsequential

Drone critics are skeptical of the counterterror utility of killing terrorist leaders—the main purpose of drone strikes. From this perspective, removing terrorist leaders—whether by killing or capturing them—is one way that some terrorist organizations have met their demise. For example, after the Philippine military, in 2006 and 2007, killed the leaders of the Abu Sayyaf Group, a Salafi jihadist separatist group in the Philippines, the group struggled to retain its ideological focus, split into factions, and began to focus its activities primarily toward criminal enterprise that was largely divorced from the vestiges of the global jihad.²⁵

Other notable success stories of so-called leadership decapitation include the Shining Path in Peru, in which the capture of Shining Path leader Abimael Guzmán precipitated the group's decline; the Kurdistan Workers' Party (PKK) in Turkey, in which PKK leader Abdullah Öcalan's capture resulted in Öcalan attempting to strike a deal with Turkish authorities to scale back or end PKK terrorism; the Real Irish Republican Army (RIRA) in Northern Ireland, in which the arrests of RIRA leader Michael McKevitt and other RIRA members led McKevitt and his followers to proclaim that continued armed resistance would be futile and that the RIRA was at its end; and Aum Shinrikyo in Japan, in which the arrest and subsequent execution of Aum Shinrikyo leader Shoko Asahara largely vanquished the group.²⁶

Yet leadership decapitation is neither the only way that terrorist groups can be defeated, nor is it the most common way in which terrorist groups "end." On the contrary, terrorist organizations can and do end in a variety of ways. In a study of 648 terrorist groups from 1968 to 2008, Seth G. Jones and Martin Libicki find that most groups that ended did not end because of military force or because they had achieved a victory against their adversaries. Rather, those that ended tended either to join the political process—43 percent of those that ended—or be dismantled by local police and intelligence agencies—40 percent.²⁷ Jones and Libicki observe, however, that of the groups that ended as a result of nonmilitary "policing" or intelligence-centric strategies, they tended to end because local police or intelligence agencies "arrested or killed key members."²⁸

Failure to Deny Terrorists a Safe Haven

Critics suggest that denying al-Qaeda a safe haven in one place increases the chances of the group finding one in another. One counterterrorism expert suggests that "the long-term effect of drone strikes may be that the al-Qaeda threat continues to metastasize."²⁹ Indeed, the decimation of al-Qaeda's senior leadership in Pakistan as a result of drone strikes correlates with the rise of al-Qaeda franchises in other weak and poorly governed spaces across the Muslim world, from Yemen and Somalia to Algeria and the African Sahel.³⁰ In these areas, senior al-Qaeda operatives have left Pakistan and joined forces with fledgling Salafi jihadist groups, such as AQAP in Yemen, Al Shabab in Somalia, and AQIM in Algeria, the last of which has in turn expanded al-Qaeda support to

other Islamist insurgencies in the Sahel, such as Ansar Dine in Mali.³¹ As a result, even though al-Qaeda's core in Pakistan has certainly been weakened, the organization has indeed found other areas in which to operate. Despite losing Osama bin Laden in an SOF raid on his compound in Abbottabad, Pakistan, and the loss of dozens of his top lieutenants to US drone strikes in FATA, al-Qaeda is clearly not dead.

Yet despite al-Qaeda's resilience to US drone strikes, it is unclear whether the group's adaptation to the pressure put on it by US counterterrorism measures represents a success by al-Qaeda or a failure of US efforts, including the drone campaign. As of late 2013, al-Qaeda lacks a central base from which its operatives can plan, train for, and ultimately conduct attacks on the United States homeland. It is too soon to tell whether the group's increasing decentralization is a sign of strength or weakness or simply a new strategy favored by bin Laden's successor, Ayman al-Zawahiri, that focuses more on fomenting insurgencies to overthrow apostate governments in the Muslim world than on conducting major terrorist attacks on the US homeland. What can be known is that aggressive US counterterrorism measures, which include continued drone strikes on the group's remaining senior leadership in Pakistan and on that of its affiliates in other countries, make it extraordinarily difficult for al-Qaeda to mass in a single area for a sustained period of time, as it did in Afghanistan from 1996 to 2001, which was a critical enabler for the methodical planning and ultimate execution of the 9/11 attacks. Indeed, since being forced to flee Afghanistan during the US invasion in late 2001, the group has failed to mount any attack of similar magnitude, and the most threatening plots it has hatched have come almost entirely from its AQAP affiliate in Yemen. These plots predated and in fact led to the escalation of the US drone campaign in that country, which has made it much harder for AQAP to match its earlier efforts.

Drone Strikes Harm Foreign Relations

There is some evidence that drone strikes have caused chafing of diplomatic relations between the United States and its counterterrorism allies. For example, after it was revealed that then Yemeni president Ali Abdullah Saleh gave the United States permission to conduct a high-profile strike that killed a top al-Qaeda operative in 2002, Saleh temporarily banned US drone strikes in his country, before eventually permit-

ting renewed strikes later in his tenure.³² Arguably more costly has been the impact of drone strikes on United States–Pakistan relations. Relations soured quickly owing to a series of disputes involving US counterterrorism measures, including the diplomatic row over Raymond Davis, a CIA contractor reportedly operating under diplomatic cover, who killed two Pakistani Directorate for Inter-Services Intelligence agents and was denied diplomatic immunity by the Pakistani government; the SOF raid that killed al-Qaeda leader Osama bin Laden in Abbottabad, Pakistan, located near the Pakistani Military Academy (the Pakistani equivalent of the United States Military Academy at West Point); and the United States’ escalated use of drone strikes in the Pakistani tribal areas during the Obama administration.

Despite arguments to the contrary, there are abundant examples where US drone strikes have helped allied governments such as Pakistan and Yemen by targeting those governments’ enemies—individuals whom the United States also considers its enemies. During the Bush and Obama administrations, for example, Pakistan housed drone facilities, and the Pakistani government was often informed of drone strikes ahead of time. Ex-Pakistani President Pervez Musharraf, whose term ended in 2008, had decided that the benefits of drones to his presidency far outweighed any political fallout from his support of the US drone campaign. To that end, Musharraf covered up US strikes within his country, reportedly telling a CIA officer “in Pakistan, things fall out of the sky all the time.”³³

The United States’ allies in Yemen also threw their support behind the drone program, with former Yemeni president Ali Abdullah Saleh following Musharraf’s example by allowing US drone attacks while claiming that the Yemeni air force carried out the strikes. Abdu Rabbu Mansour Hadi, Saleh’s successor, made his support of the US drone campaign well known by publicly applauding the precision with which drones target terrorists.³⁴

Although there is evidence of strained United States–Pakistan relations, it is, as described above, unclear what exact role drone strikes have played. Indeed, the US drone campaign, in Pakistan and elsewhere, has thus far relied upon—and required—host-state compliance and support, which the United States has secured through various means of material support, including foreign aid and security assistance. US use of drones in counterterrorism has taken advantage of relatively permissive

environments militarily, which have been largely unthreatened by anti-aircraft guns or surface-to-air missiles. The rate of US drone strikes in Pakistan declined in 2013 and 2014. But the fact that the United States continues to conduct drone strikes in Pakistan at all suggests a certain level of permissiveness on behalf of the Pakistani government and military, which have the capability to threaten US drones flying in their airspace but choose not to do so.

Drone Strikes Create More Terrorists Than They Kill

Critics of the drone program argue that while the sources of recruitment and mobilization to militant networks are numerous, drone strikes provide a boost to militants' recruiting efforts. Some suggest that a desire to avenge the carnage wrought by drones encourages relatives and friends of drone strike victims to join the ranks of militant organizations and help to perpetrate further violence against the United States or allied governments believed to be complicit in their deaths.³⁵ A major report released by Stanford Law School and New York University, for example, indicates that some Pakistanis interviewed in affected parts of the FATA believe that the United States seeks to kill them simply for being Muslims and view the drone campaign as a part of a religious crusade against Islam.³⁶ Subsequent researchers have claimed that in FATA, the population's ire at the drones is mainly targeted at the Pakistani government directly rather than at the United States or its overseas interests.³⁷ The new recruits are funneled into preexisting militant networks in northwestern Pakistan, serving to further destabilize the region and threaten the Pakistani government rather than eliminate militant activity and restore government primacy.

Yet those most vocal in their anger at US drone strikes in affected areas likely already harbor anti-American sentiment and have been and would still be ripe recruitment targets for terrorists. This may partly explain why al-Qaeda and affiliated groups have found sanctuary in these areas in the first place. Empirical evidence from studies of the effects of shelling and bombardment on militant violence in counterinsurgency and counterterrorism is mixed. One study of Russian artillery strikes on Chechen villages found that villages that had been shelled by the Russians were less likely to be the source of future insurgent attacks than villages that were not, suggesting that these strikes did not incite

the local populace to support or participate in heightened insurgent violence.³⁸ A study of US aerial bombardment of suspected Vietcong village bases during the Vietnam War, however, suggests that these bombings were a precursor to deeper Vietcong infiltration and control of these areas.³⁹ Other studies suggest that local responses to violence are much more complex, depending on who commits the violent act and on the local ethnic or tribal dynamics.⁴⁰ Although drone strikes appear to stoke local enmity,⁴¹ it also appears that any enmity drones might create does not lead to more militant violence. On the contrary, violence in areas proximate to FATA agencies struck by drones tends to decline afterward.⁴²

Regardless, in situations where there are no good choices, drones may be the best of the bad choices. Under many circumstances, drones are both less destructive and more precise than other military means that could be used instead. Unlike, for example, an F-16 dropping a five hundred-pound bomb, a drone can create a smaller blast zone with more grenade-like warheads, thereby minimizing collateral damage. Another advantage that drones have over conventional aircraft is that they are able to hover above a target for extended periods of time and wait for the perfect time to attack—that is, when civilians are outside the kill zone.⁴³

In addition, drone strikes generally result in less bloodshed than United States-commissioned manhunts for terrorists by allied security forces. While Pakistan and Yemen—which are the most threatening hotbeds of al-Qaeda activity—are allied with the United States, their militaries are notorious for their broad-handed tactics, such as indiscriminately bombing civilian areas, using no-holds-barred strategies against militant groups, and regularly torturing detainees. Reports of the number of militants versus civilian casualties differ.

Despite inconsistent data, even the highest estimates show that the ratio of civilian to militant deaths caused by drones is much lower than that of more conventional forms of air warfare. For example, in December 2009, the United States launched Tomahawk cruise missile salvos at a suspected terrorist training center in Yemen, which resulted in the deaths of more than thirty people, mostly women and children. If the Yemeni government had allowed the use of drones at the time, United States forces would have been able to identify the presence of innocents and aborted the mission. And if the drone were to strike, it would have killed fewer civilians with a smaller warhead. Of course, civilian casual-

ties are tragic and politically unpopular, but the data should not be ignored: drones are much more precise and discriminate than other kinds of weapons.⁴⁴

Security Implications

Drones are changing the landscape of modern warfare. Three factors in particular—their persistence, their performance, and their expandability—have come to alter the way that the US government is able to collect intelligence and engage in lethal targeting of enemy combatants, particularly nonstate actors such as terrorists and insurgents. By providing persistent surveillance, which has been likened to an “unblinking eye,” along with precision military targeting capabilities and relatively low cost, drones have quickly emerged as a seemingly ubiquitous instrument of US counterterrorism efforts in numerous countries.

But what are the future implications of drone use? Some of the security implications of drones are fairly clear, yet others remain unclear, uncertain, or stuck firmly in the “too early to tell” category. Some of these knowns and unknowns are explored below.

Knowns: Drones Are Here to Stay

There seems little doubt that drones are here to stay. How exactly they will be used, by whom, and for what purposes, remain in question. But what is not in question is that in the eyes of the policy maker, drones are cheap and pose less risk than their alternatives—at least at present. For a fiscally strapped country that is weary of war, this reality is perhaps the most important near-term security implication for US drone use: drones are cheap relative to alternatives and require little on-the-ground manpower and thus pose little risk of US casualties. It is important to note that drones are relatively cheap and non-labor intensive not only for lethal targeting but also for their nonlethal purposes, which broadens their appeal and appears to shape patterns of use.

These stylized facts are not lost on their targets. In fact, the terrorists themselves appear to have a keen understanding of the rationale underlying the US drone campaign, at least for many in the United States. An al-Qaeda document, originally authored by AQAP in Yemen, and discovered by Associated Press journalists in Mali after AQIM militants

fled the area, reveals significant insight into the terrorists' belief in the practicality of drone use against them given the US situation at the time. The document reads as follows:

To start with, we have to know that the Americans did not resort to this approach—The War of the Drone—because they have shortages in the combat jets like the F16 and other types or they don't possess enough troops, but because it is the most suitable approach for them now. The Americans fully realize that they are in the 10th year of war and that they were economically exhausted and suffered human losses and they were confronted with public pressure backed by the Congress in a way that it made the honorable and responsible withdrawal from the war as a prime goal of the White House. But this does not mean that abandoning the war, [*sic*] rather, they pushed them to seek alternative military strategies that enable them to continue the war without being economically depleted or suffer human losses and avoid the American public opinion pressure. Here the war of the drone appeared as a perfect solution. The drone is unmanned and cost nothing compared to the manned jets and it does not create public exasperation when it crashes because the increase of human losses in the past pushed the American people to go to the streets shouting “bring back our sons” and if a drone crashes, no one will shout “bring back our planes.”⁴⁵

The jihadist directive reveals a nuanced analysis of American politics at the time the document was produced, concluding that, as in other theaters, drone warfare was likely to be the preferred approach given the American public's increasing dissatisfaction with the war in Afghanistan and its low tolerance for combat deaths in new campaigns, as expressed by the public's lack of support for President Barack Obama's proposed strike in Syria following Assad's alleged chemical attack that affected Syria's civilian population in August 2013.

It is just as apparent, however, that, as mentioned above, drone operations require a permissive environment, either because of the host-nation government's willingness to allow these operations or its incapacity to prevent them. This means that even though drones are likely to play an ever-growing role in many facets of counterterrorism, they are just as unlikely ever to be relied upon independently of other facets of counterterrorism campaigns or other types of missions for which drones might be deployed. Improved technologies and new means of defending drones to conduct critical missions are likely to be developed, by the

United States or other countries, in order to continue to be able to reap the advantages that drones can provide.

Unknowns

At present, the United States is dominant in unmanned technologies generally and especially in their military applications. These technologies, however, are rapidly diffusing. The number of countries with the capability to operate UAVs is expected to grow rapidly, as is the sophistication of these other countries' technologies. The proliferation of these technologies makes it critical for the United States to evaluate its current development and use of unmanned systems in light of the probable future capabilities of other actors and their likely responses to US actions. Even if other countries are unable to deploy lethal unmanned systems outside of their own borders, the US use of unmanned systems today may influence US adversaries in ways that the United States ultimately finds counterproductive.

How Will Militants Adapt to US Drone Strikes?

Given the jihadists' expectations that drones are likely to remain a major component of ongoing US efforts against their networks, it is unclear how effectively they will adapt their methods and tactics to counter the threats drones pose to them. Documents found by the Associated Press in Timbuktu, Mali, in February 2013 reveal that al-Qaeda is not only concerned about the threats posed by drones but is actively exploring a wide range of measures to counter the drones. In a document dedicated expressly to drone strikes, which was originally authored by an al-Qaeda member in Yemen, it was written that "[The United States] has already tried this strategy [drone strikes] in Waziristan that proved success [*sic*] and they are going to apply it now in Yemen."⁴⁶

The author proposed a counterstrategy based on three things:

- The formation of public opinion to stand against the attacks,
- Deterring "spies,"
- Tactics of deception and blurring.

To pursue this strategy, the document suggested twenty-two possible courses of action, which range from enhanced operational security pro-

cedures to technical solutions that would foil drones' core technologies. Although it is unlikely that militants will develop technical antidrone capabilities in the near future, states likely will. If militants are able to combine increasingly sophisticated operational practices with the support of a state sponsor to help combat US drone use, the program's military effectiveness could be threatened.

*Copycat Killers? How Will Targeted Killings
Influence Global Norms?*

Critics of current US drone strikes contend that the widespread US use of drones to conduct targeted killings in countries with which it is not at war may set a precedent that allows other countries to justify killing citizens of other nations or even their own.⁴⁷ Rosa Brooks, for example, has declared, "the United States is effectively handing China, Russia, and every other repressive state a playbook for how to get away with murder."⁴⁸

Although there is nothing new about the use of targeted killings in such contexts, the frequency of these strikes by drones and the nature of many of their targets may be norm setting in a way that isolated strikes previously were not. When the United States fired Tomahawk cruise missiles into Sudan and Afghanistan to target top terrorist leaders following the bombings of US embassies in Kenya and Tanzania in 1998, it was considered an aberration. But in recent years, the United States has, by some high-end estimates, killed more than three thousand people in hundreds of drone strikes in countries with which we are not at war, including Pakistan, Yemen, and Somalia. These strikes have targeted not just top al-Qaeda leaders but also second- and third-tier al-Qaeda leaders as well as militants from non-al-Qaeda groups believed to be associates of bin Laden or al-Zawahiri. Signature strikes in northwest Pakistan, where al-Qaeda's central core is based, have targeted military-age males whose behavior or activities fit a certain profile, sometimes without concrete verification of their identities. The drone program in Yemen has been more tightly controlled, with each strike requiring rigorous target validation, but reports suggest the controversial signature strikes may become a facet of counterterrorism operations in that country as well.⁴⁹

The US use of drones to conduct targeted killings in other countries against midlevel and unverified targets may set a precedent that allows other countries to justify killing their enemies, at their own discretion,

outside their borders. John Brennan, the United States senior counterterrorism official and CIA director, publicly acknowledged this possibility when he said, “we are establishing precedents that other nations may follow, and . . . not all of them will be nations that share our interests or the premium we put on protecting human life, including innocent civilians.”⁵⁰ The Obama administration appears to recognize this, moving in 2012 and 2013 to institutionalize good practices and place constraints on unmanned systems use.⁵¹

The evidence supporting the norm-setting potential of such strikes, however, is ambiguous. Were other countries to conduct targeted killings and cite US drone strikes as precedent, would prior US behavior be an actual cause of other countries’ targeted killings, or would it simply be a rhetorical strategy employed to justify a decision that would have been taken regardless of previous US actions? Political science research has found evidence of the importance of norms in resolving international crises, suggesting that the United States’ use of targeted killings might weaken its diplomatic leverage against other countries employing such tactics in the future. On the other hand, studies of deterrence have frequently discounted the role of prior behavior, finding that aggressor regimes typically find reasons to believe that “this time things are different” (that is, they privilege present contextual factors over prior actions undertaken in different contexts).⁵² If the latter interpretation is correct, then it matters little to the future behavior of unsavory regimes whether the United States makes widespread use of targeted killings, and it would be folly for the United States to relinquish any counterterrorist advantages derived from such killings in order to strengthen global norms against targeted killings.

Possible Proliferation of Drones

Today, US adversaries have not deployed unmanned platforms in lethal roles, but this fact is almost certain to change in the coming decades. As mentioned earlier, more than seventy-five other countries currently operate unmanned systems, and that number is expected to continue growing. The United States’ success in using unmanned systems in Iraq and Afghanistan has prompted other countries to increase their own investments in this field. Current projections show the United States accounting for a steadily declining proportion of worldwide research and development expenditures on unmanned aerial systems.

A number of studies suggest that the United States will face growing threats from unmanned technologies in the future.⁵³ That future could be near. One of the United States' main rivals, Iran, has already developed its own armed drones. China, another international rival, recently announced it would use surveillance drones to monitor a group of uninhabited islands in the South China Sea that are controlled by Japan but claimed by China and Taiwan.

To some extent, US government development of these technologies itself contributes to the diffusion of know-how in other countries. In the longer term, however, the primary driver of this diffusion is likely to be the private sector. There are considerable commercial applications for most of the technologies necessary for unmanned military platforms, and United States-based and other firms are anxious to develop these markets. The existing frameworks for regulating the proliferation of these technologies—the Missile Technology Control Regime and Wassenaar Agreement—are voluntary arrangements under constant pressure from countries pursuing their own commercial and strategic interests. Reducing the diffusion of unmanned technologies with military applications and their acquisition by US adversaries will be highly challenging.

Conclusion

It is clear that drones already have begun, and will continue, to change the face of warfare in the twenty-first century. Drones have been the Obama administration's weapon of choice for targeting militants and have been widely used within Afghanistan. Drones are not the only weapons system used against insurgents and terrorists—SOF raids, traditional air strikes, and cruise missiles remain vital options for conducting such operations. But the combination of the new capabilities afforded by drones, their relative cost effectiveness, and their ability to keep American soldiers out of harm's way have made them a leading means by which to fight what analysts have called "the long war," particularly as the wars in Iraq and Afghanistan have wound down.

Drones have enormous potential as a tool of war, but they also come with risks. On the one hand, they enable the US government to target militants with whom it is at war more precisely and effectively; they serve as valuable intelligence collection platforms that enable analysts

to detect and disrupt patterns of activity that, in their absence, would likely lead to militant attacks; and their very presence leads militants to change their behavior, reducing communications with each other and restricting their movement, in effect enabling the United States to seize the initiative and play “offense” in areas in which it has little presence rather than to constantly be on the defensive. On the other hand, it seems abundantly clear that the United States is currently enjoying a unique period in which it, along with selected allies, enjoy an all but monopoly on drone technology, particularly in its lethal use. It is clear that drones have distinct limitations and are not a one-size-fits-all tool for fighting wars, either now or in the future. Drones provide limited leverage, for example, in contexts in which a friendly government is not present to allow them to fly in its airspace, as in Syria or Iran. In such places, drones are likely to be detected and are at risk of being shot down. In short, as useful as drones are for narrow counterterrorism missions, it would be a mistake for policy makers to confuse them for a catchall silver bullet for the variety of national security threats against which the United States must defend and for interests it must protect.

Winning without War: Evaluating Military and Nonmilitary Strategies for Countering Terrorism

David Cortright and Rachel Fairhurst

Policy makers in Washington remain committed to a military solution in the struggle against al-Qaeda, the Taliban, and other armed extremist groups that use terror methods. Although the Obama administration discontinued use of the phrase “war on terror” and shifted its rhetorical emphasis to “countering violent extremism,” military operations continue to be the primary US response to global terrorist dangers.¹ The US military may have fewer “boots on the ground” now than a decade ago, but counterinsurgency (COIN) warfare and military operations continue. The new form of military intervention utilizes small numbers of Special Operations troops, Central Intelligence Agency (CIA) paramilitary teams, and drone strikes—usually in combination with United States—“advised” indigenous security forces. Military Special Operations troops are reportedly active in more than a dozen countries, and the CIA is conducting more covert action operations around the world than at any time in its history.² A military paradigm still prevails. A war on terror by another name.

The original Authorization to Use Military Force (AUMF) adopted by the US Congress in September 2001 authorized “all necessary military means” against those who planned or aided the 9/11 terror attacks. The resolution was later amended to allow strikes against al-Qaeda and “associated forces.” This expanded AUMF language has provided legislative authority for a major campaign of US covert military operations

over the past thirteen years. It also provides the claimed legal authority for conducting drone strikes. The AUMF is a license to conduct a global campaign of military operations not just against al-Qaeda but against a wide range of locally based extremist movements and insurgent fighters, primarily in the Arab world and northern Africa but also in far-flung locations, from the southern Philippines to the mountains of Colombia.

Many have questioned the use of military force as a means of countering terrorism. Catholic ethicist Rev. Bryan Hehir wrote in the immediate aftermath of the 9/11 attacks, “containing and capturing terrorists is by definition a function of police and legal networks. War is an indiscriminate tool for this highly discriminating task.”³ The 2001 al-Qaeda attack on the United States was not an act of war. It was a politically motivated crime by international terrorists. The same is true of mass casualty strikes that have occurred in Madrid, London, Bali, and many other places since 9/11. These are not acts of war committed by governments but crimes perpetrated by nonstate actors who are intent on intimidating political leaders and sowing fear.

The militants who launch these attacks have the capability to inflict mass casualties, but they do not pose a threat to the power or military capability of the United States or other major states. Veteran CIA analyst Glenn Carle describes the leaders of al-Qaeda as “small men and secondary threats whose shadows are made large” by our exaggerated fears. The capabilities of al-Qaeda are “far inferior to its desires.”⁴ The organization has never had the capability of achieving its declared megalomaniacal purposes. To believe otherwise, as some US officials apparently did in the days after 9/11, was to give credence to Osama bin Laden and his followers. It legitimized their illegitimate claim to global leadership and influence. Labeling the campaign against al-Qaeda a “war on terror” gave quasi-military status to a criminal organization. It turned mass murderers into soldiers, inadvertently granting them a degree of legitimacy.

In this chapter, we offer a critical evaluation of military approaches to countering terrorism and argue for a nonmilitarized strategy. We begin by explaining the limitations and negative security impacts of the current reliance on military operations and drone attacks, drawing on empirical studies that show the disutility of the use of military force as a means of ending terrorist groups. The chapter briefly examines the relationship between terrorism and insurgency and identifies some of the strategic implications of attempts to counter both. We then explore al-

ternative strategies for countering terrorism and violent extremism that seek to separate militant groups from potential communities of support. This is followed by an emphasis on international cooperation in countering terrorism, drawing from United Nations (UN) reports and the 2006 UN Global Counter-Terrorism Strategy. The last sections emphasize political strategies for overcoming militancy by addressing the conditions conducive to violent extremism and by seeking to ameliorate the political, economic, and social grievances that can motivate armed violence. The strategies outlined here give priority to conflict transformation and the building of more effective and accountable governance. They focus not on killing terrorists but on drying up the wells of injustice and desperation from which they spring. These alternatives elevate the importance of peace building, economic development, and the expansion of human rights as essential means of addressing the root causes of terrorism and armed conflict and creating conditions for greater justice and peace.

“Rejection Response”

Al-Qaeda leaders portray foreign military operations and drone strikes in Muslim countries as a war against Islam.⁵ Of course this is not the purpose of the United States. As President Obama declared in his 2009 Cairo address, “America is not—and never will be—at war with Islam.”⁶ Nonetheless, the negative publicity surrounding drone strikes reinforces al-Qaeda’s false claims and feeds into propagandist rhetoric aimed at recruiting adherents.

Public opinion studies in Muslim countries show widespread anger and resentment toward US policy. In-depth polling and focus group analyses by Steve Kull and his colleagues at the Program on International Policy Attitudes between 2006 and 2009 reveal a widespread belief that “America seeks to undermine Islam—a perception held by overwhelming majorities.”⁷ These findings suggest that many agree with al-Qaeda’s contention that American policy is directed against Islam itself. Hostility toward US policy is especially deep in Pakistan. A 2012 poll by the Pew Research Center’s Global Attitude project found that only 17 percent of Pakistanis favor drone strikes, and in the targeted tribal districts almost 90 percent oppose US military operations in the area. Roughly

three in four Pakistanis (74 percent) consider the United States an enemy, up from 64 percent three years earlier.⁸ As long as these attitudes prevail there will be no end to local support for groups that launch violent attacks against United States–related targets.

The *Living under Drones* report produced by researchers at the Stanford and New York University law schools provides “strong evidence” that US drone strikes “motivate attacks against both US military and civilian targets.”⁹ From their discussions with residents in Waziristan, the researchers conclude that “drone strikes breed resentment and discontent toward the U.S.” and aid militant recruitment. Pakistani professionals and officials interviewed for the report “expressed their belief that, on balance, drone strikes likely increase terrorism.”¹⁰ Pakistani ambassador to the United States Sherry Rehman told CNN’s Christiane Amanpour in a July 2012 CNN interview that the drone program is “counterproductive to all our goals in the sense that it radicalizes . . . foot soldiers, tribes and entire villages in our region.”¹¹

Waging war against terrorism is counterproductive. It arouses public anger and generates a will for revenge, creating a violent reaction. This increases the risk of armed conflict and undermines security. According to former Pentagon adviser David Kilcullen, the supposed cure of conducting military operations against terrorism is “worse than the disease.”¹² Unwanted foreign military intervention tends to produce what Kilcullen calls a “rejection response” that can lead to armed resistance.¹³ This seems to be true whether the intervention takes the form of boots on the ground or drones from the sky. The US interventions in Iraq and Afghanistan generated large-scale insurgency wars that took many more lives than the al-Qaeda attacks of 9/11. While ending US military operations in Iraq and decreasing them significantly in Afghanistan has reduced the scale of the rejection response, drone strikes generate their own blowback effect, contributing to violent extremism.

The negative reaction to US drone strikes was given a human face in April 2013, with the congressional testimony of Farea al-Muslimi, a young democracy activist from Yemen who had spent time in the United States on a State Department–sponsored exchange. By coincidence al-Muslimi appeared at a hearing by the US Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Human Rights only days after a drone strike hit his home village of Wessab. That “drone strike and its impact tore my heart,” he said, “much as the

tragic bombings in Boston last week tore your hearts and also mine.” Expressing his appreciation and admiration for the United States, al-Muslimi cautioned that “the killing of innocent civilians by U.S. missiles in Yemen is helping to destabilize my country and create an environment from which AQAP [al-Qaeda in the Arabian Peninsula] benefits.”¹⁴ Drone strikes unfortunately “are the face of America to many Yemenis. If America is providing economic, social and humanitarian assistance to Yemen, the vast majority of the Yemeni people know nothing about it. Everyone in Yemen, however, knows about America and its drones.” Al-Muslimi’s words highlight the counterproductive effects of US drone strikes. “What radicals had previously failed to achieve in my village,” said al-Muslimi, “one drone strike accomplished in an instant: there is now an intense anger and growing hatred of America.”¹⁵ President Obama heard a similar message in October 2013 from Malala Yousafzai, the Nobel-Prize-winning Pakistani student who had been shot in the head by a Taliban gunman the year before. While thanking Obama for US support of education in the region, she said in a statement, “I also expressed my concerns that drone attacks are fueling terrorism. Innocent victims are killed in these acts, and they lead to resentment among the Pakistani people.”¹⁶

In Yemen, since US drone strikes began, local al-Qaeda-related extremist groups have grown stronger. In its 2012 report on foreign terrorist organizations, the US State Department estimates that AQAP has perhaps one thousand members.¹⁷ Some reports put the number of fighters at perhaps “a few thousand.”¹⁸ These are significant increases over the two to three hundred members estimated by the State Department in 2009.¹⁹ The apparent growth in local militancy is caused in part by the angry reaction to bombing strikes that kill the wrong target. In May 2010, a drone accidentally killed Jabr al-Shabwani, the deputy governor of Marib province. A month later his family carried out retaliatory attacks on Marib’s oil infrastructure, causing an estimated \$1 billion in lost revenue from a pipeline blast.²⁰ Militant groups seek to take advantage of the local outrage that results from such incidents.²¹ They hold Yemeni president Abdu Rabu Mansour Hadi responsible for the bloodshed because he has allowed the United States to launch drone strikes and has unleashed the Yemeni military to attack rebel strongholds.²² While many Yemenis reportedly support military action against the al-Qaeda-affiliated rebels, retaliatory violence against government forces has increased.²³

Assessing Adversaries

Drone strikes have become a prominent tool for attacking militant groups in Afghanistan, Pakistan, Yemen, and Somalia. In the Af-Pak region, United States/North Atlantic Treaty Organization strategy equates the goal of countering al-Qaeda with defeating the Taliban insurgency. The original decision to overthrow the Taliban regime in 2001 was based on this assumption. Most US military operations in the region have been directed at the Taliban, not at al-Qaeda.²⁴ The organization created by Osama bin Laden that attacked the United States on 9/11 has been decimated over the years by military and police operations and is a mere shadow of what it once was. The Taliban by contrast has evolved into what General David Petraeus has described as “an industrial strength insurgency” with many thousands of fighters and multiple factions in both Afghanistan and Pakistan.²⁵

CIA Director Leon Panetta told ABC News in June 2010 that the total number of al-Qaeda terrorists in Afghanistan is “relatively small. At most, we’re looking at 50 to 100, maybe less.”²⁶ The original “al-Qaeda Central” organization created by Osama bin Laden is no longer capable of mounting major strikes, experts agree, and has minimal operational capacity. Al-Zawahiri and other al-Qaeda spokespersons may still issue threatening diatribes against the West, but they do not have operational forces at their command. Affiliated groups such as AQAP and al-Qaeda in the Islamic Maghreb (AQIM) have emerged, but these movements are mostly focused on local concerns and pose less of a direct threat to Europe and the US homeland. Affiliate groups may adopt al-Qaeda as a “flag of convenience” to aid local fundraising and recruitment, but they have little or no organic connection with the leaders who planned and carried out the 9/11 terrorist attacks.²⁷

Al-Qaeda and the Taliban have been closely intertwined over the years. Both are rooted in an extremist jihadi ideology and are fiercely opposed to the presence of foreign troops in Muslim communities. They have been interdependent militarily, financially, and politically. Yet important distinctions exist between the two. Al-Qaeda is an Arab-based movement with a global agenda of attacking corrupt Arab regimes and the Western interests that support them. The Taliban is a complex, diverse network of mostly Pashtun nationalists, dispossessed tribes, and Islamist extremists seeking to control the Pashtun-majority parts of Af-

ghanistan and Pakistan. Kilcullen describes the insurgent coalition as “a fragmented series of shifting tactical alliances of convenience,” a network of extremist groups that are “loosely cooperating toward roughly similar objectives.”²⁸ According to analyst Thomas Rittig, the Taliban consists of both a vertical political structure and a decentralized set of network-like structures rooted in diverse religious, ethnic, and regional tribal interests.²⁹

Taliban groups generally do not have a global agenda. Unlike al-Qaeda they have not attacked the United States. They want the removal of foreign troops from their soil and more Islamist forms of government in Kabul and local provinces. In contrast to al-Qaeda’s global agenda, most Taliban factions focus primarily on local objectives.³⁰ Few share al-Qaeda’s agenda of waging war on the West, and none are known to be engaged in attacks beyond the region.³¹ No Afghans participate in al-Qaeda’s hierarchy, and no Arabs are in Taliban command structures. There is no recorded incident of an Afghan Talib participating in a terrorist attack outside the Af-Pak tribal region.

In Yemen as well, insurgents are focused primarily on local concerns. The current conflict in Yemen is rooted in deep differences between the northern and southern regions that have existed for many years and that have not disappeared with attempts to unify the country in recent decades. The Houthi rebels of the Zaydi stream of Shia Islam have been engaged in an armed revolt against the Yemeni state since 2004 in pursuit of greater regional autonomy.³² They are highly critical of foreign interference in Yemen. The Southern Movement (al-Hirak al-Janoubi) is similarly secessionist in its objectives and is motivated by perceptions of marginalization and specific grievances related to land disputes, patronage politics, corruption, and economic injustice.³³ Violent clashes between al-Hirak and Yemeni security forces have taken place since 2007.

Most of the concern about terrorist danger in Yemen has centered on the locally based AQAP network. Many analysts assume that the al-Qaeda affiliation of AQAP indicates an international agenda and that its targets are mostly international in nature. AQAP activists have been involved in high-profile attempts to attack the United States, including the December 2009 shoe-bomb attempt to detonate explosives on a Detroit-bound flight and the 2010 plot to hide explosives in printer cartridges on cargo planes bound for the United States, but these failed efforts are the exception not the rule. The vast majority of AQAP attacks have been directed against local targets. As Peter Knoope of the International Cen-

ter for Counter-Terrorism has observed, “AQAP has a largely national agenda, with a clear idea of a national enemy, based on national considerations and national grievances.”³⁴

A report by the National Consortium for the Study of Terrorism and Responses to Terrorism (START) documents the local orientation of AQAP-initiated violence. Drawing from their Terrorism Database, START estimates that AQAP carried out 320 attacks between 2009 and 2012, and that 316 of these attacks took place within the borders of Yemen. According to the report, “The victims of attacks attributed to AQAP are almost always Yemeni,” with approximately 45 percent of the group’s attacks targeting Yemeni government military forces in an ongoing civil conflict over control of territory.³⁵ The military struggle in Yemen is primarily a civil conflict among differing ethnic groups competing for power and autonomy. AQAP has opportunistically manipulated this civil conflict, overlaying it with a global jihadist visage that is more rhetoric than reality.

A “Counterinsurgency Air Platform”?

President Obama has stated that drone strikes are directed at “specific senior operational leaders” of al-Qaeda and associated forces, but the evidence does not support this claim. During congressional testimony in April 2013, in the same Senate hearing where Farea al-Muslimi appeared, Peter Bergen reported that as of that date, fifty-five senior operational leaders of al-Qaeda and the Taliban had been killed in Pakistan. This was only 2 percent of all drone-related fatalities in Pakistan. Of the fifty-five identified senior officials, eighteen were Taliban leaders, so that the percentage of al-Qaeda targets was even less. In Yemen, according to Bergen, only 8 percent of the victims were identified as senior militants.³⁶ Many were “either ordinary tribesmen or people who are not fully fledged Al-Qaeda members,” according to Ibrahim Mothana, a co-founder of the Watan Party and organizer of the 2011 youth protests in Sana. They posed no direct threat to the United States.³⁷

An investigation by Jonathan Landay of McClatchy Newspapers confirms that very few drone strike victims in Pakistan have been al-Qaeda leaders.³⁸ Based on a review of classified intelligence documents, Landay reports that of the 482 people killed by drone strikes in Pakistan in the twelve months prior to September 2011, only six were identified as top al-Qaeda leaders—1.2 percent of the total. More than half of the victims

were local extremists, according to Landay. In some cases, US officials could not even identify whom they had killed.

Bergen describes the drone program as “a counterinsurgency air platform.” It has been used primarily to kill lower-ranking members of the Taliban insurgency in Pakistan and foot soldiers of the civil conflict in Yemen. Those being killed “do not have the capacity to plot effectively against the United States.” This is a “striking finding,” Bergen argues, one that directly contradicts the claims of the Obama administration.³⁹ Drone strikes in Pakistan and Yemen are not being used primarily to protect Americans from al-Qaeda but to intervene in the internal struggles of these countries.

The primary counterterrorism concern of the United States and other major powers is to prevent internationally oriented extremists from launching terrorist attacks from these countries. The question is whether this is best achieved by intervening in internal political-military struggles or by improving national and international law enforcement and intelligence sharing and addressing the underlying conditions that foster violent extremism. As we examine below, most governments and the UN have opted for nonmilitary approaches and have emphasized greater efforts to address the underlying conditions of instability, inadequate development, and unaccountable governance that give rise to terrorism.

How Terrorism Ends

Empirical evidence confirms that war is not the most common or effective means of countering terrorist groups. A 2008 RAND Corporation study, *How Terrorist Groups End*, shows that terrorist groups usually cease violent operations because of political integration and effective law enforcement, not the use of force. An examination of 268 terrorist organizations that ended during a forty-year period finds that the primary factors accounting for their demise were participation in political processes (43 percent) and effective policing (40 percent). The use of military force accounted for the end of terrorist groups in only 7 percent of cases.⁴⁰ Terrorist groups end most often when they decide to forgo violent means and join a political process in which they gain greater power and address their grievances through conventional rather than military means. An example of this is the peace process in Northern Ireland, in which the Irish Republican Army abandoned armed struggle in ex-

change for political representation of the Republican community in government and security forces.

Terrorist groups also end through local law enforcement agencies.⁴¹ Policing works better than war because law enforcement officials are rooted in local communities. They are closer to the ground and can gain the knowledge and trust of residents that enable them to learn about suspicious activities and penetrate terrorist networks. The head of the Crown Prosecution Service in the United Kingdom said, “the fight against terrorism on the streets of Britain is not a war. It is the prevention of crime, the enforcement of laws and the winning of justice for those damaged by their infringement.”⁴² The most successful means of thwarting transnational terrorist plots are international police cooperation and intelligence sharing.

Policy approaches that emphasize political accommodation and law enforcement work most effectively with militant groups that have local rather than global agendas. While al-Qaeda has nonnegotiable, millennial political pretensions like restoring the caliphate, many of the groups that use terror methods in Pakistan, Yemen, and Somalia are motivated primarily by local political agendas. They seek to redress grievances and imbalances of power locally. Many of these insurgent groups may be open to political solutions that achieve their objectives by other means. Groups that refuse political accommodation and continue violent methods may then become more isolated in their communities and more vulnerable to effective law enforcement efforts. Most of the insurgent commanders and fighters targeted by US drone strikes are focused on removing foreign forces from their communities and gaining power within local governments. The recent curtailing of US drone strikes in Pakistan, purportedly in response to that government’s request for restraint during negotiations with the Pakistani Taliban, may indicate a gradual awareness among some in the Obama administration of the desirability of a policy of political accommodation, rather than drone warfare, although the United States has not yet confirmed the reason behind the suspension of these strikes.⁴³

Terrorism and Insurgency

Because insurgencies frequently resort to terror methods—bombings, assassinations, and the killing of civilians—it is natural to associate ter-

rorism with insurgency. The United States has made this assumption explicit in its strategy of equating al-Qaeda with the Taliban and attacking both. The linkages between insurgency and terrorism are especially strong in settings where rebel groups resort to asymmetric warfare in the face of heavily armed national armies or foreign forces. Terrorist groups and insurgencies often have similar political objectives in seeking to destabilize local regimes and resist foreign intervention.

Significant differences exist, however.⁴⁴ The archetypical insurgency is linked to a mass movement and depends upon the support of surrounding communities. In Mao's famous analogy, guerrilla fighters are like fish swimming in the sea, sustained by the people around them. Terrorist groups disconnected from an insurgency are different. In most cases they do not have public support and cannot afford to expose themselves for risk of being killed or captured. While some insurgencies have employed terrorist tactics, others have not. Broadly based insurgencies have a strategic interest in avoiding civilian casualties. They cannot afford to alienate their social support base through indiscriminate killing and heavy-handed tactics. When al-Qaeda attempted to dominate the Sunni insurgency against the US invasion of Iraq in 2005–2006, tribal leaders broke with al-Qaeda and created the Awakening Movement that sided with the American military, turning the tide of the war.

Al-Qaeda emerged out of the popular Mujahidin insurgency against the Soviet invasion of Afghanistan, but the organization never had a broad base of social support. When bin Laden attacked the United States in 2001, even many Taliban supporters questioned the wisdom of harboring his organization. Soon after the 9/11 attack, a council of Islamic scholars met in Kabul and urged Taliban leader Mullah Omar to ask bin Laden to leave Afghanistan "voluntarily."⁴⁵ Some observers believe that Taliban leaders might have been willing to see bin Laden and his terrorist network depart if a graceful exit could have been arranged.⁴⁶

The armed militias the United States is fighting in Pakistan and Yemen resemble classic insurgencies more than isolated terrorist groups. The Taliban groups operating in Afghanistan and Pakistan and the armed rebels fighting in Yemen have a base of public support, or at least acquiescence, sufficient to enable them to carry out sustained armed attacks and replenish battlefield losses with a steady stream of new recruits. In both regions, the insurgent groups have remained strong or even grown in capability despite US drone strikes and significant mili-

tary pressures from local government forces. These realities suggest that the lessons of COIN are relevant to identifying the most effective strategies for countering violent extremism.

COIN to the Rescue?

The challenges of COIN are different than those of counterterrorism, but they share common foundations. Both require an understanding of the grievances and conditions that give rise to armed militancy and a strategy for encouraging aggrieved groups and communities to seek solutions through political rather than military means. A 2008 study on COIN by the RAND Corporation, *War by Other Means*, identifies the core factors that account for the success or failure of COIN and the conditions that produce the strongest insurgencies.⁴⁷ The four most significant statistical predictors of successful insurgency are the following:

- Populations excluded from politics and estranged from the state;
- Authoritarian, unresponsive, inept, and corrupt government;
- Armed groups committed to destroying such government; and
- Significant popular sympathy for armed groups.⁴⁸

All these conditions are present in Pakistan and Yemen. They are directly related to questions of governance and the level of political support for or against a regime.

Strategic specialists have long recognized that COIN is primarily a political task. David Galula's classic study, reprinted in 2006, calls for a struggle that is 80 percent nonmilitary.⁴⁹ The US Army's 2006 COIN field manual, coauthored by General David Petraeus, echoes this emphasis on prioritizing civilian efforts and states that political factors are primary in the struggle against violent extremists.⁵⁰ According to the official US government COIN guide, successful COIN requires political efforts to improve the quality of governance and address legitimate political grievances. "The political function is the key function, providing a framework of political reconciliation, and reform of governance around which all other COIN activities are organized. In general, a COIN strategy is only as good as the political plan at its heart."⁵¹

Successful COIN depends upon an effective political strategy for

building inclusive, representative, and accountable governance in the communities affected by violence. The most enduring lesson of previous COIN campaigns is the necessity for effective indigenous political leadership.⁵² Also important are efforts to provide support for the building of quality public institutions.⁵³ These are the decisive factors in assuring good governance and establishing political systems that are responsive to the public will. They are vital to the goal of reducing corruption and abuse and empowering people to elect leaders who govern in the public interest.⁵⁴ These are not tasks that can be accomplished by drone strikes or the intervention of foreign military forces. No amount of military force can compensate for the absence of responsible governance.

According to the RAND study, *War by Other Means*,

The greatest weakness in the struggle with Islamic insurgency is not U.S. firepower but the ineptitude and illegitimacy of the very regimes that are meant to be the alternative to religious tyranny—the ones tagged and targeted as Western puppets by jihad. Success thus hinges on improving the performance and accountability of governments in the Muslim world. This is the essence of classical counterinsurgency.⁵⁵

The absence of representative governance is a principal source of violent extremism. Alan Krueger and other researchers show that terrorists and insurgents are most likely to come from countries lacking human rights and basic freedoms.⁵⁶ Populations that are excluded from politics and that face repression from authoritarian and corrupt governments are more likely to support insurgents committed to destroying such regimes. Marginalized communities are often a source of popular support for insurgents. If governments are unable or unwilling to provide safety and deliver public services for these communities, people will search elsewhere for the help they need.

Despite the evidence supporting a political approach, actual US policy continues to emphasize military solutions. A March 2011 Congressional Research Service study reported that some 94 percent of all US funds for the wars in Afghanistan and Iraq were spent by the Pentagon, with only 5 percent devoted to foreign aid and diplomatic operations.⁵⁷ As noted at the outset, drone strikes remain a preferred means of countering terrorism, famously described by then CIA director Leon Panetta as “the only game in town” for confronting al-Qaeda.⁵⁸ This continued reliance on military solutions reflects both the dominance of the War on

Terror paradigm in Washington and a lack of strategic vision in developing political means for undermining terrorism.

Eroding the Support Base

The struggle against al-Qaeda and associated groups requires a multidimensional, long-term strategy for diminishing the political support that sustains extremist groups. The strategic framework requires a two-level approach: (1) coordinated international police and intelligence efforts to protect against terrorist attacks and drive al-Qaeda and associated networks out of business and (2) a parallel series of preventive measures and international policies that ameliorate the grievances and conditions that give rise to violent extremism.

An effective strategy begins with an assessment of local conflict dynamics and requires differentiating among target groups. Two broad categories can be distinguished: (1) hard-core militants of al-Qaeda and related groups; and (2) potential sympathizers, supporters, and recruits. Dan Benjamin and Steve Simon offer the image of “two concentric circles, one very small, one very large.”⁵⁹ In the inner circle are those who actually commit terrorist acts or actively support them. The outer circle consists of the much larger universe of people who sympathize with the declared objectives of the militants and under the right circumstances might be induced to provide active support. The strategic challenge is to employ methods that diminish the inner circle without driving those on the outside to join the inner core, while simultaneously providing governance alternatives that encourage potential sympathizers in the outer circle to participate in legitimate politics. An excessive emphasis on the use of force and military pressures, such as drone strikes, may drive people in the outer circle into the central core. The use of military force “too often ensures that the ratio of those captured and killed to those galvanized and recruited is the opposite of what is intended.”⁶⁰ The goal instead should be to encourage those in the outer circle to turn away from the militants and perhaps even support police efforts to suppress them.

John Paul Lederach emphasizes the importance of understanding the social relationships that prevail in areas where militant groups operate. A social spectrum exists, with those who actively support or participate in militancy on one end and those who have no connection with the insurgent or terrorist movements on the other. In between is what

Lederach calls the gray area, which is composed of people and organizations that may have some form of minimal contact, connection, or affiliation with militants but are not active sympathizers or supporters. The connections people in the middle may have with militant groups are often not by choice but simply because of living in a particular area, sharing a common religious background, or having extended-family links. As Lederach writes, “After considerable years of experience in many of these settings, my own view is that this grey area may be much larger and harder to define than we understand. Yet in terms of violence prevention and stable peace *the grey area is both strategic and contested.*”⁶¹

Sociological studies indicate that as conflict escalates and polarization sharpens, social pressures increase significantly for people to join one side or the other, reducing the middle ground. External threats create greater social cohesion within affected communities and reduce opportunities for contact and interaction with outsiders who may have differing perspectives. As Lederach describes, “Tolerance for and exploration of ambiguity reduces sharply in terms of group views. Little or no room exists for questions or the expression of alternative views.”⁶² These dynamics have direct impact on what may be the most important metric for measuring the effectiveness of violence prevention efforts—“whether a particular strategy of change increased or decreased the ability of leadership to recruit active followers and bring them into acts of violence.”⁶³ By this standard, the strategy of isolation and military pressure often fails. In Pakistan, Yemen, and Somalia the evidence suggests that external pressures have led to greater violence and increased capacity for militant recruitment.

Effective strategies against violent extremism require approaches that vary with the intended target. Against the cadre in the inner circle, defensive measures are the priority. The emphasis is on protection of the civilian population and police and intelligence operations to identify and arrest those who plot and engage in violent attacks. For the much larger and strategically more important gray area of potential sympathizers and recruits, different approaches are needed. Coercive security measures may be counterproductive and could drive third parties toward militancy. The goal instead is to isolate hard-core elements and separate them from their potential support base. This requires a political approach that addresses deeply felt grievances, promotes democratic governance, and supports sustainable economic development. The creative

application and interplay of these various approaches, directed strategically toward the right targets, can erode the social foundations of terrorist and insurgency groups and cut them off from vital sources of political and economic support.

Shibley Telhami describes this emphasis on reducing support for militant groups as addressing the “demand side” of terrorism.⁶⁴ It requires understanding the political and social dynamics within local communities that allow terrorist organizers to mobilize support. As Audrey Kurth Cronin notes, terrorist groups “cannot exist without the availability of broader sources of active or passive sympathy, resources, and support” within the societies where they operate. Understanding these “avenues of sustenance” is the “proverbial center of gravity” for responding to the terrorist threat.⁶⁵ Telhami adds, “It is difficult to envision how one can address the terrorism phenomenon without addressing the central issues that create the fertile grounds for breeding terrorism and that are exploited by organizers.”⁶⁶ To isolate and suppress militant groups, it is necessary to ameliorate political grievances and oppressive conditions and thereby reduce the social “demand” for armed violence.⁶⁷ The goal is to dry up flows of recruits, money, and support that sustain militant groups.

Isolating hard-core militants and reducing the legitimacy of terrorist methods requires a strategy of conflict transformation: recognizing the injustices that terrorist groups exploit and engaging with affected parties to resolve grievances through political rather than military means. When contending groups are involved in dialogue and political power-sharing arrangements, they are less likely to resort to violence. This is the essence of peacemaking—encouraging the resolution of political differences and transforming disputes into more manageable forms. Because it is highly decentralized, the al-Qaeda network is potentially susceptible to political defection. This is a vulnerability that should be exploited. The International Institute for Strategic Studies recommended a strategy of “filling political vacuums with diplomatic activity.”⁶⁸ Reaching political accommodation with local groups whose agendas are amenable to negotiation can help to splinter the global terrorist movement and isolate hard-core factions. Successful dispute resolution in local power struggles could lower political tensions in the affected country and loosen links with al-Qaeda. Conflict transformation strategies provide means of addressing the conditions that give rise to terrorism and removing the political foundations of extremist groups.

International Cooperation

Because al-Qaeda and associated groups undertake violent acts that transcend national boundaries, the strategies employed against them must be transnational. Every nation shares a common interest in eliminating the scourge of transnational terrorism and in working with other nations to counter violent extremism. John Ikenberry argues that the struggle against terrorism must be based on alliance partnerships and international cooperation, which “entails intelligence, sanctions, diplomacy, financial regulation, development aid, and a multitude of other ongoing efforts—all of which require extensive multilateral cooperation.”⁶⁹ Security protections are part of the equation, but they should be subordinate to political, economic, and social policies that address the root causes of terrorism. The most effective tools in this fight are not unilateral but cooperative. International law, multilateral institutions, and collaborative action are essential ingredients of a winning strategy against global terrorism.

Immediately after the 9/11 attacks, the UN Security Council approved Resolution 1373, which gives the UN a central role in facilitating international cooperation in efforts to destroy and disrupt terrorist networks. Adopted under the authority of Chapter VII of the UN Charter, Resolution 1373 required every country to freeze the financial assets of terrorists and their supporters, deny them travel or safe haven, prevent terrorist recruitment and weapons supply, and cooperate with other countries in information sharing and criminal prosecution. UN member states were urged to afford one another “the greatest measure of assistance” in investigating terrorist acts and to facilitate the exchange of information on matters related to travel, communications, and arms trafficking among terrorists.⁷⁰ Resolution 1373 was unparalleled in establishing legal obligations and mobilizing states for a campaign of nonmilitary cooperative law enforcement measures to combat global terrorism.⁷¹ The Security Council has adopted dozens of additional counterterrorism resolutions since then and has established a wide range of global counterterrorism programs.

Over the years the UN Counter-Terrorism program has expanded greatly and has helped to spawn a broad array of cooperative counterterrorism initiatives by international organizations, individual states, and regional organizations on every continent. The UN initially cre-

ated a Counter-Terrorism Committee, and then a Counter-Terrorism Executive Directorate to serve it, and subsequently also established the Counter-Terrorism Implementation Task Force, which seeks to coordinate the counterterrorism efforts of dozens of UN offices and international agencies. Over the past decade, the UN counterterrorism agenda has broadened beyond the sanctioning of individuals and entities suspected of association with terrorist groups. It now includes counterterrorism capacity-building programs for states and regional organizations; the development of norms against incitement to terrorism; the promotion of counternarratives against extremist propaganda; outreach to civil society; and greater efforts to prevent and counter violent extremism through a focus on the political, economic, and social conditions that increase the risk of armed violence.⁷² The UN has relatively little operational capacity in many of these programs areas, but it plays an indispensable role in generating and leveraging global political legitimacy for coordinated action against terror threats.⁷³

In March 2005, at the Madrid International Summit on Democracy, Terrorism and Security, UN secretary-general Kofi Annan outlined a general strategy against terrorism that combined prevention with protection. That strategy included “five Ds”:

- Dissuade disaffected groups from choosing terrorism as a tactic to achieve their goals;
- Deny terrorists the means to carry out their attacks;
- Deter states from supporting terrorists;
- Develop state capacity to prevent terrorism;
- Defend human rights in the struggle against terrorism.⁷⁴

In Annan’s *In Larger Freedom* report released that year, he emphasized the need for a holistic strategy by stating that “development, security, and human rights go hand in hand. . . . [W]e will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights. Unless all these causes are advanced, none will succeed.”⁷⁵ In April 2006, Annan reiterated the call to “reinforce the inexcusability and unacceptability of terrorism, while working to address the conditions that terrorists exploit.”⁷⁶ He urged greater efforts to promote democracy and representative government, end military occupations, reduce poverty and unemployment, and halt state collapse.

The *Global Counter-Terrorism Strategy*, which the UN General Assembly unanimously adopted in September 2006, embodies these ideas for a comprehensive and holistic approach to the fight against terrorism. The UN strategy incorporates Annan's calls for a more integrated approach to protecting against and preventing terrorism. The *Strategy* transcends the narrow security-oriented focus of the United States and other major states. It goes beyond the many counterterrorism resolutions adopted by the Security Council. It links the struggle against terrorism to a broader set of principles for avoiding violent conflict through development, democracy, and diplomacy. The *Strategy* identifies four pillars of international policy. It calls for measures to

- Address the conditions conducive to the spread of terrorism;
- Prevent and combat terrorism;
- Build States' capacity to prevent and combat terrorism and strengthen the role of the UN system in this regard;
- Ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.⁷⁷

Significantly, the first of the pillars focuses on conditions conducive to the spread of terrorism. This places the primary emphasis on efforts to advance development and good governance, not on security measures. The *Strategy* defines "conditions conducive" as "prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization, and lack of good governance. . . ." ⁷⁸ The way to fight terrorism, according to the *Strategy*, is not only to enhance security, through such measures as improving border controls, but to adopt preventive measures such as "resolv[ing] conflict, end[ing] foreign occupation, confront[ing] oppression, eradicat[ing] poverty, promot[ing] sustained economic growth . . . [and] good governance." The *Strategy* notes that success in realizing development objectives and improving human rights and governance could "reduce marginalization and the subsequent sense of victimization that propels extremism and the recruitment of terrorists."⁷⁹

The UN *Strategy* is important because it helps to shift the focus of international policy toward a more holistic approach that prioritizes

development, human rights, and democratic governance. Because it is approved by all UN member states, the *Strategy* has enormous political legitimacy. It gives prominence to conflict prevention rather than security protection. The first pillar pays specific attention to the advancement of development, while the fourth pillar emphasizes the promotion of human rights and the rule of law. The protection of human rights cuts across all four pillars of the *Strategy* with the instruction “that States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.”⁸⁰ The *Strategy* provides opportunities for promoting these goals through the cooperation of states and the support of multiple stakeholders, including civil society groups that often play a vital role in defending human rights and exposing government corruption and wrongdoing.

Conclusion

Drone warfare is premised on the assumption that military strikes are a necessary and effective means of countering terrorism, but the evidence in support of this belief is uncertain at best. Drone strikes can temporarily disrupt militant operations in specific localities, but any tactical gains are outweighed by significant strategic disadvantages, including increased animosity toward US policy and greater support for violent resistance. Military operations are ill suited to the task of preventing terrorist crimes and are often not effective or sufficient for countering entrenched insurgencies.

The struggle against terrorism is ultimately a political struggle. It is not a military campaign but a “contest for the hearts and minds of ordinary Muslims around the world” as Francis Fukuyama writes.⁸¹ It is not merely a battle of arms, according to the 2006 US *National Strategy for Combating Terrorism*, but a “battle of ideas.”⁸² The *National Strategy* called for “the creation of a global environment inhospitable to violent extremists.”⁸³ The 9/11 Commission argued that the goal of counterterrorism strategy must be “prevailing . . . over the ideology that contributes to Islamist terrorism.”⁸⁴ This requires a greater commitment to the democratic principles of political freedom, social justice, greater equality, and the rule of law. It also involves demilitarizing the struggle

against violent extremism and focusing instead on the use of diplomacy, law enforcement, and economic development. It means working cooperatively in the world rather than unilaterally, with humility rather than arrogance. In this way the United States and other nations can speak and act with moral authority in dissuading others from supporting terrorism and can offer hope and a positive vision for the future to overcome the ideology of hatred.

Targeted Killings and Secret Law: Drones and the Atrophy of Political Restraints on the War Power

Mary Dudziak

One important aspect of the use of drones in warfare is its effect on presidential power. The deployment of deadly force by American presidents is subject to the limits of domestic and international law. Limits to presidential war power have been regularly overridden, but drone warfare threatens to make legal and political limits even more frail than they have become in recent decades. Drone attacks are attended by a mix of publicity and official secrecy. Although some level of secrecy is expected in the use of armed force, the policy of targeted killing adds a new layer: the US government has kept the applicable legal restraints largely secret. The secrecy surrounding the legal justifications for drone strikes is one aspect of the emergence of a broader secret legal infrastructure that includes rules governing surveillance by the National Security Agency. Legal opinions explaining the scope of presidential power for drone strikes and surveillance are not disclosed, and congressional briefings are classified, with legal limits placed on what members of Congress can say to their constituents. Secret law undermines the transparency needed for political checks on presidential war power to function.

Secrecy has never been absolute in American history. Instead, secrecy and disclosure, often through leaks, go together.¹ The government manages secrecy, or uses secrecy as an aspect of governance, through the acts of both containing and disclosing information. The overuse or misuse of secrecy is historically associated with war. Daniel Patrick Moyni-

han has written that secrecy comes in cycles, and following the revelation of secret government actions, there are calls for transparency and accountability.² War-related secrecy, he argues, is ratcheted back when war subsides.

If cycling from secrecy to transparency requires a break from wartime to peacetime, then the ongoing character of contemporary American war deprives us of the opportunity for secrecy to be recalibrated. Moreover, the Obama administration, devoted to the idea of the rule of law, seeks to codify and legitimate its secret practices. A legacy of Obama administration drone warfare and surveillance is therefore the institutionalization and legitimation of a secret legal infrastructure.

This chapter addresses the impact of secret warfare on political accountability by placing it in a historical context, comparing two decisions made in secret: President Obama's decision to kill Anwar al-Awlaki in 2011 and President Richard M. Nixon's decision to bomb Cambodia in 1969. My interest here is not whether secrecy was right or wrong in these contexts but rather how secrecy affects the role of political restraints on presidential war powers. In both contexts, the president briefed key members of Congress but kept others in the dark, and secret briefings made it impossible for those in the know to inform their constituents. In the Nixon administration, secrecy was used to expand the president's military options beyond what the public would support. In the Obama administration, by contrast, the targeted killing of al-Awlaki was widely reported, but not officially confirmed until May 2013. Secrecy attached not to the use of force itself but to the administration's rationale. In the Nixon era, the overt invasion of Cambodia triggered effective political limits on the war power, whereas open debate over Obama's targeted killing remains hampered.³ Political accountability is harder to achieve in an era when American strikes are accomplished by remotely targeted weapons rather than American troops on the ground.

This essay is not antitechnology but instead is about the need to employ any technology in a way that does not undermine democratic engagement and political restraints on presidential war power. In the military context, the use of drones has important benefits. At least in current practice, drones are not used for carpet bombing but instead for focused strikes using missiles or other explosives that have a smaller blast radius than bombs dropped by aircraft with human pilots. Because of this, if a mistake is made, the number of casualties is lower than that from traditional aerial bombing. Drone strikes are sometimes portrayed as part of

an inevitable history of advances in military technology, always toward better and more precise weaponry. But the history of military technology is not always a progression toward more precision. The use of air power to drop explosives was initially controversial because of its imprecision, and this has been a feature of air power in many wars. Drone strikes have the capacity to be more precise, but they build in an important lack of precision—reliance on local intelligence for targeting decisions. Because of this, the ability of drones to strike a specified target leads to an appearance of precision that can be belied by intelligence problems.⁴

Nixon and Cambodia

Debates over secrecy and political accountability litter the history of American war.⁵ An important example from the Vietnam era is President Richard M. Nixon's secret bombing of Cambodia in 1969. This example illustrates why presidents often use secrecy: to expand their military options beyond what is politically feasible. Because Nixon disclosed this action to some members of Congress, it also raises questions about whether limited classified briefings enable sufficient interbranch deliberation to make the war power politically accountable.

When a story about the Cambodia bombing first appeared in the *New York Times* in May 1969, Nixon denied it. But preemptive strikes in a nation the United States was not at war with had been underway for two months. If not for the secrecy, constitutional theorist John Hart Ely later argued, it might have been justifiable as an effort to support American troops in the war in Vietnam.⁶ The objective in bombing Cambodia was to disrupt Communist bases and supply routes along South Vietnam's western border. But the bombing was kept secret from Congress and the American people, "involving measures as extreme as hoodwinking the Air Force Secretary and Chief of Staff and providing falsified secret documents to the relevant congressional committees for up to four years after the events."⁷

Nixon and National Security Advisor Henry Kissinger hoped that bombing Cambodia would be "'irresistible military pressure' to force the other side into accepting a negotiated settlement favorable to the United States," Jeffrey Kimball has written.⁸ The idea to do this "had antedated Nixon's election and represented both the mind-set of those optimists who favored military solutions to the war and the doctrines

of those strategists who believed” that North Vietnamese bases “should be attacked wherever they might be found.” By early January 1969, “the president-elect had come to believe the time was ripe for developing an option that had long appealed to him, and he ordered his assistant to begin the process.” Plans were delayed, however, until a “provocation” occurred.⁹

Kissinger later claimed that the reason secrecy was needed was to avoid a public reaction from Prince Sihanouk of Cambodia, the North Vietnamese, and others. But the “primary reason,” according to Kimball, “was to prevent the American people, and particularly the anti-war movement in the streets, universities and press, and Congress, from learning of the raids.” As his presidency was just beginning, Nixon later wrote, he “wanted to provoke as little public outcry as possible.”¹⁰ Kimball argues that the president and Kissinger were more interested in public opinion than in “the constitutional requirement to obtain permission from Congress to make war on another country.” If he had gone to Congress or announced the plan publicly, “there would have been uproar.” Concerned about leaks, Nixon even kept his secretary of state William Rogers, who opposed the action, in the dark initially. Nixon told Kissinger, “State is to be notified only after the point of no return.”¹¹

The bombing campaign, called “Operation Breakfast,” began on March 17, 1969. Detailed plans were made to keep it secret, with information provided only on “a strict need-to-know basis.”¹² Sixty B-52 bombers were prepared for a bombing run over targets in Vietnam. After the usual briefing before this mission, pilots and navigators of forty-eight planes were then pulled aside and informed by their commanding officer that they would receive new coordinates from a radar installation in Vietnam. Their planes would be diverted to Cambodia.¹³ But the destination was kept secret even from some members of the flight crews. Marilyn Young writes that an “elaborate system of double reporting” was created, so that “even the secret records of B-52 bombing targets were falsified so that nowhere was it recorded that the raids had ever taken place.”¹⁴

One reason for fabricated records was to keep information about the bombing from Congress. But the president brought some members of Congress in on the secret. He and Kissinger briefed seven Congress members, including the minority leaders of the House and Senate, the chairmen of the House and Senate Armed Services Committees, the ranking Republican member of the House Armed Services Commit-

tee, and chairmen of the House and Senate Appropriations Committees. Four of the seven were Democrats. Senator Barry Goldwater found out informally through field officers while he was on a trip to Southeast Asia, and Senator Mike Mansfield, the Senate Majority Leader, was told on August 22, 1969, while traveling, by Cambodia's Prince Sihanouk. Beyond those legislators, the bombings were kept secret from the rest of Congress.¹⁵

Over fourteen months nearly four thousand B-52 flights dropped 103,921 tons of explosives, followed by more extensive bombing further into Cambodia.¹⁶ Kissinger later claimed that he had been assured that there were no civilians in the area, which was not the case. Meanwhile, the North Vietnamese response to the bombings "was to move deeper into Cambodia, away from the border; the B-52s followed them."¹⁷ Critics have argued that the ultimate effect was to destabilize the Sihanouk government, enabling the Khmer Rouge ascent to power in Cambodia, leading to the mass killings that followed.¹⁸ As Young puts it, "Nixon's conviction that the way to end the war in Vietnam was to expand it" would "forever [change] the world for Cambodians."¹⁹

Nixon could not keep secret his decision to send ground troops to Cambodia in 1970. He did not attempt to conceal this effort but instead went on television to explain the action to the American people. Arguing that North Vietnam had increased its activity in Cambodia, Nixon announced that American and South Vietnamese troops would attack North Vietnamese positions. These forces were not invading Cambodia, he argued, but only attacking North Vietnamese bases there, and the purpose was not to escalate the war but to protect American troops and "to guarantee the continued success of our withdrawal."²⁰ The public reaction was immediate and dramatic, leading to widespread anti-war demonstrations, including the Kent State protest that ended with the shooting and the killing of four students and the wounding of nine by the Ohio National Guard.²¹

Pressured by widespread reaction against the ongoing war, Congress pushed back in various ways, repealing the Gulf of Tonkin Resolution on January 12, 1971, and prohibiting funding for the introduction of ground troops in Cambodia later that year.²²

Secrecy in the air campaign had allowed the Nixon administration more flexibility in war planning. After the overt invasion, however, the public and political reaction had an impact, restricting his options. As Kimball put it, "the strategic results were that he would not be able

to send U.S. troops into Laos or again into Cambodia, he would feel more than before the need to carry out large-scale troop withdrawals from South Vietnam.” Nixon’s hope of ending the war soon in a way he thought favorable was shattered. The president would continue to consider more aggressive options, but concerns about the impact of war strategy on Nixon’s 1972 reelection kept him committed to negotiations and troop withdrawals.²³ In contrast to the secret bombing, when it came to the invasion of Cambodia, politics restrained the war power, even as that power was exercised.

Political reaction to the secret bombing campaign itself came later and was muted by the unfolding of the broader Watergate scandal.²⁴ Congressman John Conyers proposed an article of impeachment of Nixon based on the Cambodia bombing. The article did not receive a majority vote, however. A number of House and Senate leaders, including Democrats, had been briefed on the bombing. If this secret warfare was illegal, they would be implicated because their silence could be read as approval or acquiescence. Ely speculated that the article failed because “the Democratic leadership was unwilling to support it because a full inquiry would have demonstrated that a few prominent members of their party had known about the secret bombing at the time.”²⁵ In this way, secret briefing of congressional leaders did not aid political limits on the war power but may have undermined transparency in the aftermath. Congress played a stronger role only when public disclosure led to broad public engagement.

The Nixon presidency is often regarded as a presidency without restraint, outside the rule of law.²⁶ It is also an example, however, of the way restraints on the war powers once worked in American history. Much harm resulted from Nixon’s secret war tactics, but secrecy had its limits. Efforts to hide American military action were eventually uncovered. The American people reacted to the expansion of the war in ways that limited the president’s choices, showing us that sustained public engagement can have an impact on the war power even as a conflict is being waged and after it has been purportedly approved by Congress. But the repudiation of Nixon’s illegal actions had its limits. Secret war had been engaged in with the knowledge of some members of Congress, and it dropped off the agenda of the impeachment process. This suggests that limited information sharing with Congress can lead to complicity in secret warfare, undermining transparency and political accountability.

The transparency that mattered the most was disclosure not to Congress but to the American people.

Obama and Drone Warfare

As previous chapters have noted, the use of drones in armed conflict did not begin with President Obama. George W. Bush ordered the first drone strike and more than forty additional ones during his administration, at a time when the drone fleet was smaller. President Obama greatly expanded their use. He also sought to ensure that targeted killing was on a sound legal basis and that guidelines were articulated that would limit and constrain its use. Although law and government regulations are normally developed openly and subject to debate, the legal basis for targeted killing was developed in secret. Rather than detailing the legal standards openly, the administration instead relied on classified briefings of limited members of Congress.²⁷

Although Obama administration drone policy was initially officially secret, its existence and some details about the decision-making process were eventually widely covered in the press. This meant that the American public learned about the program through leaks and news accounts rather than through public disclosure by the administration. Reports about the decision-making process, based on confidential interviews, appeared in the *New York Times*, *Washington Post*, and elsewhere in 2012 and 2013.²⁸ In an important new article, legal scholar Gregory McNeal illuminates the bureaucratic character of the targeting process and argues that a first step toward transparency would be for the government to simply make this process more public.²⁹ The public debate in the meantime, however, has depended largely on investigative reporting.

News reports emphasized that President Obama took personal responsibility for American actions to the extent of reviewing the “kill list” of those targeted. “The mug shots and brief biographies resembled a high school yearbook layout,” Jo Becker and Scott Shane reported for the *New York Times*. The list included several Americans and two teenagers. “How old are these people?” Obama asked of his counterterrorism advisors as he looked over biographies of people who might make the list. “If they are starting to use children, . . . we are moving into a whole different phase.”³⁰

If some decisions seemed hard, others were considered easy, like the decision to kill Anwar al-Awlaki, an American-born cleric living in Yemen. His teachings had inspired Nidal Malik Hasan, the Fort Hood shooter, and he had advised Umar Farouk Abdulmutallab, the “underwear bomber,” who attempted to bring down a flight from Amsterdam to Detroit on Christmas Day in 2009.³¹ After the Fort Hood shooting, intelligence agencies increased surveillance of al-Awlaki. Intercepted communications demonstrated his important role in al-Qaeda in the Arabian Peninsula. But evidence that al-Awlaki went beyond incitement was lacking until the interrogation of Abdulmutallab, who said that al-Awlaki had aided and encouraged him. Mark Mazzetti, Charlie Savage, and Scott Shane reported that “With the Nigerian’s statements, American officials had witness confirmation that Mr. Awlaki was clearly a direct plotter, no longer just a dangerous propagandist.”³² Behind the reported narrative, a deeper story played out within the American national security bureaucracy. “The kill-list creation process is complex and time intensive,” McNeal writes, “usually involving dozens of analysts from different agencies.” When decisions to use deadly force are a product of a bureaucratic process, accountability “is not readily susceptible to external review.”³³

But could the US government kill an American who was in a country the United States was not at war with? Al-Awlaki’s father, Nasser al-Awlaki, brought public attention to bear on this issue when he filed suit in federal district court in 2010, seeking to enjoin the United States from killing his son, arguing that it violated his son’s rights under the US Constitution. The court dismissed the suit, however, holding that the father did not have standing to bring the lawsuit and also that the case was not justiciable.³⁴ In July 2012, after Anwar al-Awlaki was killed, his father and other relatives sued Defense Secretary Leon Panetta and others, arguing that the killings of al-Awlaki, his sixteen-year-old son who was killed in another drone strike, and another relative were unlawful. The US government informed the court that should it proceed to trial, the government would reserve the option of invoking the military and state secrets privilege, which would most likely have prevented a trial from going forward.³⁵ Federal District Judge Rosemary M. Collyer found the case to be justiciable but granted a motion to dismiss in April 2014. She emphasized that “In this delicate area of warmaking, national security, and foreign relations, the judiciary has an exceedingly limited role.” Although government nondisclosure had made the case “unnecessarily

difficult,” she was able to “cobble together enough judicially-noticeable facts” to arrive at a ruling.³⁶ The case illustrates the limited capacity of courts to police the boundaries of the war powers and to ensure transparency and accountability.³⁷

Facing public demands for transparency about targeted killing, the executive branch explained its rationale in a series of speeches. Harold Koh, State Department legal adviser, was the first to discuss publicly the legal rationale behind targeted killing, in his speech to the American Association of International Law in March 2010. Koh’s speech began to fill in the picture, but it lacked specifics. And many questions remained open, especially the more difficult question of whether targeting US citizens violated American law.³⁸

It would be two years before the next important public statement on this topic. In March 2012, Attorney General Eric Holder explained the administration’s rationale for why targeted killing of US citizens was lawful. In spite of the fact that targeted killings of US citizens had been widely reported, he declined to confirm or deny any actions and solely addressed the legal basis. The speech “was designed to offer the public some explanation of the government’s reasoning,” Charlie Savage noted, however, “the speech contained no footnotes or specific legal citations.” It contained far less detail than had already been made public through news reports and leaks. In this way, public disclosures largely confirmed parts of the narrative that had already been widely circulated. In this way, the speech did not more fully inform Americans but simply illustrated the level of confirmation the administration thought was appropriate or necessary to meet public demands for transparency. Similarly, although books and news articles had previously reported the news, President Obama and Attorney General Holder did not publicly acknowledge that four Americans had been killed in drone strikes until May 2013.³⁹

Because of persistent secrecy, information about the administration’s legal arguments on targeted killing first appeared from leaks and reporting based on interviews with confidential sources. The resulting narrative is both illuminating and problematic, filling in the picture but in a way that is often unverifiable.

Mazzeti, Savage, and Shane reported on the Office of Legal Counsel’s (OLC) work on this issue in March 2013, relying on confidential sources. They wrote that OLC lawyers had worked out the details of the legal rationale in a series of memos. The memos conceded that the

Fifth Amendment due process clause applied to the targeted killing of a US citizen outside the United States but adopted a novel argument that due process “could be satisfied by internal deliberations in the executive branch.” This argument is surprising because a central feature of due process protection is the ability to have a government deprivation of life, liberty, or property evaluated by a neutral decision maker. The lawyers

preliminarily concluded, based on the evidence available at the time, that Mr. Awlaki was a lawful target because he was participating in the war with Al Qaeda and also because he was a specific threat to the country. The overlapping reasoning justified a strike either by the Pentagon, which generally operated within the Congressional authorization to use military force against Al Qaeda, or by the C.I.A., a civilian agency which generally operated within a “national self-defense” framework deriving from a president’s security powers.⁴⁰

Subsequently, however, OLC lawyers wrote a second memo to address concerns that the initial memo had not taken into account, particularly a federal statute that prohibited Americans from killing another American overseas. In the new memo, they interpreted the statute to prohibit only unlawful killings. Focused narrowly on al-Awlaki, the memo was completed in 2010.⁴¹

With the legal case for the targeted killing of al-Awlaki laid out in secret, Obama approved it, and al-Awlaki was killed in a drone strike in September 2011, along with another US citizen not targeted, Samir Khan, who was with him at the time. “This is an easy one,” the president remarked at the time.⁴²

Even though some information had been disclosed through speeches and reporting, controversy over the legal basis for targeted killing continued. When counterterrorism advisor John Brennan was nominated as Central Intelligence Agency (CIA) director in January 2013, the lack of transparency over targeted killing threatened the nomination. In a presentation at the Woodrow Wilson International Center for Scholars in April 2012, Brennan argued that targeted killings were “legal, ethical, and wise.” The president and his advisors had made these decisions “carefully, deliberately and responsibly,” using “the rigorous standards and process of review to which we hold ourselves today when considering and authorizing strikes against a specific member of Al Qaeda outside the ‘hot’ battlefield of Afghanistan.”⁴³ But President Obama re-

sisted efforts by members of Congress to have access to the OLC memos that detailed the “rigorous standards” and review process. When senators “threatened to delay, if not derail, Brennan’s confirmation” as CIA director, finally, on March 5, 2013, the president released what remained of eleven memos to members of the House and Senate Intelligence Committees. Only committee members could view them, not their staff members. Access to the memos was still blocked for other members of Congress and for the American people.⁴⁴ Meanwhile, a white paper disclosing part of the rationale for targeted killings was leaked to NBC News. It reportedly lacked the full analysis of the secret memos and largely tracked statements Attorney General Holder had made previously in support of targeted killings.⁴⁵

A curious aspect of the white paper is an example cited as authority: Nixon and Cambodia. In an argument designed to refute the criticism that international law does not support extending armed conflict outside a battlefield, the white paper cited as historical authority a speech given by John R. Stevenson, then State Department legal adviser, on May 28, 1970, after the US invasion of Cambodia. The speech relates to the legality of the overt 1970 invasion, but it obfuscates the earlier bombing campaign, still secret at the time. Stevenson told the New York Bar Association that since 1965, “the territory of Cambodia has been used by North Vietnam as a base of military operations” and “it long ago reached a level that would have justified us in taking appropriate measures of self-defense on the territory of Cambodia. However, except for scattered instances of returning fire across the border, we refrained until April from taking such action in Cambodia.” The difficulty with this statement is that Nixon’s carpet bombing of Cambodia began in March 1969, so the sort of “scattered instances of returning fire across the border” referred to by Stevenson were actually regular bombing runs by B-52s.⁴⁶

The speech was essentially part of the Nixon administration cover-up, although it is unclear whether Stevenson himself was aware of this.⁴⁷ In other respects, the use of military force in Cambodia in 1970 was a good analogy for drone strikes in Yemen. In both, military force was used in a nonhostile territory. The United States had not gone to war with Cambodia or Yemen. But the sorry history of US actions in Cambodia, and their longer term impact, made the analogy an unfortunate choice when used as a justification for a new intervention.

The controversy over targeted killing made headlines when Senator Rand Paul filibustered Brennan’s confirmation on this issue for thirteen

hours on March 6, 2013.⁴⁸ Publicity surrounding the filibuster suggested that opposing targeted killing of US citizens could be politically advantageous. One thing was certain: it was not going away.

Ultimately, President Obama addressed the issue in a speech at the National Defense University on May 23, 2013. He acknowledged that secret drone warfare undermines a president's political accountability. "The very precision of drone strikes and the necessary secrecy often involved in such actions can end up shielding our government from the public scrutiny that a troop deployment invites," he said. The president acknowledged for the first time that four Americans, including al-Awlaki, had been killed in drone strikes. He also stated that he did "not believe it would be constitutional for the government to target and kill any U.S. citizen—with a drone, or with a shotgun—without due process, nor should any President deploy armed drones over U.S. soil." A "high threshold" applied "to all potential terrorist targets, regardless of whether or not they are American citizens," he emphasized. This standard "respects the inherent dignity of every human life."⁴⁹ But Jack Goldsmith, a former head of the OLC, commented, "It is very hard to judge the significance of the new targeting standards because we don't really have a firm grasp on how the old standards were applied. . . . The baseline matters and we don't know the baseline."⁵⁰

Importantly, Obama acknowledged that, in order to move forward, threats to US national security cannot be thought of as a permanent war, and he announced his intention "to engage Congress about the existing Authorization to Use Military Force, or AUMF, to determine how we can continue to fight terrorism without keeping America on a perpetual wartime footing."⁵¹ Many praised the president for speaking out on this issue, and the *New York Times* editorialized that it marked "The End of the Perpetual War." But this was simply one in a series of declarations of the end of conflict in the War on Terror that have not been accompanied by the actual end of conflict.⁵² And it remained unclear whether drone warfare would be more transparent in the future. A summary fact sheet expanded on the president's remarks, and Attorney General Holder explained reasoning behind al-Awlaki's targeting in a letter to Congress, but the finer details about legal standards for targeting decisions remained classified. The administration insisted that Congress was providing oversight, but classified briefings undercut that oversight role since members of Congress could not inform their constituents or seek their input.⁵³

The public controversy over drones eventually dissipated, and 2013 polling data indicated that 70 percent of Americans supported the use of drones to kill terrorists overseas.⁵⁴ The debates over legal standards, secret memos, and transparency were ultimately a far cry from the massive antiwar demonstrations that shook the Nixon presidency. The prospect of going to war in other countries with robots has not been a cause to unite the masses. That Congress has made some demands on the president is laudable, but limited disclosure of secret decisions did not serve as a break on Nixon's actions and is unlikely to restrain future presidents' war powers.

Criticism of Obama administration national security policy was diverted in a different direction when a CIA contractor, Edward Snowden, leaked documents showing surveillance of domestic telephone and Internet activity by the National Security Agency.⁵⁵ There has been a formal legal process for approval of this surveillance by the Foreign Intelligence Surveillance Court. Under the Foreign Intelligence Surveillance Act of 1978 (FISA), Congress attempted to create an exclusive means of authorizing electronic surveillance of domestic activities, including wire communications from or to a person in the United States that would otherwise require a warrant, any radio communications, and any communication without consent of the parties being wiretapped. These activities were to be authorized only by the Foreign Intelligence Surveillance Court, consisting of seven (now eleven) federal district court judges appointed by the Chief Justice of the Supreme Court. Applications for wiretapping could only be approved if the contents of the communication dealt with foreign governments or powers, terrorist or political groups, or agents of foreign powers, notwithstanding domestic criminal activity as well.⁵⁶ The FISA court was created in response to revelations of domestic spying in the 1960s and early 1970s. Its role has expanded in recent years. Rather than simply issuing warrants, it occasionally releases opinions regarding the scope of government surveillance power. These opinions are largely classified, however. This means that the FISA court is building a body of secret law on surveillance.⁵⁷

The Erosion of Political Restraints

The path from March 1969, when the Cambodia bombing began, to the era of drone warfare is not simply the passage of history from one po-

litical era to another. Between these years, structural changes in the way the United States wages war have developed. These changes have produced the deep disconnect between American war and the American people that enables a contemporary president to go it alone. In that sense, the impact on American politics and democratic restraint of secret drone warfare is simply one more step in a broader trajectory. This makes a solution more difficult to achieve but also more urgent.⁵⁸

One structural change since 1969 is the turn to an all-volunteer armed force. Supported by Richard Nixon in the closing weeks of the 1968 presidential election, the abolition of the draft received widespread support. Some hoped that the all-volunteer armed forces would make it harder for the United States to go to war. For others, it would make it easier, eliminating the widespread disruption caused by conscription and ensuring that massive antiwar movements as in Vietnam era would be a thing of the past. Since that time, there have been no draftees and their family members to demonstrate against ongoing deployment.⁵⁹

Second, the rise of private military contracting makes war possible without American troops, even when humans are involved.⁶⁰ Third, even before the use of drones, technology has made war seem precise and even bloodless. During the 1991 Gulf War, American military planners believed that “smart bomb” technology helped generate the support of the American people for the war, since television reports showing the path of laser-guided missiles made war look like a video game, with explosives seeming to hit only their intended targets.⁶¹

Changes in the way America goes to war have distanced everyday Americans from the costs of war. Changes in military service illustrate this broader point. According to a 2011 Pew Research Center report, “a smaller share of Americans currently serve in the U.S. Armed Forces than at any time since the peace-time era between World Wars I and II.” “During the past decade, as the military has been engaged in the longest period of sustained conflict in the nation’s history, just one-half of one percent of American adults has served on active duty at any given time. As the size of the military shrinks, the connections between military personnel and the broader civilian population appear to be growing more distant.”⁶²

The data reveal “a large generation gap,” with three-quarters of Americans ages fifty and over having immediate family members who served in the military (a spouse, parent, sibling, or child). In contrast, 57 percent of people aged 30–49 have immediate family members who

served. For 18-to-29-year-olds, the percentage drops to only one-third. Military service is now more concentrated in certain families: “Veterans are more than twice as likely as members of the general public to say they have a son or daughter who has served (21 percent vs. 9 percent).” And overall, what the report calls a “military-civilian gap” is more pronounced among younger people.⁶³

The Pew report suggests that various political opinions are correlated with connections to family members who have served in the military, but there are deeper implications of the disconnect between Americans and American war making. The more distant and isolated Americans are from their nation’s wars, the less they are politically engaged with American war policy.

Scholars often argue that the tendency of presidents to initiate military action without congressional authorization can only be reined in if Congress insists on playing its constitutional role.⁶⁴ But Vietnam-era history illustrates that Congress plays a more meaningful role in American war politics when the people are engaged and aware. The American people’s distance from the costs of war, as illustrated by the Pew report, reinforces contemporary political disengagement.⁶⁵ Drone warfare exacerbates this distance, for even the American soldiers involved are far from the death and destruction and in some cases never leave the United States. On the home front, war has become a policy rather than a state of existence.

As Americans become more isolated from the costs of war, military engagement no longer seems to require the support of the American people. Their disengagement does not limit the reach of American military action but enables its expansion. Secrecy and technology have therefore been a lethal combination—lethal to democratic engagement. With the American people largely uninterested in American military policy, their members of Congress lack the incentive to play a more meaningful role.

Previous efforts to rein in the presidential war power are unlikely to work in drone warfare. After Vietnam, Congress passed the War Powers Resolution (WPR), which required the president to notify Congress when armed force is used and requires Congress’s approval in some circumstances for ongoing involvement in hostilities. The WPR has not been effective in limiting presidential war power and will be even less useful in the future. Its requirements are triggered by the introduction of American troops—soldiers, not robots—into hostilities. Arguing that

the WPR would be inapplicable to US involvement in the recent conflict in Libya, Koh said one of the reasons WPR did not apply to the Libya conflict was that “the exposure of our armed forces is limited: To date, our operations have not involved U.S. casualties or a threat of significant U.S. casualties.”⁶⁶ Soldiers and CIA operatives piloting drones outside a zone of combat are obviously not exposed to enemy fire. As a result, Koh’s interpretation of the WPR as applied to Libya is, by implication, an invitation for robotic war to be conducted by the president without the notice to Congress required by the resolution.

Scholars and policy makers are exploring new ways to bring deliberation and, at the boundaries, limitations to presidential unilateralism in targeted killings. Proposals include creating a parallel to FISA courts to review proposed targeted killings.⁶⁷ Historically, limits to the use of force come from politics—from an engaged and alert electorate. Replicating FISA for targeted killings might rationalize and legitimize drone warfare, and more importantly it might bury the process further in secrecy, reinforcing the detrimental absence of popular political engagement that characterizes contemporary American decision making about the use of lethal force. McNeal argues that the bureaucratic character of targeted-killing policy means that the bureaucracy itself has a high capacity to constrain the process, effecting “control from within the Executive Branch.”⁶⁸ But the hidden character of bureaucratic decision making further shields it from the public view.

There is no tidy solution to the way secrecy affects American national security politics. But turning to history helps us to see the nature of the political restraints that have atrophied. Any effort to reframe national security policy must seek to enhance the ability of Congress to serve as a limit, not to further undermine it. Nixon’s aggression in Cambodia was not checked by limited secret data releases to congressional leaders but instead, eventually, by public awareness and engagement. Members of Congress have played a meaningful role when their constituents have demanded it. Individual members of Congress themselves have played an important role in raising public awareness, as Senator Paul’s filibuster shows. There is a long history of minority dissent in Congress on decisions to use military force, illustrating the way dissenters help focus public attention on use of the war powers.⁶⁹ Yet the ability to effectively use lethal force without the exposure of American troops means that we have lost the feature that traditionally has triggered popular political engagement. This means that the most difficult and pressing need in an era

of drone warfare is for a new war politics—for a reengagement of the American people with their nation's use of force. This is why transparency is so important. It is only when the people can know about the costs and consequences of war that they act as a brake on the war power. Because of this, transparency is not a threat to security. It is a bedrock feature of the democracy that security policy seeks to protect.

Understanding the Gulf between Public and US Government Estimates of Civilian Casualties in Covert Drone Strikes

Chris Woods

During a research field trip to South Waziristan in late 2012, I was able to visit a number of villages previously targeted by Central Intelligence Agency (CIA) drone strikes. One such town was Sara Rhoga, the former headquarters of the militant group Tehreek-e-Taliban Pakistan (the TTP). My visit to Waziristan was tightly controlled by the Pakistan military, with whom I had embedded. My primary purpose was to focus on reconstruction efforts in the Mehsud tribal area.¹ Like many South Waziristan villages, Sara Rhoga was mostly destroyed during fierce fighting between the Pakistan Army and the TTP in 2009. Seventy percent of the local population remained internally displaced—and while infrastructure reconstruction (much of it funded by the United States) was well advanced during my visit, few homes had been rebuilt for those still wishing to return.

There was little interest from my army handlers when, at the end of a lengthy interview, villagers steered the discussion from reconstruction to CIA drone strikes and tribal hostility toward the United States. I was aware that monitoring organizations such as the Bureau of Investigative Journalism² and the New America Foundation showed three US strikes on Sara Rhoga—all in 2009, and none since. Would the men blame the wholesale destruction of their area on the United States, rather than on

the military and Taliban? That might have been the easier path with the army observing. Instead the public conversation became a nuanced discussion among villagers of when and where the CIA had bombed. All were in agreement that no drone strikes had hit the village since 2009. There was also consensus that most of those killed in no more than three drone attacks had belonged to the TTP. But, the villagers insisted, civilians had also died. Again after public discussion, a list of five named noncombatants was handed to me. The villagers' recollections matched fairly closely media reporting at the time. Three US attacks on the TTP between March 1 and September 29, 2009, were said to have killed between twenty-one and forty-three individuals. Most fatalities were reported to be militants. But there were concerns raised at the time about the May 9 attack. As Sky News noted in its report, "Nine people—five of them militants—have reportedly been killed in a suspected U.S. missile attack in north Western Pakistan."³ In my 2012 meeting there appeared to be no attempt by villagers to inflate either the damage or casualties caused by US strikes. The attacks were also placed within the context of much greater violence visited upon the region by the Pakistan Army and militant groups. Are those five civilian deaths recalled by the villagers of Sara Rhoga counted as such by the CIA? Almost certainly not, based on available evidence. A yawning gulf now exists between public estimates of civilian drone casualties in Pakistan and those of the US government. Understanding the reasons behind that rift is of vital interest if the true efficacy of the US targeted-killing program is to be evaluated accurately. This chapter, therefore, explores possible reasons for—and implications of—this significant gulf between public and US government estimates of civilian casualties.

Contradictory Narratives

We are now more than a decade into a secretive US targeted-killing program employing armed remotely piloted aircraft outside the conventional battlefield. At least 487 covert drone strikes have reportedly taken place in Pakistan, Yemen, and Somalia, killing between 2,799 and a maximum of 4,476 people as of December 2014.⁴ The attacks are mainly the work of the CIA, while all strikes in Somalia and some in Yemen are also the work of the Pentagon's Joint Special Operations Command (JSOC). Public and US government estimates indicate that the majority

of those killed were alleged militants belonging to groups with which the United States and its allies are in conflict, such as the Haqqani Network and al-Qaeda in the Arabian Peninsula.

Debate continues as to whether any or all of these groups are legitimate (or even legal) targets.⁵ However a significant proportion of fatalities are consistently reported by affected communities—as well as by credible media, monitoring bodies, the governments of Pakistan and Yemen, and nongovernmental organizations—to have been civilians, particularly in the earlier years of the program. While those same indicators also suggest that the present administration has invested considerable effort in reducing the numbers of civilians killed, the US government continues to mount an aggressive information campaign aimed at countering claims of significant collateral damage.

The US Position

In June 2012, investigative news group ProPublica consolidated all recent US administration claims to media regarding drone civilian deaths. According to multiple reports by anonymous US officials, no more than sixty civilians had been killed in covert drone strikes since 2004.⁶ In August 2011, for example, an anonymous US counterterrorism official told this author by email that no more than fifty civilians were thought to have been killed. Those claims have been endorsed by those tasked with overseeing the secret US targeted-killing program. In her opening remarks at John Brennan's February 2013 confirmation hearing as new director of the CIA, Senator Dianne Feinstein, chair of the Senate Select Committee on Intelligence (SSCI), laid out the government's (and oversight committee's) present understanding of CIA civilian casualties: "The figures we have obtained from the executive branch which we have done our utmost to verify confirm that the number of civilian casualties that have resulted from such strikes each year has typically been in the single digits."⁷

In his testimony to the SSCI John Brennan went further, stating that in his view claims of higher civilian casualties were falsely representing government actions:

I think the people who were standing up here today [Code Pink], I think they really have a misunderstanding of what we do as a government, and the care

that we take and the agony that we go through to make sure that we do not have any collateral injuries or deaths. And as the chairman said earlier, we need to be able to go out and say that publicly and openly. I think that's important, because people are reacting to a lot of falsehoods that are out there.⁸

Feinstein and Brennan's comments represent the continuation of a persistent message from both Bush and Obama administration officials—as well as from those tasked with oversight—that civilians have not, in the main, been killed in covert drone strikes.⁹ President Obama too has insisted that collateral damage in US strikes has been kept to a minimum, notably in a Google town hall online event in January 2012 that marked the first on-the-record acknowledgement of the US covert drone campaign since November 2002:

Drones have not caused a huge number of civilian casualties, for the most part they have been very precise precision strikes against al Qaeda and their affiliates. And we are very careful in how it's been applied. So I think there's this perception somehow that we're just sending in a whole bunch of strikes willy nilly. This is a targeted focused effort at people who are on a list of active terrorists who are trying to go in and harm Americans, hit American facilities, American bases, and so on. It is important for everybody to understand that this thing is kept on a very tight leash.¹⁰

The president adopted a more conciliatory tone in his May 2013 speech on national security issues, admitting that civilians do die in US covert drone strikes—and also noting the tension between public and US government understanding:

Before any strike is taken, there must be near-certainty that no civilians will be killed or injured—the highest standard we can set. Now, this last point is critical, because much of the criticism about drone strikes—both here at home and abroad—understandably centers on reports of civilian casualties. There's a wide gap between U.S. assessments of such casualties and nongovernmental reports. Nevertheless, it is a hard fact that U.S. strikes have resulted in civilian casualties, a risk that exists in every war. And for the families of those civilians, no words or legal construct can justify their loss. For me, and those in my chain of command, those deaths will haunt us as long as we live, just as we are haunted by the civilian casualties that have occurred throughout conventional fighting in Afghanistan and Iraq.¹¹

President Obama's comments indicate that he is troubled by civilian deaths. Indeed, there are clear indications that since late 2010 the CIA, under orders, has gone to significant additional efforts to reduce collateral damage from drone strikes. Yet US officials have to date refused formally to publish estimates of civilians killed in Pakistan and elsewhere.¹² While withholding its own detailed casualty data, the US intelligence community has routinely attacked drone casualty estimates by others. In August 2011, the Bureau of Investigative Journalism (TBIJ) first published its Pakistan casualty estimates. Based on a root-and-branch reexamination of credible media reports across seven years of US strikes, the data indicated a significantly higher number of civilian casualties than had previously been claimed. TBIJ's findings were based on an examination of thousands of reports of drone strikes by credible media organizations, including the international news agencies Reuters, Associated Press, and Agence France Press; major media groups including the *New York Times*, *Washington Post*, BBC, CNN, the *Guardian*, and others; and reputable Pakistani media including the *Express Tribune* and the *News and Dawn*. US intelligence officials were made aware of the study some weeks prior to publication, as well as of the transparent methodology being employed.¹³

Once published, anonymous US officials were quick to label TBIJ's work as "wildly inaccurate" and as "way off the mark."¹⁴ Pressure was exerted by US and Pakistani intelligence officials on the Bureau's launch-partner media organizations to withdraw from coverage, which the United Kingdom partner ultimately did. The *New York Times* also reported anonymous US officials as claiming that TBIJ's report was "suspect" for relying on material from a lawyer who, it was implied, was receiving information from Pakistani intelligence agencies.¹⁵ The lawyer in question, Mr. Shahzad Akbar, was one of many sources TBIJ had consulted with. He had shared, for example, sworn affidavits from drone strike survivors, which were linked to legal cases he was pursuing against US officials. As TBIJ noted at the time, emails leaked to it by others also showed that CIA officials were informing journalists that TBIJ's data were "uncorroborated" and "divorced from the facts on the ground," while Mr. Akbar was accused of generating publicity "designed to put targets on the backs of Americans serving in Pakistan and Afghanistan."¹⁶ The US intelligence community thus exerted significant effort to undermine the credibility of a casualty metastudy seeking to address an information vacuum generated by that same community.

Overall Estimates

In response to TBIJ's publication of its data and subsequent media coverage, US officials nevertheless did for the first time anonymously issue estimates of the overall numbers of militants and civilians believed killed in covert drone strikes in Pakistan. As the *New York Times* noted, the CIA claimed that by August 2011 it had killed around two thousand militants and an estimated fifty civilians in Pakistan, with no civilians killed in the preceding fifteen months.¹⁷ Such data were obtained via "real-time eyes on the targets, as well as multiple other forms of collection to assess who may have been killed," according to an agency official.¹⁸ At the time of writing, this represents the only known publicly stated US estimate of overall and civilian casualties. So how "wildly inaccurate" are TBIJ's casualty findings—and those of other casualty monitors—when compared with the CIA's own estimates?

Three key organizations presently monitor and tabulate credible reports of US covert drone strikes. These are the London-based bureau (TBIJ) and the United States-based New America Foundation (NAF) and Long War Journal (LWJ). A comparison of their findings is revealing. Pakistan strike data up to August 2011 indicate little difference in baseline estimates of overall casualties between the CIA and two of the three monitoring groups,¹⁹ while NAF underpitches on its minimum count the CIA's overall estimate. Given that all three organizations draw heavily on credible media reports of strikes as the basis for their own estimates, this casts doubt on claims by some that media reporting of drone strikes cannot be trusted. Former Defense Intelligence Agency analyst Joshua Foust, for example, has argued that "media accounts are a poor basis for generating rigorous debate about drone strikes."²⁰ And Reuters analyst Myra Macdonald has claimed, "Data on drone strikes based on media reports do not tell us the number of civilians killed; they tell us what unnamed Pakistani security officials choose to say about casualties, and they have the option of either exaggerating or underestimating the numbers depending on what suits politically."²¹ Table 11.1 indicates that consolidated media reports may in fact be a good basis for public understanding, at least when considering overall casualty figures.

Where the three organizations and others do clash with the US intelligence community and congressional oversight bodies is in estimates of the number of civilians killed. As noted, no US official has ever pub-

TABLE II.I. **Pakistan drone casualty estimates, June 2004–July 2011**

Organization ^a	Estimated deaths (all) to July 31, 2011	Difference from CIA data (%)	Estimated civilian deaths	Difference from CIA data (%)
CIA	2,050	—	50	—
TBIJ	2,135	85 (+ 4)	395	+ (345) (690)
LWJ	2,152	102 (+ 5)	140	+ (90) (+180)
NAF	1,610	–440 (– 21)	251	+ (201) (+ 400)

^aData from the three monitoring organizations were taken in June 2013.

licly allowed for more than sixty noncombatant deaths during the nine-year covert Pakistan bombing campaign. The lowest civilian casualty estimate, from NAF, is three times greater than this—with TBIJ’s estimate some eight times higher.²² Monitoring organizations are not alone in such estimates. Field studies in Pakistan by the Center for Civilians in Conflict²³ and the law schools of Stanford and New York universities have indicated similarly high levels of civilian casualties from drone strikes.²⁴ In February 2013, Pakistan’s then foreign secretary Jalil Abbas Jilani told senators in Islamabad that of between nineteen hundred and three thousand people his government believed had been killed in US drone attacks, some 80 percent were militants.²⁵ A month later Ben Emerson QC, the UN Special Rapporteur on human rights and counterterrorism, issued a statement following a fact-finding mission to Islamabad in which he noted that “[t]he [Pakistan] Government has been able to confirm that at least 400 civilians had been killed as a result of drone strikes, and that a further 200 individuals were regarded as probable non-combatants. Officials indicated that due to under-reporting and obstacles to effective investigation on the ground these figures were likely to be under-estimates of the number of civilian deaths.”²⁶

A confidential internal report prepared for the Federally Administered Tribal Areas (FATA) Secretariat and obtained by this author also details extensive noncombatant fatalities between 2006 and 2009—with one in five of 762 reported deaths in CIA drone strikes clearly described as civilian. Former North Waziristan Political Agent Rauf Khan Khattak said, when shown the internal report, “There was no benefit in officials ‘cooking the books’ here, since this document was clearly never intended to be seen outside the civilian administration.”²⁷ A landmark ruling by the Peshawar High Court in May 2013—which ruled CIA drone strikes

on Pakistani territory illegal—indicated even higher civilian casualty estimates. Citing data provided to the court by the FATA political administration, Chief Justice Dost Muhammad Khan stated that since 2007 alone, 896 Pakistani civilians had died in North Waziristan, with a further 553 civilians killed in South Waziristan.²⁸ All publicly available evidence thus clearly indicates that the CIA has been responsible for hundreds of civilian deaths in Pakistan. Far from being wildly inaccurate or far from the mark there is a strong consensus—based on extensive reporting by multiple sources—of large-scale civilian deaths, particularly in the earlier years of the CIA's Pakistan campaign. Why then does the United States continue to represent the attacks so differently?

Civilian Casualties: An Unbridgeable Gap?

In June 2011 John Brennan asserted that US covert drone strikes had now become so accurate that civilians were no longer being killed. As he told an audience at Johns Hopkins University,

One of the things President Obama has insisted on is that we're exceptionally precise and surgical in terms of addressing the terrorist threat. And by that I mean, if there are terrorists who are within an area where there are women and children or others, you know, we do not take such action that might put those innocent men, women and children in danger.

Brennan continued, "In fact I can say that the types of operations . . . that the U.S. has been involved in, in the counter-terrorism realm, that nearly for the past year there hasn't been a single collateral death because of the exceptional proficiency, precision of the capabilities that we've been able to develop."²⁹ A subsequent CIA background briefing for journalists leaked to this author (which also extended by three months the claimed period during which no civilian deaths were said to have occurred) made clear that Brennan's views on low civilian deaths were shared by the agency itself: "In that same period of time, the period that Brennan cited, we can't confirm any noncombatant casualties. Since 2001, about 2,000 militants have been killed and in the neighborhood of 50 noncombatants have been killed—none since May 2010."³⁰

Brennan's comments capped a string of claims by anonymous US of-

ficials through the first half of 2011 that insisted that civilians were no longer being killed—even as drone strikes in Pakistan were at their most intense.³¹ More attacks took place in 2010, for example, than in all previous years combined. Brennan's claims have since come under intense scrutiny, and he would later partially backpedal, telling George Stephanopoulos "over a period of time before my public remarks [that] we had no information about a single civilian, a noncombatant being killed."³² That claim appears to be false. In April 2013, news agency McClatchy obtained leaked CIA briefing documents—most likely intended for Congress—which confirm the agency was aware of at least one civilian death two months prior to Brennan's June speech: "The [leaked] reports estimated there was a single civilian casualty, an individual killed in an April 22, 2011, strike in North Waziristan."³³ Additionally, a CIA signature strike in March 2011 resulted in mass civilian casualties. Within hours, Pakistan's president, prime minister, and army chief had publicly condemned the deaths. An official Pakistan government briefing issued at the time also reports that Washington's then ambassador Cameron Munter was summoned to the foreign ministry in Islamabad on March 18 for a dressing-down. A strongly worded statement reported that "Ambassador Munter was categorically conveyed that such strikes were not only 'unacceptable' but also constituted 'a flagrant violation of humanitarian norms and law.'" Munter also intended "to convey Pakistan's message to the U.S. Administration at the highest levels," the foreign ministry press release claimed.³⁴ While some challenge Pakistan's portrayal of aspects of the meeting, it is not disputed that the ambassador did indeed convey Pakistan's concerns to the highest levels in the US government.³⁵

There would appear to be no evidence to support public assertions by John Brennan and the CIA that zero civilian casualties occurred between May 2010 and September 2011, even on the basis of classified US data. How, then, should we view ongoing US government claims that civilian casualties from nine years of CIA bombings in Pakistan are far below the public's present understanding? Critics have advanced the following as possible explanations.

An Illusion of Authenticity? Flawed Media Reporting

Baseline casualty estimates by monitoring organizations, the Pakistan government, and others indicate a strong correlation with the CIA's

own overall estimates, as Table 11.1 notes. At issue is the understanding of *civilian* casualties since 2004. The primary resource for information on more than 360 US drone strikes in Pakistan to mid-2013 remains the media. From the outset, news agencies have sought to report accurately on air strikes in FATA. Yet FATA remains an extremely challenging environment. Reports of the very first CIA covert strike in Pakistan, in June 2004, illustrate some of those issues. Nek Mohammad, a local and charismatic militant leader, was killed as he sat eating with associates in Wana, South Waziristan. Local media were quickly able to ascertain who had likely died, including the ten- and sixteen-year-old sons of Sher Zaman Ashrafkhel (although those child deaths would later disappear for some years from Western media reports of the attack). Also reported killed at the time was Nek Mohammad's brother Wali. Inaccurate claims regarding drone strikes can sometimes take months or even years to be corrected. Only in October 2012 would Wali Mohammad break his silence, revealing to the BBC that while he had been seriously injured in the attack he had survived.³⁶ Attribution of the attack was also problematic. A Pakistan military spokesman told journalists at the time, "Nek Mohammad was suspected to be present in a hide-out with his associates and our security forces acted swiftly on the information and that is how he was killed."³⁷ It would only later emerge that the Pakistan military, as part of a secret agreement with the United States, claimed as its own all US drone strikes in FATA between 2004 and 2006. Mark Mazzetti of the *New York Times* reports that Mohammad was killed as part of a "back-room bargain" in exchange for CIA drone access to Pakistan airspace.³⁸ Where drone reporting is least successful is in the immediate aftermath of an event—generally the time of greatest demand for a modern twenty-four-hour news machine. Gathering casualty information during a conflict is a challenging and frustrating process—particularly in an impoverished region such as FATA with its poor communication networks—and salient facts often do not emerge until some days after the international media has pronounced on the outcome of an attack.

If journalists can struggle to understand aspects of an attack as much as a decade on, little wonder that the reporting of drone strikes can face heavy criticism. At its most severe, journalists are depicted as meekly accepting spoon-fed propaganda from Pakistan's Intelligence Service—the ISI—or from Taliban officials. One prominent US academic has claimed, for example, that

with respect to drone strikes, either the Pakistani Taliban call in the “victim count” or the ISI plants the stories with compliant media in print and television—or some combination of both. In turn, the Western media outlets pick up these varied accounts. Of course the victim counts vary to give the illusion of authenticity, but they generally include exaggerated counts of innocents, including women and children.³⁹

Certainly the ISI and Taliban—along with the CIA and US government—engage in propaganda activities on the subject of drone casualties. Yet the depiction of journalists and other researchers as passive recipients bears scant relation to reality. The role of the CIA in attacks in Pakistan emerged as early as December 2005, for example, when news photographer Hayatullah Khan identified fragments of a US Hellfire missile at the scene of a supposed Pakistan military attack that had killed al-Qaeda operative Abu Hamza Rabia. Within hours of publishing his photographs Khan was abducted by unknown assailants and later murdered. When his widow later accused the ISI of likely involvement, she too was assassinated.⁴⁰ Local journalists often exhibit great bravery in seeking the facts about covert US drone strikes at significant risk to themselves. Little wonder that Pakistan is consistently listed as one of the most dangerous nations on earth for reporters.⁴¹

Reports of civilian deaths resulting from covert drone strikes are both rare and specific in Pakistan and elsewhere: journalists often go to significant lengths to understand what transpired in an attack. The first reported US drone strike for 2013 in Pakistan is a useful illustrator. Senior Taliban commander Maulvi Nazir—long a target for the CIA—was quickly identified as being killed in South Waziristan along with up to ten others. As journalists focused in, additional details emerged. The *News* and *Dawn* published the names of four subcommanders killed along with Nazir, the *Express Tribune* an additional two. The latter paper also cited a senior Taliban spokesman as confirming Nazir’s death, while the *New York Times* quoted a number of Pakistani government officials. No claims were made of civilian casualties, although total casualty reports ranged from six to eleven killed.⁴² One can see a similar level of detail when civilian casualties are reported. An air strike on the Yemeni city of Rada’a in September 2012 was initially claimed by officials to have killed only militants. But the attack, which an anonymous Pentagon official conceded to the *Washington Post* three months later

was the work of the United States, killed twelve named civilians ranging in age from ten to sixty.⁴³ Two additional named persons were injured. Reports of the attack were supplemented with photographs of the scene, with comments from eyewitnesses and surviving family members, and with details of a proposed parliamentary inquiry.⁴⁴ What is striking about many covert drone attacks is not the paucity of casualty information publicly available but its breadth and depth.

For Pakistan it certainly remains true that it is difficult for journalists from outside FATA—or for Western media—to visit and report on the tribal areas. The same has been said of Yemen’s more troubled regions. Yet claims that it is “impossible” for Western journalists to visit such locations are clearly incorrect. As already noted, this author was able to report from the Mehsud tribal areas of South Waziristan in late 2012, the result of a negotiated Pakistani military embed. The reporting limitations experienced were comparable to those previously encountered on embeds with US or British forces in Iraq. Other Western journalists who were recently given limited access to North and South Waziristan have included those from the *New York Times*, NBC News, the BBC, and the *London Times*.⁴⁵ Numerous news agencies and media groups have also been able to report from Yemen’s troubled southern regions, including towns only recently vacated by al-Qaeda’s local affiliates.⁴⁶ Nevertheless, there is no doubt that journalists can face significant pressures when attempting to report on the aftermath of CIA and Pentagon drone strikes. Access may be limited; pressure from state and nonstate actors can be extreme; and the quality of journalism—particularly at a local level—may be poor. Yet reporters are used to being targeted by those seeking to influence events and evolve appropriate coping mechanisms. International news agencies will, for example, seek comments not only from local military and civilian officials but also from civilian villagers and from the Taliban itself. Reporting on a current conflict is difficult, yet it does have value. When follow-up field studies have been conducted into casualty reports in Pakistan and elsewhere, a reasonable correlation is often found with those earlier media claims.⁴⁷

“They Would Say That, Wouldn’t They?” Unreliable Eyewitnesses

An additional contention is that many reports of drone-related civilian deaths are exaggerated or falsified by actual or supposed witnesses

and survivors. Dr. Christine Fair has articulated her concerns regarding the collection of accurate civilian casualty data on the ground in FATA, which she terms social desirability bias:

Some person you don't know, or perhaps someone you do know, knocks on your door and says "I heard that Mohammed over there, his house, his compound was attacked by a drone. Do you know who was in there?" What answer would you give? You're probably not going to say it was a terrorist, you're probably not going to want to say anything at all if you can avoid it, but the least dangerous answer's going to be "Oh, it was an innocent civilian killed by a drone" because the Taliban aren't going to come after you if you say that, the CIA, who knows what they'll do and the ISI, God knows what they'll do. So the least dangerous answer—the more innocent and the younger they are, the better that answer is. And in polling this is what social desirability bias is and you can't get around it.⁴⁸

Fair raises a valid point. US covert drone strikes are just a small element of violent actions against the inhabitants of Pakistan's tribal areas. Ongoing operations by Pakistan's military have led to significant civilian and militant casualties and to extensive structural damage throughout the region. Terrorist and military-style attacks by the Taliban and others are also commonplace. Yet Fair assumes that those affected by kinetic actions are unable or unwilling to discriminate between those responsible in this complex world. Her claim that people exaggerate the deaths of civilians also appears unsupported by the evidence. Indeed credible reports of civilian deaths in Pakistan, Yemen, and Somalia are now a rarity, as the data sets of TBIJ, NAF, and LWJ all demonstrate. Critics of claims of higher civilian casualties—including the US government—have yet to advance a convincing argument as to why the same data sets they deride for "wild inaccuracy" all show such a sharp recent decline in civilian deaths. Reported drone civilian casualties have, in the main, fallen both numerically and proportionally in recent years. In 2006 almost all those killed by CIA drones in Pakistan were reportedly civilians. In 2012 almost none were.⁴⁹ Indeed where false claims of civilian deaths have been identified—for example when TBIJ found that an Iranian TV station had likely fabricated reports of more than seventy "U.S. drone strikes" in Somalia—they have been exposed as false.⁵⁰

*“Military Aged Males” and Other Anomalies:
Differences of Interpretation*

For most years since 2004, publicly reported civilian fatalities from covert drone strikes are well above the “single digits” average claimed by US officials. As noted, some of that disparity is likely due to the downplaying of civilian deaths by Washington—along with an overstating of noncombatant fatalities by some public sources. That aside, there are clear indications that the CIA (and perhaps the Pentagon’s JSOC) employs a definition of “civilian” that is markedly at odds both with the public and legal understanding. The clearest example of this disconnect was given by *New York Times* journalists Jo Becker and Scott Shane, when they revealed that the CIA employs a novel definition of “combatant” when bombing Pakistan’s tribal areas:⁵¹ “Mr. Obama embraced a disputed method for counting civilian casualties that did little to box him in. It in effect counts all military-age males in a strike zone as combatants, according to several administration officials, unless there is explicit intelligence posthumously proving them innocent.”⁵²

No US official has publicly challenged or corrected this assertion by Becker and Shane, which as they noted “may partly explain the official claims of extraordinarily low collateral deaths.” Such a definition of “combatant” would have no place on the conventional battlefield and would clearly violate ethical and legal principles. Officials from the North Atlantic Treaty Organization, Centcom, and the British military also made clear to this author at the time of the *New York Times* article that they could not countenance such a definition of combatant.

Applying the military-age male formula to Pakistan data sets such as TBIJ’s is revealing—and may partially explain some of the disconnect between CIA and public estimates of civilian drone deaths. In 2010, for example, the data show that military-age male civilians significantly outnumbered others, with a minimum of fifty-eight reported killed. Even so, a minimum twenty-six women and children were also reported killed that year by the CIA—far higher than agency estimates, particularly in a year in which it claimed zero civilian deaths from May onward. There are also significant doubts about whether US officials posthumously reclassify military-age males when it is learned that they are innocent. When the CIA’s drones attacked a tribal gathering, or *jirga*, in March 2011, between twenty-six and forty-two male adults were killed. Anonymous US

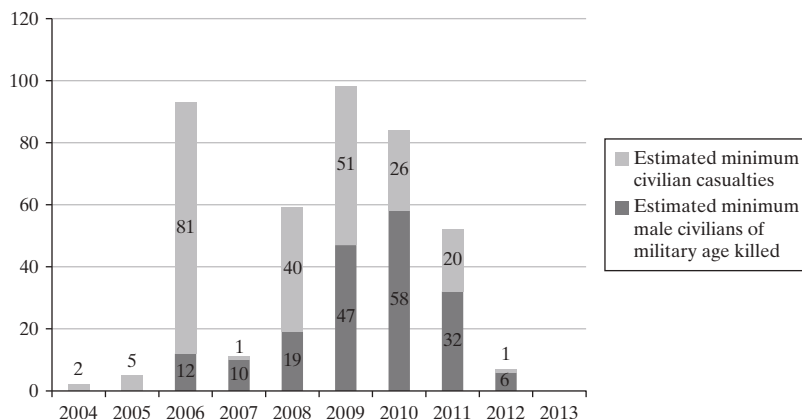


FIGURE 11.1. TBIJ minimum estimates of civilians killed in Pakistan 2004–2013, with civilians known to be military-age males highlighted. Source: The Bureau of Investigative Journalism (TBIJ), www.thebureauinvestigates.com.

officials insisted at the time that “These people weren’t gathering for a bake sale. They were terrorists.”⁵³ However, it soon emerged that most of those who died were indeed civilians. Pakistan’s president, prime minister, and army chief all protested the deaths. Numerous follow-up investigations have found extensive evidence that most of those killed were a mix of tribal elders, villagers, and local *khassadar* police. A small number of Taliban were also reported present. Yet we know that no civilian males killed in this attack were ever posthumously reclassified by the CIA, since the *jirga* strike falls firmly within the window in which both John Brennan and the agency subsequently insisted no civilians were killed by drones (May 2010 to June 2011). Even assuming that the CIA was unaware of global press reports, the US ambassador in Islamabad is understood to have conveyed to the highest levels of the US government Pakistan’s concerns regarding civilian deaths.⁵⁴ Brennan’s claim a year later that he had “no information” regarding civilian deaths in that period remains difficult to explain, unless the CIA has routinely classed as combatants dozens—perhaps even hundreds—of adult males who would broadly be viewed as civilians.

Even when all military-age male civilians reported killed by drones are removed from its data, TBIJ minimum estimates stubbornly remain almost four times greater than the CIA’s own figure of around sixty non-combatants killed. Other monitoring organizations and those reporting

from the field—as well as the Islamabad government—also continue to report far higher estimates of civilian deaths in Pakistan, particularly historically. This gulf between public and US government understanding, particularly of historical data, cannot be reconciled at present.

A Marked Decline in Civilian Casualties

The issue of civilian deaths has the potential to undermine significantly the US targeted-killing campaign. Polling by the Pew Research Center in early 2013 found that more than half of Americans surveyed were “very concerned” about whether drones endangered civilian life.⁵⁵ A YouGov poll in the same month found that US support for drone strikes against “high level terrorism suspects overseas” fell from 54 percent to 29 percent if “innocent civilians may also be killed.”⁵⁶ Seeking an actual reduction in civilian deaths in Pakistan and elsewhere—and downplaying such deaths when they do occur—is clearly viewed as a valuable strategy by an administration and intelligence community keen to continue with the targeted-killing project.⁵⁷ John Brennan’s claims of zero civilian casualties most likely represent a distorted version of an emergent situation: that almost all deaths of women and children ceased in Pakistan drone strikes after autumn 2010, although civilian males of military age continued to be killed on occasion. Take, for example, 2012, which represented a watershed year for US media coverage of the drone campaign. As Tara McKelvey has demonstrated, US reporting of strikes doubled “in both breadth and depth” between 2009 and 2012.⁵⁸ The latter year also saw an extensive pushback by the Islamabad government against US bombings and the emergence of a public narrative increasingly focused on collateral damage and possible blowback to the CIA. In such circumstances a classic propaganda model might be expected to claim that civilian deaths rose during this period, or at the very least remained at a constant. Instead reported civilian deaths fell sharply, by all public counts. TBIJ’s data, for example, shows that an estimated minimum 12 percent civilian casualties for 2011 declined to an estimated 3 percent the following year. Of forty-seven reported CIA drone strikes in 2012, civilian deaths have been confirmed by multiple sources in just five attacks: seven deaths out of an estimated minimum of 242 reported killed. And those civilian fatalities are rarely anonymous statistics. In four of five known collateral damage events for 2012, TBIJ has been able to name

most of the civilians who died. On a further occasion, initial reports by Reuters that a militant's wife and child may have been killed were later denied by the Taliban itself. If this is propaganda, it is of a most peculiar sort. Those opposed to US covert drone strikes risk undermining their campaigning if they focus—as some have—exclusively on reported civilian deaths or if they continue to insist that large numbers of civilians are still being killed.

A Need for Greater Transparency

Many welcomed comments by President Obama and other senior officials that the United States was striving to limit civilian deaths in covert drone strikes. Indeed, as noted, there is evidence that this was occurring by 2012. Yet the refusal of the United States to release its own comprehensive casualty data—or even to explain how the CIA defines a civilian—has made it all but impossible to judge the true efficacy of the campaign, particularly when public casualty estimates have historically been so out of kilter with those of the United States. There is an urgent need for more transparency, accountability, and oversight of the program on the part of the government, courts, and legislature. CIA director John Brennan indicated in his February 2013 congressional confirmation hearing that he hoped to steer the agency away from its recent paramilitary role and toward pure intelligence gathering.⁵⁹ President Obama too stated that he wished the covert drone program to transition to the US military.⁶⁰ Some may have assumed that full Pentagon control of the drone program might lead in and of itself to greater transparency and accountability. However, there have been few indications of this. Despite a partial declassification of US military drone strikes in Yemen and Somalia, officials continue to refuse to release details of specific strikes on “operational grounds,” and no casualty data have ever been issued by the Pentagon in relation to covert drone strikes in Yemen and Somalia.⁶¹ As noted, it took more than three months for an (anonymous) official in 2012 to confirm that US military assets had killed twelve civilians in Rada’a, Yemen. More notoriously, the Pentagon is now known to have schemed with Yemen’s government to conceal US involvement in a lethal 2009 cruise missile strike that killed forty-four named civilians, most of them women and children.⁶² Military control of the covert drone program cannot be assumed to be a guarantor of either transparency or

accountability. The CIA and Pentagon have maintained an iron grip on all records pertaining to this decade-long secret war. No wonder a federal judge has referred to this as a “looking glass world,” in which government officials “proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for their conclusion a secret.”⁶³

Instead, true external oversight is needed, in a manner that need not undermine national security. Congress, for example, could reach out beyond the US intelligence community when scrutinizing CIA activities. SSCI chair Dianne Feinstein told the Senate in February 2013 that her committee was doing its “utmost” to verify that civilian deaths from drone strikes were in single digits. Yet oversight mainly appeared to involve staffers watching videos and documentation of attacks provided to them by the CIA.⁶⁴ No oversight committee member or staffer—and no US intelligence community official—has ever been known to seek information from any organization that has conducted field studies into civilian casualties in Pakistan, for example.⁶⁵ The CIA should also be encouraged to publish as much information as possible—including video feeds of strikes—to make clear whom it understands it has killed in Pakistan and elsewhere and in what numbers. It should also explain clearly which definitions of “civilian” it has employed in Pakistan and on what legal basis. The present agency position—that it can neither confirm nor deny the existence of any such campaign—only invites mockery when numerous US officials from the president downward openly discuss the covert targeted-killing program.

A continuation of the present US approach risks much. The Obama administration indicated that it foresaw its targeted-killing program in Pakistan and elsewhere continuing far beyond 2014. Transparency and public accountability are anathema to both the CIA and JSOC, the agencies that on present modeling would run a combat model relying heavily on drone strikes and special forces actions. The ensuing information vacuum would risk handing an effective propaganda tool to militant and terrorist groups opposed to the United States. Already there is strong evidence that al-Qaeda and its affiliates routinely cite US covert drone strikes in their literature. Less clear is whether the US drone campaign is an effective recruitment tool for terrorist groups. Yet it is undisputed that in those countries and regions where covert strikes take place, US unpopularity is at an historic high, with significant implications for US strategic policy in the decade ahead.⁶⁶

The United States also seeks to influence the debate into the future use of armed drones by other nations. As John Brennan noted on the first anniversary of the death of Osama bin Laden,

Going forward, we'll continue to strengthen and refine these standards and processes [on US targeted killings]. As we do, we'll look to institutionalize our approach more formally so that the high standards we set for ourselves endure over time, including as an example for other nations that pursue these capabilities. As the President said at Oslo, in the conduct of war, America must be the standard bearer. This includes our continuing commitment to greater transparency.

The United States has made targeted killings—or extrajudicial assassinations, as some would have it—a significant and acknowledged aspect of its foreign policy since 2001 following the lifting of a quarter-century ban.⁶⁷ Thousands have been killed by the United States under this new doctrine—not just in drone strikes but in countless other covert US military and paramilitary actions. Tactically such activity has limited al-Qaeda and its affiliates and other militant organizations. Yet we know next to nothing about the long-term strategic impact of such actions. Greater openness by the United States about those it has killed in this secretive war—and a reconciliation with present public understanding—could enable a more nuanced reassessment informing policy decisions moving forward. On a more human level, an open recognition by the CIA and Pentagon of those civilians killed—and in what circumstances—may help restore a much-needed sense of accountability.

The Myth of Precision: Human Rights, Drones, and the Case of Pakistan

Rafia Zakaria

The crux of the debate on drones in the United States has focused on the legality of their use, the legitimacy and transparency of the process through which targets are selected, and the chains of accountability through which drone attacks are ordered and executed. These are all crucial concerns, and many eminent legal scholars and human rights activists are doing important work on this issue. While these interventions expose important elements of the debate on the use of drones, they do not question the central premise of their use: the ideas that the unmanned drone is a precise weapon that can eliminate exact targets with little or no collateral damage and that the receiving country is only minimally affected by the intrusion.

Using the case of Pakistan and an analysis of the impact of drone strikes from 2004 through 2012, this paper demonstrates how this central premise of the use of drones is erroneous and misguided. The result of the long-term impact of drone strikes in that country is hence an important consideration in considering the facility and value of drone strikes, not simply on the basis of their legality and legitimacy, but also on the basis of their effectiveness. While the complexities of the political and security landscape in Pakistan make it impossible to isolate the effects of drones independent of ongoing security operations by the Pakistani military, the sudden and vast escalation in militant violence during the years 2009–2012 suggests at a minimum that the claimed justifica-

tion for drone strikes, the eradication of terrorist violence, has not been achieved.

The Obama administration's words and the cumulative rhetoric of the use of drone warfare as a whole have been littered with curative terms; administration officials routinely use the terms "precise," "surgical," "exact," and various synonyms to create the image of drone killing as one in which the United States plays the role of the doctor, extricating the tumors of extremism ailing countries such as Pakistan. The extrication is painful, as champions of the drone program in the Obama administration admit with a shrug and a nod, but is all part of healing terror through surgical attacks conducted by drones.

In this chapter I aim to take to task the rhetoric of the precision of drone strikes, first by discussing the positioning of drones as a panacea to the horror of terrorism; second by unraveling the narrow definition of casualties underpinning the argument of precision; third by demonstrating how the operative definition of casualties, even with the interventions of human rights groups and investigative journalists, still fails to present the complete picture of upheaval; and finally by presenting Pakistan as an illustrative case demonstrating how these assumptions create a false picture of drone-led conflict and obscure the human cost incurred to populations being targeted by these attacks. In this respect I discuss the unattended issue of a person's "right to home" and how the issue of massive displacement and ensuing conflict is currently absent from assessments of the casualty costs of drones.

The "Precision" Argument

At the end of April 2012, Khalil Dale's body was found wrapped in a plastic bag with his name written on it and tossed into an orchard near Quetta in Baluchistan, Pakistan's embattled southwestern province. Abducted some months before, he was found with a crudely written note that said he had been killed because his employer, the International Red Cross, had failed to pay the ransom demanded by the captors. When the bag holding his body was opened, it revealed that his throat had been cut by a small, sharp knife and that his head had been completely severed from the rest of his corpse.

There is no immediate connection between the brutal death of Dale, a humanitarian aid worker who had been running a camp in one of the

most impoverished parts of Pakistan, and drone attacks. And yet the discussion around drone attacks—their ethics, their necessity, their place within the US arsenal—is incomplete without addressing directly the context in which they are used. Simply put, the use of drones and the vocabulary by which they are justified, with words like “precision” and “surgical,” center on a tactical and rhetorical contrast to the brute barbarism of terrorist acts—the beheadings and floggings, the unmitigated carnage of suicide bombings. Terrorism is a problem, and drones are being sold as the neat, sterile solution to all of its bloody ambiguities and sinister secrets.

Less than a week after Dale’s body was discovered, the 270th drone strike ordered by President Obama pounded North Waziristan, the war-torn tribal border between Pakistan and Afghanistan. In the reports provided by US officials, a Predator drone fired two missiles on a compound near the Shawal area, seventy kilometers west of Miramshah.¹ Nine people, their identities still unknown, died. There are no pictures of the aftermath of the strike and no knowledge about how the target was selected or which remote assassin pulled the trigger. As it did in that strike and in most of the more than four hundred drone strikes² that have taken place over the past decade, the US government would eventually say that those killed were almost all militants, including important leaders of al-Qaeda or Tehreek-e-Taliban Pakistan, whose deaths would deal significant blows to the capacity of the groups to operate in the region.

On May 1, 2012, Obama’s then chief counterterrorism adviser John Brennan presented for the first time the administration’s official position on drone attacks.³ According to Brennan, because the United States has been in armed conflict with al-Qaeda and “associated forces” since the September 11, 2001, terror attacks, the United States is legally permitted to use lethal force against any of its operatives “when the country involved is unwilling or unable to take action against the threat.” Brennan also asserted that the strikes were ethical because they are necessary (existing threats to the United States require them), distinct (they distinguish particular targets and do not arbitrarily disregard civilian life), and proportional (they employ force with specific aims and with due attention to avoiding unnecessary casualties). Because of this, Brennan informed his audience that the drone strikes are, in fact, “humanitarian.”⁴

Most Americans are likely to accept Brennan’s argument; it addresses a messy problem in the comforting cadences of humanity, ethics, and legality, covering over the dissonance of beheadings and bombings. Few

would pause at the phrase “unable or unwilling” or question the conclusion that the attacks are “proportional” and “necessary,” even when these terms are unilaterally and secretly defined by the United States. For those still agonizing over drone warfare, Brennan offered the following assurance that he is not heartless:

[T]he issue of targeted strikes raised profound moral questions. It forces us to confront deeply held personal beliefs and our values as a nation. If anyone in government who works in this area tells you they haven’t struggled with this, then they haven’t spent much time thinking about it. I know I have, and I will continue to struggle with it as long as I remain involved in counterterrorism.⁵

Since the speech, legal academics, commentators, and legislators during Brennan’s confirmation hearings have challenged some of the Obama administration’s assertions.

Yet their questions, however crucial, have not touched on a number of other troubling aspects of remote-control warfare. Set against the visible and arbitrary barbarity of terrorism, drone attacks—like torture, indefinite detention, unwarranted surveillance, religious profiling, and other depravities of the post-9/11 world—seem less horrible in their secrecy and impact. They are touted for their precise elimination of terror, but, as the hundreds of civilians killed by these strikes attest, the appeal of drones lies less in the precision of whom they kill than in the safety of those who are doing the killing. Drones allow a war that is safe for Americans and imposes the entire cost on Yemenis, Pakistanis, and Somalis. In this construction, therefore, the invisibility of cost, an invisibility that owes to the collusion of a variety of political forces and several branches of government, neatly and conveniently provides the invisibility and ignorance necessary for the safety of Americans and the annihilation of terror.

Drones as a Solution to Terrorism?

Human rights groups and investigative journalists were the first to question the numbers of casualties incurred by drone attacks. Ever since, the issue of casualties has remained central to the drone debate, not least because of the secrecy and lack of transparency in every aspect of the strikes. The tribal areas where drone strikes occur in Pakistan are diffi-

cult for journalists to access, and the Central Intelligence Agency (CIA), Pakistani security forces, and the Directorate for Inter-Services Intelligence do not allow human rights personnel to go into those areas and assess the damage following a hit. With all means of “explicitly proving” that the people who perished were combatants denied, the definition unilaterally created by the Obama administration becomes the operative one, and the myth persists that all strikes are precise, surgical, and accurate and that drone attacks accomplish the curative purpose of ridding the region and the world of terrorist attacks.

Given the secrecy surrounding drone attacks, human rights organizations such as Amnesty International have repeatedly called on the Obama administration and the United States Congress to “publicly disclose the policies and procedures for ‘targeted killings,’ ‘signature strikes,’ and ‘Terrorist Attack disruption strikes.’”⁶ Repeated efforts by the American Civil Liberties Union to access various documents under the Freedom of Information Act have also faced legal challenges and judicial denial.⁷

Contributions to the debate on the civilian casualties of drone attacks have therefore focused on the lack of information, the confusion over the numbers, and on whether the people killed are civilians. The core of the debate over casualties remains the number of those killed directly by the strikes. While this exposes the complexities of secrecy and procedure as related to the issue of drone attacks, it does not (1) respond to the precision of these attacks as a means of curtailing terrorism and extremist activity in general or (2) present an accurate casualty picture of the unrest and upheaval caused in local environments by supposedly precise and exact attacks.

The current formula of the War on Terror operationalized by the Obama administration through the use of unmanned drone strikes is simply this: when al-Qaeda and/or Tehreek-e-Taliban militants are identified, either by drone surveillance or other forms of intelligence, as operating or present in a certain area, a drone strike can be used to eliminate them. This elimination in turn produces a reduction in the capacity of al-Qaeda or whichever militant group is being targeted, reducing their territory of control, their safe havens, and other means via which they operate.

This logic of the War on Terror is related closely to the idea that terrorism, or at least al-Qaeda and the Tehreek-e-Taliban Pakistan, can be eliminated by killing various members of their leadership. As numerous

Obama administration officials have opined, and as is seen in the aftermath of every “successful” drone strike, three or four or five of the targets tend to be members of the Taliban and al-Qaeda leadership. The numbers quoted in American media reports promote the idea of surgical precision and curative necessity, implying that the problem of terror is gradually being solved via this evisceration even while it involves some legal and ethical overreaching.

If this logic is indeed apt, then an increase in drone attacks should in turn lead to a decrease in the capacity of terrorist organizations to conduct operations. With a diminished leadership downed by drones and the safety and secrecy of safe havens destroyed by surveillance, terrorist groups should be severely impacted if not disabled completely from carrying out counterattacks especially on civilians. It is this part of the equation that does not hold up in the face of the data on drone attacks and terrorist attacks.

In 2009, the first year of President Obama’s first term, he ordered a total of fifty CIA drone strikes.⁸ These strikes were said to have killed anywhere between 517 and 729 people, of which 98 to 207 were said to be civilians. The casualties were said to include al-Qaeda operative Zabu Al Taifi, killed in a strike on a compound in January 2009; the leader of the Tehreek-e-Taliban Pakistan, Baitullah Mehsud; and Tehreek-e-Taliban Pakistan commander Maulvi Gul Nazir. In the same year, according to statistics provided by the South Asia Terrorism Portal,⁹ there were about five hundred terrorist attacks¹⁰ in Pakistan. These figures for terror attacks are limited to operations that actually used explosive devices; they are not differentiated by group and could likely include groups other than al-Qaeda or the Tehreek-e-Taliban Pakistan. Over 80 percent of these attacks took place in Khyber-Pakhtunkhwa, Pakistan’s northwestern province that borders Afghanistan and includes the Federally Administered Tribal Areas. At this point in 2009 the major urban areas of Pakistan were not seeing any directly related consequences of United States–led drone attacks in the tribal areas or in Khyber-Pakhtunkhwa province.

In 2010, President Obama ordered a total of 128 CIA drone strikes in Pakistan¹¹ that were said to have killed a total of between 874 and 1,058 people, anywhere between 84 and 193 of them civilians. Among those killed was Mansur Al Shami, the alleged bodyguard for al-Qaeda’s number three man, Sheikh Mustafa Abu Al Yazid; Abdul Haq Turkistani, leader of the militant group East Turkistani Party; and various other al-

Qaeda and Taliban operatives said to be in the tribal areas. In turn, according to the South Asia Terrorism Portal, 473 bomb blasts took place in Pakistan. The geographic concentration continued to be the tribal areas, Khyber-Pakhtunkhwa, and parts of Balochistan province. Major cities such as Karachi saw only one or two terror attacks.

In 2011, the third year of President Obama's first term, he ordered a total of 75 CIA drone strikes that killed somewhere between 451 and 660 people, of which 52 to 146 are reported as having been civilians. These attacks included a strike in March 2011 that was alleged to have killed between nineteen to thirty-eight civilians, including a small child. Both Pakistan's president and prime minister condemned the attacks. Later news emerged that the United States ambassador to Pakistan tried to halt the strike only to be overruled by the CIA chief.¹² Witness testimony further revealed that the strike had mistakenly targeted a tribal *jirga*, hence leading to the high civilian death count. The strikes were reported to have killed al-Qaeda chief financial officer Abu Zaid Al Iraqi, Tehreek-e-Taliban spokesperson Shakirullah Shakir, and scores of other militants allegedly holed up in the tribal areas.

As in the previous two years, this third year of intense drone surveillance and air strikes did not seem to reduce the capacity of militants to plan and execute bombings in Pakistan. According to the South Asia Terrorism Portal, 639 bombings took place in 2011, an increase from the two previous years. In addition, while the geographic concentration of the bombings continued to be Khyber-Pakhtunkhwa and the tribal areas, an increasing number of terrorist bombings were carried out in the far southern port city of Karachi. An increased frequency of bombings was also seen in Quetta, the capital of Balochistan province. More than two thousand civilians were reported dead from incidents of terrorist violence in Pakistan in 2011.

In 2012, President Obama ordered a total of forty-eight strikes that incurred high numbers of casualties, between 242 and 400, with seven to forty-three being civilians. This means, according to government sources, that several hundred militants were killed in these operations, the fourth year of intense drone strikes. Included among the victims was famed Tehreek-e-Taliban commander Hakimullah Mehsud, killed in a strike in January. The strikes also allegedly killed al-Qaeda leaders Qari Fayaz, Maulvi Faisal Khurasani, and Yasir Khurasani. On May 24, 2012, drone operators mistook an early morning prayer gathering in a field as a signature element of a terrorist gathering. They did not know that,

in the middle of summer, early morning prayers are often held outside. This 270th drone strike ordered by President Obama was said to have killed nine civilians. Like others before, it was a “double-tap” strike in which the first strike was followed by another after rescue workers had gathered at the venue to aid the injured and carry away the dead.

In that same year, the total number of terrorist bomb blasts taking place in Pakistan increased to an all-time high of 632. The total casualties from these strikes were estimated at 1,007 killed and 2,687 injured. A mapping of the statistics also shows a change in the geographic concentration of the areas in which the attacks took place.¹³ The highest number of deaths from terrorist attacks, a total of 1,553, were reported not in Khyber-Pakhtunkhwa in the tribal northwest but in Sindh, where Karachi is located. Second place was reserved for Balochistan province at 954, followed by Khyber-Pakhtunkhwa at 656.

As the numbers indicate, the geographic area of attacks has expanded from being originally limited to the Khyber-Pakhtunkhwa province to densely populated areas like Karachi in the south. In addition to the geographic dispersal, the frequency of bomb blasts has increased every year since 2009, with 2012 showing the highest number of such attacks.

Based on this rather rudimentary numerical analysis, it can be seen that even while the frequency of drone attacks increased during the Obama administration’s first term and even while numerous, successive, and recurrent claims were made regarding the annihilation of the capacity of both al-Qaeda and the Tehreek-e-Taliban Pakistan, the number of bombings carried out in Pakistan in fact increased in number, casualties, and damage to infrastructure. In addition, with drone attacks concentrated in the northwest tribal regions, militant activity seems to have expanded its radius from being fairly limited to the tribal areas in 2009 to significant activity in the urban areas of Karachi and Lahore by 2012. The drone strikes then seemed to have shifted the theater of militant operations from the sparsely populated areas in northwestern Pakistan to the densely populated urban south.

The Displacement Effect

The above analysis is meant to point to the vacuity of the suggestion that precise drone strikes are eliminating terrorist networks and reducing their capacity to strike civilian targets. The claimed precision and

limited damage are further contradicted by a large population of displaced people. Like the issue of the exact number of casualties caused by drones, the issue of the exact number of persons displaced by drones is also severely contested. The reasons are that (1) drone strikes are also taking place in regions where there may be activity by the Pakistan Army, so it is difficult to pin down the cause of displacement, particularly to drones rather than to the larger conflict. (2) The displaced are rarely housed in camps or shelters, which could allow relief and human rights workers to keep a count; instead, they are often dispersed through kinship networks into urban areas where it is difficult to count them. And finally, (3) because of local politics, claiming displacement from the tribal areas often affects the chances displaced populations may have in obtaining employment in urban areas. Cumulatively, these factors create a situation in which precisely estimating the number displaced exclusively by drone attacks is extremely difficult.

In its 2009 report “Eyes on Pakistan,” Amnesty International detailed the issue of displacement caused by security operations in the northwest tribal areas. The report was released prior to the escalation in drone strikes by the Obama administration and so could not include an analysis of the displacement caused cumulatively by ongoing security operations in the area and US drone strikes conducted by the CIA. Since then, most human rights organizations have not been able to conduct investigations to measure how the increase in drone strikes is displacing people from their homes in native areas to other parts of Pakistan. The absence of such data, and the exclusive focus simply on the number of strikes and the consequent limiting of the number of casualties to civilians killed by the strikes, has been noted by the 2012 report *Living under Drones*.¹⁴

Another impediment in evaluating the effects of drone strikes in particular is the fact that the Pakistani military has at different times also undertaken operations in the area. In some cases these operations have been well publicized and have overlapped with the occurrence of drone strikes. In others, there is significantly less information. Undoubtedly, these strikes also have a role in affecting the capacity of groups like the Tehreek-e-Taliban Pakistan to operate in other parts of the country. However, it must also be remembered that the security operations in Waziristan¹⁵ as well as in other portions of Pakistan such as the Swat valley predate an escalation in drone strikes, with massive operations occurring in 2007.¹⁶

The issue of the impact of drones and the idea of casualties thus remain constructed in terms of the casualties themselves and whether they are civilian or militant deaths. In human rights terms, such a construction looks at the issue of casualties solely from the perspective of Article 3 of the Universal Declaration of Human Rights, which says that “everyone has the right to life and the security of person.”¹⁷ While this is indeed the primary basis of the claims of the victims of drone attacks, its exclusive focus on the loss of life does not present an accurate picture of the effects of drone strikes or the ultimate argument of precision that is associated with them.

In the case of Pakistan, there are several secondary factors that point to the wider impact of drone strikes. One of these—while not definitive, owing to the data collection constraints pointed out earlier—is the increasing prevalence of ethnic conflict in areas like the southern port city of Karachi. Pakistan is a country with deep ethnic divisions that have often led to internecine struggles between the various groups in the country. One area particularly afflicted by these has been Karachi, which has seen repeated outbreaks of violence between the Urdu-speaking Muhajir community, the descendants of original migrants from India, and ethnic Pashtuns who migrated to the city in later years.¹⁸ The period from 1994 to 1996 was the bloodiest in the history of ethnic conflict in the city.

In 2012, however, ethnic violence erupted again in Karachi. Statistics released by the Citizens Police Liaison Committee, a nongovernmental civic group that assists with law enforcement and service provision in Karachi, show that ethnic violence claimed 1,938 lives in the year 2012,¹⁹ making it the worst year since 1994, when ethnic violence was at its peak. According to media reports,²⁰ the vast majority of killings took place between supporters of the Muttahida Qaumi Movement (MQM),²¹ which was originally established to represent the descendants of Pakistan’s original migrants from India, and the Awami National Party (ANP), which represents ethnic Pashtuns. According to claims made by the MQM, the unrest in the tribal areas has led to a huge influx by the Taliban into the area. The ANP in turn says that the arriving migrants are not Taliban but simply ethnic Pashtuns displaced by the fighting and looking to start new lives.

Regardless of the truth of either of these claims, the division of Karachi into ethnic turf wars is a reality, with the MQM controlling the middle-class suburbs of the city and the ANP controlling the working-class neighborhoods. Whether it is militants or migrants (or both) who

are relocating to Karachi, the point remains that the unrest in the north-west of Pakistan, in which drone strikes are one if not the only factor, is destroying the economic and security situation in the city. A report²² issued by the United States Institute for Peace refers to Karachi as the “preferred hideout of the TTP [Tehreek-e-Taliban Pakistan], Afghan Taliban, other extremist and sectarian outfits” and said that Karachi’s urban density and sprawl offer “the best militant hideout,” since US drone strikes cannot be launched into Karachi, which unlike the Federally Administered Tribal Areas is the country’s economic and financial capital. The report further goes on to say that militants “are relocating to Karachi and are able to plan local and international operations in the city.”

More recent reports have substantiated the premise that the Tehreek-e-Taliban now has significant operations inside Karachi. A news report published in the English newspaper *Dawn* in March 2013 further detailed the situation. Entitled “Taliban in Karachi: The Real Story,”²³ it reported that Qari Bilal, a prominent Taliban leader, had been killed in Karachi following the assassination of Parveen Rahman, a well-known social worker. According to the article, large swaths of the city occupied by the Pashtun community had been taken over by the Tehreek-e-Taliban Pakistan. The Taliban, the report alleges, had edged out the secular ANP among the city’s Pashtuns. More than thirty different Taliban factions were said to be operating in Karachi, with the sections led by Maulana Fazlullah and Hakimullah Mehsud wielding the greatest power.²⁴

In more recent attacks, the Tehreek-e-Taliban Pakistan took responsibility for the January 9, 2014, killing of Chaudhry Aslam, one of Karachi’s top police officials. According to news reports, the fact that he had a full security cordon and a bulletproof car did not prevent the Tehreek-e-Taliban from planting one hundred kilograms of explosives on the side of a major highway during the middle of the day. Sajjad Mohmand, a spokesperson for the Tehreek-e-Taliban Pakistan, took responsibility for the killing saying, “Aslam was involved in killing Taliban prisoners in Karachi and was on top of [*sic*] our hit list for carrying out operations against us.”²⁵ The killing of the police officer was followed soon by the killing of three journalists of the Karachi-based Express TV network on January 21, 2014, also in the city. Collectively, the deaths signaled evidence of the Taliban’s ability to operate in certain localities of the city, where police and media are now unable to go.

Not only have the Tehreek-e-Taliban Pakistan expanded their realm of activity and influence in these areas, they have enough confidence in their new territorial strongholds to begin influencing the social structures of these urban communities. According to the *Dawn* report, the Tehreek-e-Taliban Pakistan has organized mobile courts that travel around the mostly Pashtun-inhabited communities of Gulshan-e-Buner, Sohrab Goth, and Quarry Colony. The local judges or *qazis* who preside over these ad hoc courts administer justice through a mix of tribal and Islamic tradition. In addition to establishing the courts, Taliban leaders have also been seen to organize “victory” processions through these localities when prisoner exchanges with the government have released prominent Tehreek-e-Taliban Pakistan leaders. Adding the case of Pakistan and the ethnic violence in Karachi to the drone debate gives specificity to an issue that is otherwise conducted in abstract terms. Revealing the increase in violence in the city, and the tactical relocation of militants away from drone strike zones into populated areas, further reveals drones as imprecise tools that merely disperse the effects of militancy and put larger civilian populations at risk. The operations carried out by the Pakistani military in North Waziristan and Swat in 2004 and 2006 were not followed by a concomitant rise in violence in Karachi. This suggests that the sudden increase in terrorist attacks in the city can be pinned to the dramatic escalation in drone attacks between the years 2009 and 2012. In essence, an analysis of the drone program in Pakistan reveals how the use of a tactic believed to be so precise and even curative by its American perpetrators has unleashed deep and consequential upheavals in Pakistani society, while failing at the task of eliminating terrorism or the terror groups it so boldly touts destroying.

The Right to Home: Expanding the Human Rights Claims Owing to Drones

In 1993, in the wake of the huge displacement crisis in Yugoslavia, the then United Nations Commissioner for Refugees, Sadako Ogata, spoke for the first time of the “right to remain.” Since then, the impetus for coming up with legal stipulations that prevent the arbitrary transfers of people from one place to another has been gaining ground.²⁶

In 1994, in the *Journal of International Law* (American University), Professor M. Stavropoulou offered the following definition for the con-

cept of the “right to stay”: “No one shall be forced to leave his or her home and no one shall be forcibly relocated or expelled from his or her country of nationality or area of habitual residence.”²⁷ Since then, various iterations of the right not to be displaced have been introduced and discussed in a number of international forums, in an effort to delineate how the rights of indigenous people, environmentally affected people, and others fit into the emerging understanding of the right to one’s home being considered a basic human right.

In the context of Pakistan, the right to home, or the right to not be displaced, has particular relevance in relation to the debate on US drone attacks in Khyber-Pakhtunkhwa province. Not only are few current statistics kept on the exact numbers of people being displaced by US drone attacks, advocacy attempts from the Pakistani side have made little effort to link these displacements to the added cost of conflict in the area. Statistics provided by a 2009 Amnesty International report put the number at more than one million.²⁸ More recent statistics stated the number of continued displaced persons to be closer to 180,000,²⁹ with 60,000 living in the Jalozai camp in Khyber-Pakhtunkhwa province. A February 2013 protest held by tribesmen objecting to drone strikes illustrates the continuing problem. Its dimensions remain murky and unclear because of the difficulties of approximating the numbers that have fled.³⁰

The reasons why these numbers are important is because they present a human rights argument with which drone strikes by the United States can be opposed by Pakistani and international human rights organizations. Up to this point, most of the objections raised to the strikes have been on the basis of impingement upon Pakistani sovereignty and the number of civilian casualties. In turn, the United States has responded by asserting that Article 51 of the United Nations Charter allows it to conduct these strikes on the basis of self-defense, since the 9/11 attacks carried out by al-Qaeda constituted an act of aggression. While various United Nations officials have questioned this principle (which in effect allows the United States to carry out drone attacks against any country harboring an alleged al-Qaeda operative), the issue has stalled on the contested number of civilian casualties.

If the magnitude of the ethnic strife and upheavals caused in Pakistan is to receive any international attention, the right to home, or against displacement, must be placed at the center of the discourse. Doing so would allow the thousands of ethnic casualties caused in cities such as Karachi to be attached to the issue of drone strikes, the precision of which is cur-

rently being touted as a panacea to the problem of terrorism. Once this connection is made, and migratory patterns are traced from Khyber to Karachi and connected to ensuing patterns of ethnic violence, the true dimension of the casualties caused by the upheavals of drone attacks can be finally brought to the fore.

Conclusion

I have demonstrated in this paper how human rights advocacy on drones must attack the myth of the drone as a precision instrument that does the least possible damage and whose consequences are limited to the immediate casualties caused by a strike. Doing so requires, first, unraveling the rhetoric of remotely operated drones as the best available solution to the messy and complicated challenges posed by nonstate terror groups. This can be done in part by demonstrating how increases in drone activity have merely shifted the theater of operations and not really resulted in any significant decrease in the capacity of nonstate terror groups to conduct attacks. Although the effects of Pakistani military-led security operations and US drone attacks in the Waziristan area cannot be disaggregated, the fact that army operations were occurring long before the escalation of drone attacks in 2009 suggests that they were not a new factor, but a continuing one, and that the drone attacks had the effect of increasing the number of militant group attacks and expanding their realm of activity.

Second, while continuing the debate on casualties, human rights groups must expand the definition of casualties to include not simply those actually killed by the strikes but also those displaced and must discuss the wider effects of this displacement on a particular local context. Finally, an emphasis on the right to home is a basis on which advocacy against drone attacks can be expanded, such that the international community can be made aware of the widespread consequences of drone attacks, thus undoing their reputation as instruments of curative precision, surgically excising terrorists from different parts of the world.

CONCLUSION

The Future of Drone Warfare: Research Challenges and Policy Options

David Cortright and Rachel Fairhurst

More than thirteen years have now passed since the terrorist attacks of 9/11. During that period, the United States has mounted two major wars, dozens of special military operations, and hundreds of drone strikes in an attempt to counter global terrorist dangers. What has been accomplished through this vast worldwide military effort, and what lessons can be learned for the future directions of US policy? Are the United States and the world more secure against major terrorist attack as a result? What role have drones played in affecting this balance of security? With the end of the US combat role in Afghanistan, how will the use of military force and drone strikes fit into future counterterrorism policy?

Policy experts assume that drone systems will remain a central part of the ongoing fight against global terrorism. Drones have become “Washington’s weapon of choice,” writes Daniel Byman, a capability that is “here to stay” because many in Washington believe these weapons work.¹ Drone technology has advanced rapidly in recent years, and the number of deployed drone weapons systems has increased apace. Weaponized drones have become a central component of the US military arsenal and are at the core of counterterrorism strategy. Aerospace and defense industry analysts predict that spending on unmanned aerial vehicles will more than double over the next decade, amounting to nearly \$90 billion during that period.²

At present, the United States possesses by far the largest and most technically advanced drone strike capability, but this advantage will diminish as these systems spread and other nations acquire similar weapons. The result could be a future of wider vulnerabilities and diminished security. Sarah Kreps and Micah Zenko argue that the proliferation of weaponized drones in the absence of agreed international rules for controlling their use could have destabilizing consequences for US and global security. If other states follow Washington's lead in launching attacks across borders without authorization or notice, international constraints on the use of force could be weakened. If states are tempted to use these low-risk weapons in militarized disputes, the possibility of miscalculation and military escalation could increase.

Christof Heyns and others argue in this volume that the United States and the international community would benefit from the development of uniform standards to guide the use of these weapons. As Kreps and Zenko observe, "Without U.S. leadership it will be extremely difficult to get an international coalition to agree on a credible arrangement governing the use of armed drones."³ It is in Washington's interest to act now, before other states have fully developed capabilities, to seek international agreement on limiting the proliferation of armed drones and establishing rules for their responsible use.

The Security Paradox

The tactical benefits of drone weapons are widely recognized. Drone systems provide significant military capabilities and have an unprecedented capacity to target force precisely against designated targets. Drones are credited with killing more than fifty senior leaders of al-Qaeda and the Taliban.⁴ They disrupt the ability of terrorist leaders to meet and travel openly or to use wireless communication. Drone strikes have helped to decimate the core leadership of al-Qaeda in Afghanistan and Pakistan and in that sense have been partially successful.

The broader strategic implications of drone warfare are uncertain, however. US military operations and drone strikes have not curbed insurgency and terrorism in Pakistan and Yemen nor prevented the spread of violent extremism in other countries. Senior military and civilian analysts worry that drone strikes are stoking anti-Americanism and fueling the fires of extremism. It is easier for terrorists to conduct violent opera-

tions when local populations are hostile to US policy. Hence the paradox of a military approach that brings tactical advantages but incurs strategic costs, a process of eliminating current threats that may be creating new enemies in the future.

The policies of drone warfare and increased covert military operations around the world have come at significant cost to the United States domestically, not just financially, but in challenges to democratic accountability and the rule of law. The venture of US foreign policy into what Vice President Dick Cheney called the “dark side” has been accompanied by a weakening of political and legal constraints on the use of force. The Bush and Obama administrations have sought to reinterpret long-standing principles of international law in a way that weakens limitations on when and where military force is permissible. Open-ended congressional authorizing language and secretive presidential and Pentagon directives have become the basis for a shadowy global campaign of military operations and targeted killing, vitiating post-Vietnam attempts to strengthen congressional war powers and ban assassinations. Robotic warfare has combined with a volunteer military and the greater use of private contractors to widen the gap between the armed forces and society, creating a disconnect between soldiers and citizens that is unhealthy for democracy.

For most Americans, concerns about the potential negative effects of drone strikes and the War on Terror are secondary to the perception that these policies are keeping the country safe. The salient fact for most Americans and US political leaders is that the United States has not suffered a large-scale foreign terrorist attack since 9/11. Smaller attacks have occurred, such as the Fort Hood shooting in November 2009 and the April 2013 Boston marathon bombing, and there have been close calls, such as the failed attempt to bomb a Detroit-bound airliner on Christmas Day 2009, but no major terrorist bombing has occurred. For most Americans this means that drones are working. Opinion polls show that a majority of Americans support the use of drones to counter terrorist threats. A CBS News/*New York Times* poll of April 2013 found 72 percent in favor of using drones to carry out unmanned missile strikes against suspected terrorists in foreign countries.⁵ A Pew Research poll conducted in October 2013 found that 50 percent of Americans believe that military drones have made the United States safer from terrorism, with only 14 percent believing they have made the United States less safe.⁶ By contrast, 63 percent of Americans think the use of drones in

domestic US airspace will be a change for the worse.⁷ People will ignore the claimed negative features of drones if they believe these weapons are necessary for their safety.

Among policy experts, opinions differ sharply on whether drone strikes are an effective means of preventing terrorist attacks and countering violent extremism. Proponents insist that these weapons enhance security and are legally justified, while critics question their strategic effectiveness and the legal basis for their use. The two differing interpretations are in dialectical relation to one another. The enduring danger of extremist militancy abroad becomes the justification for continuing military operations and drone strikes against that threat, but these approaches may exacerbate the danger they are meant to diminish. Whether military operations and drone strikes are a viable strategy for countering the global terrorist threat remains at the heart of the debate over drone warfare. It is a question for which empirical evidence is critically important.

Assessing Strategies

Many of the ethical, legal, and strategic questions examined in this volume ultimately rest upon empirical assumptions. Behind the parsing of philosophical and legal language and the debates about security or risk lie factual assessments. The problem is that much of the evidence so far is incomplete and contested. An urgent need exists to develop more rigorous and convincing data on the impacts of drone strikes and whether they are effective in achieving their declared purposes.

One of the most critical issues is whether drone strikes reduce or increase the frequency of terrorist attacks and if so how widely and for how long. This is an extremely difficult question to answer, since the conditions accounting for such attacks are complex and cannot be reduced to a single factor. The existing studies on the issue are limited and yield conflicting results. The findings reviewed in chapter eight suggest that drone strikes in the Afghanistan-Pakistan region disrupt militant groups and temporarily reduce levels of terrorist attack, but the impacts are short-term and geographically confined and do not diminish the number of attacks outside the strike zone.⁸ Militant groups often merely shift their operations to other localities, as Zakaria notes in her analysis of rising violence and Taliban influence in Karachi.

A related issue is whether the killing of militant leaders helps to end terrorist groups. The data on this question are mixed as well, with one study indicating that decapitation has no effect on terrorist groups, especially when they are large and well established (like the Taliban), while a second study shows that the loss of a leader accelerates the demise of these groups. The widely cited RAND Corporation study on how terrorist groups end attributes the demise of terrorist groups primarily to political processes and effective law enforcement, with little role for the use of military force.⁹

The central question for many is whether drone strikes and military operations generally reduce or increase the rate of terrorist recruitment. This is the famous question posed by Defense Secretary Donald Rumsfeld to military commanders in October 2003: "Are we capturing, killing or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training and deploying against us?"¹⁰ The answers to this question depend upon multiple factors, some of which are unrelated to US policy and drone warfare. It is impossible to know precisely how much US military operations affect these dynamics, but at a minimum we can say that drone strikes have not ended or significantly diminished the ranks of Taliban forces in Afghanistan and Pakistan and extremist groups in Yemen.

Much more research is needed to examine these and related questions. For this, social scientists will require more complete and reliable data on the numbers of terrorist attacks, estimates of enemy forces, and the number of drone strikes and military operations launched against them. Even with the best data the methodological challenges of designing regression analyses that could isolate drone strikes as an independent variable are formidable. It is impossible even to attempt such analyses, however, in the absence of accurate information. The secrecy of Central Intelligence Agency (CIA) operations and the lack of transparency surrounding the drone program impede efforts to analyze the effectiveness of such operations and make it difficult to evaluate whether these operations are achieving the claimed objectives.

Uncertainty about the strategic effectiveness of militarized counterterrorism is matched by doubts about the justification for what political leaders describe as a policy of self-defense. As Welsh, O'Connell, and other authors in the volume write, the ethical and legal requirements for using force for self-defense are quite specific and restrictive, although disagreements exist on specific points of law. It is by no means certain

that US preventive war policies and targeted-killing operations meet these criteria. Here again, factual analysis is essential for assessing the conflicting claims.

The argument of self-defense as the basis for the armed conflict in Afghanistan is generally accepted, at least with reference to the original military mission of disrupting al-Qaeda operations, but the self-defense argument is less convincing when applied to armed attacks in Pakistan, Yemen, Somalia, and other locations. The militant groups that operate in these countries do not pose an imminent threat of military aggression or terrorist attack against the United States. They are mostly involved in local armed conflicts seeking to alter political power structures within their country or region. As we examine in chapter nine, most of those targeted by drone strikes are fighters in these locally based insurgencies. A small number of extremists in Yemen have plotted attacks against the United States and in that sense pose a threat to US citizens, but it is not clear that this provides justification for preemptive military operations.

Criminal plots to attack Americans abroad or in the US homeland are a real and continuing danger, but these threats are best addressed through law enforcement rather than military intervention. Some of the most significant terrorist threats, such as the summer 2006 plot to blow up airliners crossing the Atlantic from Heathrow, were foiled through effective police and intelligence cooperation.¹¹ Comparative analyses would be helpful in evaluating the effectiveness of cooperative law enforcement versus military operations in countering terrorism. Such studies would help in answering many of the critical policy questions at the heart of the debate on drone warfare.

Policy Options

The moment is overdue for the United States to assess not only what has been achieved through drone strikes but where the program is heading in the future. Of particular concern in assuring compliance with ethical and legal standards is the continuing dominant role of the CIA. President Obama indicated in his May 2013 address that the drone program would gradually shift from CIA to Defense Department jurisdiction, but the CIA retains responsibility for most drone strikes.¹² Bureaucratic turf fights and political objections within Congress have blocked efforts to end the CIA role in drone warfare.¹³ The enduring jurisdic-

tion of the CIA over lethal drone strikes is problematic ethically and legally because the agency by its very nature is an illegal and clandestine entity. Placing drone operations under military authority would in theory remove this problem and allow for more transparency and accountability in evaluating the program.¹⁴ Press reports indicate that regular air force operators have flown CIA drone missions in Pakistan, which if true would further complicate the challenge of differentiating CIA and military operations.¹⁵

Dilemmas about the legality and jurisdiction of drone strikes are complicated by the end of the US combat role in Afghanistan. The 2001 Authorization to Use Military Force was originally adopted to give permission for the use of US military force in Afghanistan. As that authority and the military mission for which it was intended change, the legal basis for continuing drone strikes in the region also changes. If drone strikes continue under CIA jurisdiction, this makes it more difficult to argue that the program meets ethical and legal standards.

Continuing CIA dominance of the drone program also undermines President Obama's pledge in his 2013 State of the Union address to ensure that US lethal targeting practices are made "more transparent to the American people and to the world." To date that promise is unfulfilled, and as long as the CIA maintains a major role, the program is likely to remain shrouded in secrecy. Without transparency comes the suspicion of wrongdoing and continuing concern that the program does not meet acceptable standards of ethical and legal accountability.

The irony of the government's insistence on secrecy is that the Obama administration has made progress in developing more acceptable procedures for the use of drone weapons. It has taken laudable steps to reduce the number of strikes and diminish the extent of unintended civilian harm in Pakistan. It refrained from strikes in early 2014 to enable Pakistani officials to pursue possible negotiations with militant groups. If current practices are indeed improving and becoming more compliant with ethical and legal principles, why not disclose them publicly and offer them as guidance for the development of drone warfare principles for other countries? The claimed need for secrecy is not convincing when it applies to such matters as legal criteria for designating targets or mechanisms of judicial accountability and due process. Openly discussing these legal and ethical principles would not jeopardize operational capability, any more than debate over when to use force diminishes its effectiveness once approved.

Human Rights Watch and other US legal rights groups have urged a series of common sense reforms to enhance transparency, public oversight, and legal accountability.¹⁶ In an open letter to the president in April 2013, the groups urge the US government to disclose the standards and criteria by which targeted killings with drones are conducted. They call upon the administration to establish meaningful congressional oversight and judicial review of drone policy and to commit to publicly investigating all credible reports of potentially unlawful deaths and providing reparations in accordance with the findings.

Greater transparency, oversight, and accountability will require the disclosure of necessary information. This should include the release of the counterterrorism manual that reportedly exists¹⁷ and documents from the Department of Justice, CIA, and Department of Defense that reflect the government's interpretation of operative law and policy concerning lethal targeting. The administration should disclose the legal criteria used to identify potential targets, the standards for distinguishing between combatants and civilians, the civilian protection protocols and training given to drone operators, and the standards for poststrike procedures to investigate the legality of strikes and credible reports of civilian harm.

Equally important, the human rights groups argue, are the need to identify those groups that the US government considers to be associated forces of al-Qaeda and the criteria for determining whether a group fits that category. This applies particularly to associated forces that did not participate in the September 11, 2001, terrorist attacks and why the government believes such groups can be lawfully targeted with lethal force.

The report of UN Special Rapporteur Ben Emmerson urges states to reach consensus on the interpretation of key principles of international law, many of which are addressed in this volume. These include the right of self-defense, the targeting of lethal force against persons in nonbelligerent states, the meaning of the terms "continuous combat function" and "directly participating in hostilities," and the obligation in the context of noninternational armed conflict to capture rather than kill. The report also urges states to declassify information on counterterrorism operations and to release data on the level of civilian casualties caused by drone attacks.¹⁸ In keeping with the report's recommendations, Pakistan introduced a resolution in the UN Human Rights Council in March 2014 calling for transparency in the use of drone weapons and urging

“prompt, independent and impartial investigations whenever there are indications of any violations to human rights caused by their use.”¹⁹ To date there is no indication that the United States is prepared to support such measures within the Human Rights Council.

Kreps and Zenko identify two approaches for preventing the proliferation of drone weapons.²⁰ The first is for the United States to get its own house in order by establishing fully transparent rules for target selection and permissible uses of these weapons. They recommend the formation of an independent government review panel, with parallel hearings in Congress. Models for such a panel could be the Guantanamo Review Task Force and the panel to review the National Security Agency’s surveillance operations. Kreps and Zenko also recommend steps to tighten international rules against the export of drone weapons technology. This could be accomplished by expanding and strengthening the restrictions already in place through the Missile Technology Control Regime or by creating an entirely new proliferation control regime specifically focused on drone systems. This could include the creation of an international regulatory organization tasked with establishing and monitoring global standards for transparent and responsible use of drone systems.

As Heyns and others observe, US targeted-killing policies and practices will set a precedent for other nations as they acquire and deploy these weapons in the future. If US policies are perceived as relaxing international legal standards for the use of force, this could set dangerous precedents, posing risks to international security. To avert this danger, the United States should work with other nations, ideally through the UN, to create rigorous international legal standards for the use of these weapons. This is especially necessary with regard to the use of force outside the context of established armed conflict. This is an arena where UN human rights institutions have special competence and authority. Such international efforts could bolster and enhance the existing efforts of civil society groups to monitor the use of these weapons and establish greater accountability.

A Wild West approach to drone warfare, with every state acting on its own without uniform standards, could put everyone at risk, diminishing the security of all states, including the United States. A better and more secure approach is for the United States and other nations to agree on standards, rooted in the principles of international law, that allow for the use of these weapons but that also define limits on how, where, and

when they can be employed. This would help to enhance US security and strengthen its standing as a nation of laws. Democratic states are always on firmer ground and are able to function more effectively when they are transparent about their purposes and methods and adhere to ethical and legal principles in the use of force.

Notes

Chapter One

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34. Kreps and Kaag, "The Use of Unmanned Aerial Vehicles," 275.

35. Kreps and Kaag, "The Use of Unmanned Aerial Vehicles," 271.

36. Kreps and Kaag, "The Use of Unmanned Aerial Vehicles," 275.

37. Kreps and Kaag, "The Use of Unmanned Aerial Vehicles," 278.

38. Bradley Strawser, "Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles," *Journal of Military Ethics* 9, no. 4 (2010): 346.

39. Bradley Jay Strawser, "Introduction: The Moral Landscape of Unmanned Weapons," in *Killing by Remote Control*, 17.

40. Mazzetti, *The Way of the Knife*, 6, 100.
41. "Numerous studies show that states with greater power capabilities are more likely than states with lesser capabilities to participate in and initiate wars." Greg Cashman, Leonard C. Robinson. *An introduction to the Causes of War: Patterns of Interstate Conflict from WWI to Iraq* (Lanham, UK: Rowman & Littlefield Publishers, 2007), 10.
42. Mary Ellen O'Connell, "Seductive Drones: Learning from a Decade of Lethal Operations," *Journal of Law, Information and Science*, August 2011. <http://ssrn.com/abstract=1912635> (accessed December 28, 2011).
43. Kenneth Anderson, "Efficiency in Bello and ad Bellum: Making the Use of Force Too Easy?" in *Targeted Killings: Law and Morality in an Asymmetrical World*, edited by Claire Finkelstein, Jens David Ohlin, and Andrew Altman (Oxford University Press, 2013), 378.
44. Anderson, "Efficiency in Bello and ad Bellum," 400.
45. United Kingdom Ministry of Defence, "The UK Approach to Unmanned Aircraft Systems," Joint Doctrine Note 2/11 (March 2011): 5–9.
46. UN Human Rights Council, *UN Human Rights Council: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston*, May 28, 2010, A/HRC/14/24/Add.6. <http://unispal.un.org/UNISPAL.NSF/0/69633D6116C53C898525773D004E8C13> (accessed October 18, 2013).
47. Peter W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century* (New York: Penguin Books, 2009), 316–321.
48. "Obama's Speech on Drone Policy," *New York Times*, May 23, 2013. http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html?pagewanted=all&_r=0.
49. UN Human Rights Council, *The Report of the UN Special Rapporteur . . . Philip Alston, Addendum, Study on Targeted Killings*, A/HRC/14/24/Add.6, May 28, 2010, par. 3.
50. Daniel Brunstetter, "Can We Wage a Just Drone War?" *Atlantic*, July 19, 2012. <http://www.theatlantic.com/technology/archive/2012/07/can-we-wage-a-just-drone-war/260055/> (accessed January 22, 2014).
51. US Department of Justice, "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," US Department of Justice White Paper 2013. http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (accessed May 12, 2014).
52. Anderson, "Efficiency in Bello and Ad Bellum," 379.
53. Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008), 4.
54. David Whetham, "Drones and Targeted Killing: Angels or Assassins," in *Killing by Remote Control*, 76.
55. Whetham, "Drones and Targeted Killing," 77.

56. William G. Howell, *Power without Persuasion: The Politics of Direct Presidential Action* (Princeton: Princeton University Press, 2003), 1.

57. Mazzetti, *The Way of the Knife*.

58. "U.S. Airstrikes in Pakistan Called 'Very Effective,'" CNNPolitics.com, May 18, 2009. <http://www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/>.

59. Seth G. Jones and Martin C. Libicki, *How Terrorist Groups End: Lessons for Countering Al Qaeda*, 2d ed. (Santa Monica: Rand Publishing, 2008).

60. Patrick B. Johnston and Anoop K. Sarbahi, "The Impact of US Drone Strikes on Terrorism in Pakistan and Afghanistan," January 3, 2013. <http://patrickjohnston.info/materials/drones.pdf>.

61. Jenna Jordan, "When Heads Roll: Assessing the Effectiveness of Leadership Decapitation," *Security Studies* 18, no. 4 (2009): 719–55; Bryan C. Price, "Targeting Top Terrorists: How Leadership Decapitation Contributes to Counterterrorism," *International Security* 36, no. 4 (Spring 2012): 9–46.

62. Remarks of Michael Hayden (U.S.A.F. ret.), "Conference on the Ethical, Legal and Strategic Implications of Drone Warfare," Kroc Institute for International Peace Studies, University of Notre Dame, Chicago, March 19, 2013.

63. "Stanley McChrystal on Drones: Retired General Cautions against Overuse of 'Hated' Strikes," *Huffington Post*, January 7, 2013. http://www.huffingtonpost.com/2013/01/08/stanley-mcchrystal-drones_n_2428045.html.

64. Andrea Elliot, "Militant's Path from Pakistan to Times Square," *New York Times*, June 22, 2010. <http://www.nytimes.com/2010/06/23/world/23terror.html?pagewanted=all> (accessed December 26, 2011); Preet Bharara, "Prosecution of Faisal Shahzad," Offices of the United States Attorneys, United States Department of Justice. http://www.justice.gov/usao/briefing_room/ns/mca_shahzad.html (accessed December 26, 2011).

65. Jane Mayer, "The Predator War: What Are the Risks of the C.I.A.'s Covert Drone Program?" *New Yorker*, October 26, 2009.

66. Mazzetti, *The Way of the Knife*, 234.

67. Micah Zenko, *Reforming U.S. Drone Strike Policies*, 10.

68. Walsh, "The Effectiveness of Drone Strikes." <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=1167>.

69. Salman Masood and Declan Walsh, "Pakistan Gives U.S. a List of Demands, Including an End to C.I.A. Drone Strikes," *New York Times*, April 12, 2012. <http://www.nytimes.com/2012/04/13/world/asia/pakistan-demands-an-end-to-cia-drone-strikes.html> (accessed February 11, 2014).

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tacks,” December 15, 2013. <http://www.reuters.com/article/2013/12/15/us-yemen-drones-idUSBRE9BE0EN20131215>, (accessed February 1, 2014).

72. U.S. State Department, Office of the Coordinator for Counterterrorism, “Country Reports on Terrorism 2012,” May 30, 2013, Washington, DC. <http://www.state.gov/j/ct/rls/crt/2012/209989.htm>; and Council on Foreign Relations, *Backgrounder: Al Qaeda in the Arabian Peninsula*, available at <http://www.cfr.org/yemen/al-qaeda-arabian-peninsula-aqap/p9369>. See also Leonie Northedge, “Is the U.S. Shadow War Helping Yemen?” *World Today*, February and March 2013, 34–35. <http://www.chathamhouse.org/publications/twt/archive/view/189187> (accessed February 11, 2014).

73. Council on Foreign Relations, “Backgrounder: Pakistan’s New Generation of Terrorists,” November 18, 2013. <http://www.cfr.org/pakistan/pakistans-new-generation-terrorists/p15422#p4> (accessed February 5, 2014).

74. M. Shane Riza, *Killing without Heart: Limits on Robotic Warfare in an Age of Persistent Conflict* (Dulles, VA: Potomac Books, 2013).

Chapter Two

1. Jack Chow, “Predators for Peace,” *Foreign Policy*, April 27, 2012. The US Marine Corps is already using unmanned helicopters to deliver cargo and re-supply troops in combat zones in Afghanistan. See “US Marine Corps to Keep K-Max Unmanned Cargo Re-Supply Helicopter in Theater for Second Deployment Extension.” <http://www.lockheedmartin.com/us/news/press-releases/2012/july/ms2-0731-us-marine-corps-to-keep-k-max-unmanned-cargo-helicopter.html> (accessed February 4, 2014).

2. Derek Gregory, “Where Drones Fit in Fields of Violence,” *Canada International Council’s Special Feature on Drones*, December 14, 2012. www.open.canada.org (accessed August 15, 2013).

3. Gregory, “Where Drones Fit.”

4. Micah Zenko, *Reforming U.S. Drone Strike Policies*, Center for Preventive Action, Council Special Report No. 65 (New York: Council on Foreign Relations), January 2013, 6.

5. The ethical benefits of using drones have been extensively discussed in the policy arena. See, e.g., Amitai Etzioni, “The Great Drone Debate,” *National Interest* 4 (October 2011). For a more philosophical treatment, which incorporates the ethics of war, see Bradley J. Strawser, “Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles,” *Journal of Military Ethics* vol. 9, no. 4 (2010): 342–68.

6. See Daniel Brunstetter and Megan Braun, “The Implications of Drones on the Just War Tradition,” *Ethics and International Affairs* 25, no. 3 (2011): 337–58.

7. It is important to underscore that the United States is not the only coun-

try to use drones; many countries employ them for surveillance purposes. But to date, only the United States, Israel, and the United Kingdom have deployed drones as part of combat or targeted killing.

8. Michael Walzer, "Targeted Killing and Drone Warfare," *Dissent*, January 11, 2013.

9. I follow Fernando Teson in defining a targeted killing as the extrajudicial intentional killing by the state of an identified person for a public purpose. See Fernando R. Teson, "Targeted Killing in War and Peace: A Philosophical Analysis," in *Targeted Killings: Law and Morality in an Asymmetrical World*, edited by Claire Finkelstein, Jens David Ohlin, and Andrew Altman (Oxford: Oxford University Press, 2012). Like Teson, I employ the notion of "public purpose" loosely in order to exclude private purposes (e.g., such as revenge). But that does not necessarily mean the public purpose is morally justified.

10. Jeremy Waldron, "Justifying Targeted Killing with a Neutral Principle?" in *Targeted Killings*.

11. Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009); David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002).

12. International Committee of the Red Cross, "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law," *International Review of the Red Cross* 90, no. 872 (2008).

13. Teson gives explicit consideration to these scenarios in "Targeted Killing in War and Peace."

14. What remains crucial is that killing be limited to those countries that are parties to the conflict.

15. Waldron, "Justifying Targeted Killing."

16. See Walzer, "Targeted Killing and Drone Warfare." Teson also cites this as a morally defensible case of extrajudicial killing. See "Targeted Killing in War and Peace."

17. In terms of concrete cases, Micah Zenko notes that the United States has violated its own assassination ban in at least two cases: in 1986, when it bombed the Azizihhah Barracks compound in Tripoli where Qaddafi was known to be staying; and in 1999, when it fired missiles into the bedroom of Slobodan Milosevic's personal residence in Belgrade. See Micah Zenko, *Between Threats and War: U.S. Discrete Military Operations in the Post-Cold War World* (Stanford: Stanford University Press, 2010), 83.

18. Teson, "Targeted Killing in War and Peace."

19. This point is developed fully by Brunstetter and Braun in "The Implications of Drones," 346. As they write,

the risk becomes, somewhat paradoxically, that drones forestall the threshold of last resort for larger military deployment, but that the last resort criterion does not apply to drone strikes themselves because the targeted killing of (alleged) terrorists

becomes the default tactic. Thus, the use of drones as a means to enhance a state's capacity to act on just cause proportionately and discriminately may lead to the propensity to do the opposite.

20. See, e.g., Waldron's discussion of the Irish Republican Army and African National Conference in "Justifying Targeted Killing."

21. Michael Walzer, "Live Chat: The Ethics of Drone Warfare," *New Yorker*, 2013. <http://www.newyorker.com/online/blogs/newsdesk/2013/02/live-chat-the-ethics-of-drone-warfare.html> (accessed August 15, 2013).

22. President Barack Obama, "Statement on the Killing of Osama Bin Laden," May 2, 2011. <http://www.whitehouse.gov/blog/2011/05/02/osama-bin-laden-dead> (accessed August 15, 2013).

23. "Osama Bin Laden's Killing in Pakistan Lawful, says US," *BBC News*, May 4, 2011. <http://www.bbc.co.uk/news/world-us-canada-13286312> (accessed August 15, 2013).

24. Teson, "Targeted Killing in War and Peace."

25. This is also Walzer's position. See "Targeted Killing and Drone Warfare."

26. See Amos N. Guiora, "Determining a Legitimate Target: The Dilemma of the Decision-Maker," *Texas International Law Journal* 47, no. 2 (2012).

27. It is important to elaborate here on what Teson means. Physically impossible would imply that either the target is unreachable (e.g., with special forces or other similar means). Morally prohibitive means that there will be a loss of many innocent lives in the process. Just as we do not permit the deaths of innocent bystanders during a police raid, Teson reasons, we should not tolerate them in the context of an attempt to capture a terrorist. See "Targeted Killing in War and Peace."

28. Under the law of armed conflict, an armed conflict is determined to exist (1) when there is the existence of organized armed groups and (2) when such groups are engaged in fighting at some level of intensity.

29. See *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN doc. A/CONF.144/Rev.1 at 112, August 27, to September 7, 1990. Provision 9 of these principles states,

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

30. Waldron, "Justifying Targeted Killing."

31. McMahan, "Live Chat."

32. The third important principle, which is less relevant for my particular discussion, is proportionality. For a legal analysis of all three principles, see Daniel Bethlehem, "Self-Defence against Imminent or Actual Armed Attack by Non-State Actors," *American Journal of International Law* 106 (2012).

33. See Dapo Akande and Thomas Liefländer, "Clarifying Necessity, Proportionality, and Imminence," *American Journal of International Law* 107, no. 3 (2013).

34. Mark Tutton also argues that in counterterrorism the point of last resort may arrive prior to the point of imminence, given that other options (such as deterrence or negotiation) are not feasible. See *First Strike* (New Haven: Yale University Press, 2010). There is some legal support, in the judgment of the International Court of Justice, for the relinquishing of an independent requirement of imminence and the reliance instead on proof of necessity. See International Court of Justice (ICJ), *Gabcikovo-Nagymaros Project (Hungary vs. Slovakia)*, *Judgment*, ICJ Reports (1997), para. 54. I am grateful to Dapo Akande for suggesting this case.

35. I would like to thank Meg Braun for helping me to clarify these points.

36. Akande and Liefländer, "Clarifying Necessity."

37. See White House, Office of the Press Secretary, Remarks by the President at the National Defense University, Ft. McNair, Washington, DC, May 23, 2013. <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> (accessed August 15, 2013). See also US Department of Justice, "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 White Paper 2013. http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (accessed August 15, 2013).

38. In his May 2013 speech, President Obama spoke openly about the possibility of refining and eventually repealing the 2001 AUMF, as the U.S. counterterrorism strategy moved into a new phase. See White House, Office of the Press Secretary, Remarks by the President.

39. U.S. Department of Justice, "Lawfulness of a Lethal Operation."

40. U.S. Department of Justice, "Lawfulness of a Lethal Operation," draft, November 8, 2011, 7. <http://www.fas.org/irp/eprint/doj-lethal.pdf>.

41. U.S. Department of Justice, "Lawfulness of a Lethal Operation," draft.

42. In an April 2013 hearing before the US Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Human Rights, Yemeni democracy activist Farea al-Muslimi testified that a recent drone strike in his home village of Wessab killed a suspect everyone knew who "could have been easily arrested." Quoted in Conor Friedersdorf, "This Yemeni Man Loves

America, Hates al-Qaeda, and Says Drone Strikes Make Them Stronger,” *Atlantic*, April 24, 2013. <http://www.theatlantic.com/politics/archive/2013/04/this-yemeni-man-loves-america-hates-al-qaeda-and-says-drone-strikes-make-them-stronger/275248/>.

43. For further discussion of the morality of “force protection,” particularly in cases such as Kosovo, see Brunstetter and Braun, “The Implications of Drones.”

44. Rosa Brooks, “Hate Obama’s Drone War?” *Foreign Policy*, February 14, 2013. http://www.foreignpolicy.com/articles/2013/02/14/hate_obamas_drone_war (accessed August 15, 2013).

45. International Court of Justice, “Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgement,” *ICJ Reports* (1986). In the Nicaragua case, the ICJ ruled that the sending of armed bands by or on behalf of a state did qualify as an armed attack against another state but that provision of financial, military, or logistical support to irregular forces did not constitute an attack and therefore did not give rise to the right of self-defense. It also argued that it would need to be demonstrated that the state had “effective control” over military or paramilitary operations when the alleged attacks occurred.

46. Theresa Reinold, “The Sovereignty Dodge and Responsibility to Control: Should the U.S. Do What Pakistan Won’t Do?” *Journal of Intervention and Statebuilding* 5, no. 4 (2011).

47. If the territorial state in which an attack is being planned (or has originated) is capable and willing to suppress the terrorist threat itself, then it is not lawful, under international law, for the “victim state” (in this case, the United States) to use force. See Ashley Deeks, “‘Unwilling or Unable’: Toward a Normative Framework for Extraterritorial Self-Defense,” *Virginia Journal for International Law* 52, no. 3 (2012): 483.

48. Deeks argues that we can and should develop principles that could govern the assessment that a state is “unable or unwilling.” See Deeks, “‘Unwilling or Unable.’”

49. These measures included the stationing of 145,000 members of the Pakistani armed forces in the country’s border regions, internment of terrorist suspects (on national security grounds), the opening of dialogue with militants involved with terrorist attacks, and the provision of development assistance to tribal communities in the border areas. See Office of High Commissioner for Human Rights, “Statement of the Special Rapporteur Following Meetings in Pakistan,” March 14, 2013. <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13146&LangID=E> (accessed August 15, 2013).

50. Mark Mazzetti, *The Way of the Knife: The CIA, a Secret Army, and a War at the Ends of Earth* (New York: Penguin, 2013).

51. Article 20 of the Draft Articles on State Responsibility indicates that “[valid] consent by a state to the commission of a given act by another state precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.” For more on the legal issues associated with claims of host-state consent, see Mary Ellen O’Connell, “Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009,” *Notre Dame Law School, Legal Studies Research Paper*, no. 09–43 (2010): 16.

52. Office of High Commissioner for Human Rights, “Statement of the Special Rapporteur Following Meetings in Pakistan.”

53. Jennifer Welsh, “The Slow Death of the Non-Combatant,” *Canada International Council’s Special Feature on Drones*, December 11, 2012. www.open.canada.org (accessed August 15, 2013).

54. Such strikes are also justified by criteria that depart from notions of imminence to a standard of “generally threatening.” It is difficult to argue that such individuals present a genuinely imminent threat when the United States has no idea who they are or what they specifically intend to do.

55. Teson, “Targeted Killing in War and Peace.”

56. Teson, “Targeted Killing in War and Peace.”

57. Peter W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century* (New York: Penguin, 2009), 194.

58. Nancy Sherman, *The Untold War: Inside the Hearts, Minds, and Souls of Our Soldiers* (New York: W.W. Norton, 2010), 1.

59. Research by the air force suggests that drone pilots can experience significant rates of psychological stress and documents that some camera operators have been diagnosed with post-traumatic stress disorder. See discussions of the research in David Zucchino, “Stress of Combat Reaches Drone Crews,” *Los Angeles Times*, March 18, 2012. <http://articles.latimes.com/2012/mar/18/nation/la-na-drone-stress-20120318> (accessed August 15, 2013); and Rachel Martin, “Report: High Levels of ‘Burnout’ in U.S. Drone Pilots,” *National Public Radio*, December 18, 2011. <http://www.npr.org/2011/12/19/143926857/report-high-levels-of-burnout-in-u-s-drone-pilots> (accessed August 15, 2013).

60. Cited in Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (New York: Houghton Mifflin, 2012), 217.

61. For further discussion, see Larry May, *Crimes against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005).

62. See Alexander Leveringhaus and Tjerk de Greef, “Tele-operated Weapons Systems: Safeguarding Moral Perception and Responsibility,” in *Hitting the Target: How New Capabilities Are Shaping International Intervention*, edited by Michael Aaronson and Adrian Johnson (London: Royal United Services Institute, 2013).

Chapter Three

1. The debate regarding what to call these vehicles is itself revealing. The Air Force prefers to call them “remotely piloted vehicles.” This reflects a strong cultural bias in favor of emphasizing the pilot and the resistance to undermining the pilot-dominated culture of that service. Furthermore, so far the Air Force insists that only officers may pilot them (whereas the other services are quite comfortable assigning those tasks to enlisted personnel). They are also commonly called “unmanned combat aerial vehicles” (UCAVs) or sometimes simply “unmanned aerial vehicles” (UAVs). But in popular parlance, “drone” seems to be the most common term.

2. See James Kitfield, *Prodigal Soldiers: How the Generation of Officers Born of Vietnam Revolutionized the American Style of War* (Herdon, VA: Brassey's, 1995), for an excellent account of that process of reforming the Army.

3. For an excellent overview of the dramatic and ethically troubling transformations of both the Department of Defense and the CIA after 9/11, see Mark Mazzetti, *The Way of the Knife: The CIA, a Secret Army, and a War at the Ends of the Earth* (New York: Penguin Press, 2013).

4. Of course, special forces units such as those that fought into Afghanistan already had this capability to some degree, as did the Marines with their own integral aviation assets. But for the conventional Army and Air Force, this required considerable cultural adaptation. See Martin L. Cook, “Ethical Dilemmas in the Use of Airpower in Counterinsurgency War,” in *Issues in Military Ethics: To Support and Defend the Constitution* (Albany: State University of New York Press, 2013), 223–35, for a discussion of the struggles of airpower to be relevant in supporting ground forces in counterinsurgency conflict.

5. Again, see Mazzetti, *The Way of the Knife*, for a detailed account of this evolution in both the CIA and the Department of Defense development and use of weaponized drones.

6. The existence of the Air Force as an independent military service was, of course, justified initially because of a particular theory of strategic bombing developed in the interwar period. For that reason, the Air Force was initially entirely dominated by the heavy bomber pilots. It was an earlier example of the same phenomenon of failure to adapt to present exigencies because of the strong hold of service culture that allowed for the fighter community—who would adapt to the requirements of Vietnam—to emerge to dominate the service. Michael Worden's excellent book, *The Rise of the Fighter Generals*, chronicles this transition well. His book is available electronically at http://ebooks.gutenberg.us/AU_Press_Collection/Books/Worden/Worden.pdf.

7. There has already been considerable controversy over the question whether drone pilots deserved combat decorations. As one example, see <http://www.military.com/daily-news/2013/02/20/dod-stands-behind-controversial-drone>

-cyber-medal.html. Recently, Secretary of Defense Hagel decided they did not. See http://www.washingtonpost.com/world/national-security/hagel-orders-halt-to-production-of-drone-cyber-medal/2013/03/12/e0e84e0c-8b30-11e2-b63f-f53fb9f2fcb4_story.html.

8. Evidence is beginning to suggest that this is, in fact, the case. See http://www.nytimes.com/2013/02/23/us/drone-pilots-found-to-get-stress-disorders-much-as-those-in-combat-do.html?_r=0. Intuitively, it stands to reason that the drone pilot who has been observing a target for a long time has a kind of familiarity with the subject that a fast-moving pilot would not. In addition, he or she observes the impact and the aftermath of the attack in ways an ordinary pilot rarely would.

9. Bradley Strawser, "The Duty to Employ Uninhabited Aerial Vehicles," *Journal of Military Ethics* 9, no. 4 (2010).

10. Of course, it is the inherent uncertainty of most signature strikes that provided one of the reasons President Obama elected a risky SEAL Team assault on bin Laden's compound over the far safer precision-guided munition bombing approach. In addition, of course, he wanted positive confirmation that it really was bin Laden (which could not be known for a certainty from observation at a distance) and also that he was in fact killed, rather than merely injured as might have resulted from a bombing approach.

11. See http://www.army.mil/professionalWriting/volumes/volume5/january_2007/1_07_2.html for just one of many available discussions of this point.

12. http://www.huffingtonpost.com/2013/05/23/obama-drone-speech-transcript_n_3327332.html.

13. See <http://www.livingunderdrones.org/>.

14. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), 61–6.

15. Then Pakistani president Musharraf has indeed admitted that his government gave permission for US drone strikes in Pakistani territory, although he claims only a limited number of such permissions. See <http://www.guardian.co.uk/world/2013/apr/12/musharraf-admits-permitting-drone-strikes>.

16. "... as a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed" (*The National Security Strategy of the United States of America*, 2002).

17. "China Considered Killing Naw Kham with Drone," *Bangkok Post*, February 20, 2013. <http://www.bangkokpost.com/news/local/336872/china-considered-killing-naw-kham-with-drone>.

18. M. Shane Riza, *Killing without Heart: Limits on Robotic Warfare in an Age of Persistent Conflict* (Dulles, VA: Potomac Books, 2013).

19. *Killing without Heart*, 77.

20. *Killing without Heart*, 79–80.

21. *Killing without Heart*, 88.

22. A transcript of the episode can be found here: <http://www.chakoteya.net/startrek/23.htm>. Full videos are available on Netflix, Amazon, and other streaming services, and clips are readily available on YouTube.

Chapter Four

With thanks for research assistance to Sean Parish (JD expected 2015).

1. The Bureau of Investigative Journalism's Covert Drone War Project, "Covert War on Terror." <http://www.thebureauinvestigates.com/category/projects/drone-data/>.

2. See Joel Greenberg, "Israel Affirms Policy of Assassinating Militants," *New York Times*, July 5, 2001. <http://www.nytimes.com/2001/07/05/world/israel-affirms-policy-of-assassinating-militants.html> (comments of U.S. Ambassador to Israel, Martin Indyk).

3. For more on interrogation, especially an affirmative statement from an experienced pre-9/11 interrogator that water boarding is, indeed, torture, see, Peter Bauer, "Statement on Interrogation Practices" (statement in lieu of appearance before the International Commission of Jurists, August 29, 2006; on file with the author). See also Mary Ellen O'Connell, "Affirming the Ban on Harsh Interrogation," *Ohio State Law Journal* 66 (2005): 1231–67.

4. See the speech of President Obama on May 23, 2013, at the National Defense University. This speech references the first six arguments. White House, Office of the Press Secretary, Remarks by the President at the National Defense University, Ft. McNair, Washington, DC, May 23, 2013. <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>. For analysis of other speeches and scholarship, see Christine Gray, "Targeted Killings: Recent US Attempts to Create a Legal Framework," *Current Legal Problems* 66 (2013): 75–106; and Mary Ellen O'Connell, "The Choice of Law against Terrorism," *Journal of National Security Law and Policy* 4 (2010): 343–68.

5. It may also indicate that the president's advisers are not familiar with the standard approach to international law. See note 9 and accompanying text.

6. White House, Office of the Press Secretary, Remarks by the President. The president was right to have such concerns. China has acquired a vast drone fleet and is reported to be contemplating using it to kill criminal suspects, including suspects in other countries, and to attack Tibetan and other separatists. See Edward Wong, "Hacking U.S. Secrets, China Pushes for Drones," *New York Times*, September 20, 2013, p. A1.

7. See George W. Bush, "President's Address to the Nation on the Terrorist Attacks," *Weekly Compilation of Presidential Documents* 37 (September 11, 2001): 1301.

8. George W. Bush, “President’s Address to a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11,” *Weekly Compilation of Presidential Documents* 37 (September 20, 2001): 1348. See also, “Training Camps and Taliban Military Installations in Afghanistan,” *Weekly Compilation of Presidential Documents* 37 (October 7, 2001): 1432; George W. Bush, “President’s Address before a Joint Session of the Congress on the State of the Union,” *Weekly Compilation of Presidential Documents* 39 (January 28, 2003): 109.

9. On the law governing resort to force, see Nigel D. White and Christian Henderson, eds., *Research Handbook on Conflict and Security Law* (Cheltenham: Edward Elgar Publishers, 2013); Yoram Dinstein, *War, Aggression, and Self-Defense*, 5th ed. (Cambridge: Cambridge University Press, 2011); Olivier Corten, *The Law against War, The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart Publishing, 2010); and Christine Gray, *International Law and the Use of Force*, 3d ed. (Oxford: Oxford University Press, 2008).

10. See John Negroponte to the President of the Security Council, “Attack on America” (October 7, 2001). http://avalon.law.yale.edu/sept11/un_006.asp. See also the Charter of the United Nations, Article 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

11. For a brief but comprehensive and recent review of the law of self-defense, see, Mary Ellen O’Connell, “Dangerous Departures,” *American Journal of International Law* 107 (2013): 380–6.

12. Executive Military Order, “Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism” (November 13, 2001). <http://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011113-27.html>. The order authorizes the secretary of defense to take all necessary steps to detain any person who is or has been a member of al-Qaeda; who has engaged in, aided or abetted, or conspired to commit, prepare, or threaten acts of international terrorism against the United States, its citizens, national security, foreign policy, or economy; or who has harbored such terrorist individuals or organizations. Sections 4(a) and 7(b)(2) provide for trials by military commissions of persons de-

tained under the order. The secretary of defense will appoint the commissions. Persons subject to the commissions' jurisdiction will have no right of access to any US civilian court, foreign court, or international tribunal. While the military order specifically provides in its title and substantive provisions that it applies to noncitizens of the United States, Section 7(a)(3) states that the order shall not be construed to "limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order."

13. Doyle McManus, "A U.S. License to Kill, a New Policy Permits the C.I.A. to Assassinate Terrorists, and Officials Say a Yemen Hit Went Perfectly. Others Worry about Next Time," *L.A. Times*, January 11, 2003. <http://articles.latimes.com/2003/jan/11/world/fg-predator11>. Jack Kelly, "U.S. Kills Al-Qaeda Suspects in Yemen; One Planned Attack on USS Cole, Officials Say," *USA Today*, November 5, 2002. John J. Lumpkin, "Administration Says That Bush Has, in Effect, a License to Kill; Anyone Designated by the President as an Enemy Combatant, Including U.S. Citizens Can Be Killed Outright, Officials Argue," *St. Louis Post-Dispatch*, December 4, 2002.

14. See International Law Association, *Final Report of the Use of Force Committee, The Meaning of Armed Conflict in International Law* (2010). <http://www.ila-hq.org/en/committees/index.cfm/cid/1022>. Despite the report's extensive review of law and state practice with respect to hundreds of violent incidents over a sixty-five-year period, some authors continue to take the position that the definition of armed conflict is "controversial." See, e.g., Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare* (Directorate-General for External Policies of the European Parliament, 2013). Those expressing this view tend to be focused on international humanitarian law rather than on international law generally.

15. *McCann & Others v. United Kingdom*, Series A, no. 324, App no. 18984/91 (1995).

16. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27, to September 7, 1990. <http://www.20hchr.org/english/law/firearms.htm>.

17. By 2013, few if any international law scholars were arguing that the 2003 invasion of Iraq was lawful.

18. Dean Koh made clear that new terminology was being used in an answer to a question from the author (answer, the American Society of International Law Annual Meeting, Washington, DC, March 26, 2010). It is not clear, however, that the new terms refer to a substantive change. The exchange was recorded and broadcast on National Public Radio. See Ari Shapiro, "U.S. Drone Strikes Are Justified, Legal Adviser Says," National Public Radio, March 26, 2010. www.npr.org/templates/story/story.php?storyId=125206000. See note 18 and accompanying text.

19. Harold Hongju Koh, "The Obama Administration and International Law" (speech, 104th Annual Meeting of the American Society of International Law, Washington, DC, March 25, 2010). <http://www.state.gov/s/l/releases/remarks/139119.htm>. See also http://fora.tv/2010/03/25/Legal_Adviser_Harold_Koh_International_Law_and_the_Obama_Administration/Defense_Measures_Harold_Koh_Explains_Foreign_US_Combat.

20. The International Court of Justice has ruled on this very point in a number of important cases. See "Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)," *International Court of Justice Reports* 14 (June 27, 1986); "Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)," *International Court of Justice Reports* 168 (December 19, 2005), paras. 146, 301. But see Sean Murphy, "The International Legality of U.S. Military Cross-Border Operations from Afghanistan into Pakistan," *International Legal Studies* 85 (2009): 118–20.

21. See International Law Association, *Final Report on the Meaning of Armed Conflict*, at 33 and Melzer, *Human Rights Implications of the Usage of Drones*, 30.

22. See Abubakr Al-Shamahi, "US Drones Strain on Yemeni's Dual Loyalties," *BBC Arabic*, April 30, 2013. <http://www.bbc.co.uk/news/world-middle-east-22340837>. Tim Lister, "WikiLeaks: Pakistan Quietly Approved Drone Attacks, U.S. Special Units," *CNN*, December 2, 2010. <http://www.cnn.com/2010/US/12/01/wikileaks.pakistan.drones/index.html>. See also Gray, "Targeted Killings."

23. See Al-Shamahi, "US Drones Strain on Yemeni's Dual Loyalties"; Aliza Kassim, "Islamabad Summons a Top U.S. Envoy over Deadly Drone Strikes," *CNN*, June 10, 2013. <http://www.cnn.com/2013/06/08/world/pakistan-drones>.

24. Hersch Lauterpacht, *Oppenheim's International Law: Vol II, Disputes, War and Neutrality* (London: Longmans, Green & Co., 1944).

25. Elizabeth Wilmshurst, "The Chatham House Principles of International Law on the Use of Force in Self-Defence," *International and Comparative Law Quarterly* 55 (2006): 969–70.

26. O'Connell, "Dangerous Departures."

27. Kevin Gosztola, "In YouTube Event, Obama Defends Government's Use of Drones," *Dissenter*, January 30, 2012. <http://dissenter.firedoglake.com/2012/01/30/president-obama-says-us-must-be-judicious-in-drone-use/>.

28. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1, June 8 1997), Article 51(3) "Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities."

29. For a description of this issue, see Murphy, "The International Legality."

30. Protocol of 8 June 1977 Additional to the Geneva Conventions of 12 August 1949, and Concerning the Protection of Victims of International Armed

Conflicts, Article 51(3). <http://www.icrc.org/applic/ihl/ihl.nsf/INTRO/470?OpenDocument>.

31. “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,” *International Review of the Red Cross* 90, no. 872 (2008). <http://www.icrc.org/eng/resources/documents/article/review/review-872-p991.htm>.

32. For this basic argument, see, e.g., David Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?” *European Journal of International Law* 16 (2005): 212. See also, U.S. Department of Justice, “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 White Paper 2013. http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

33. See O’Connell, “Choice of Law.”

34. See Eric Holder to the Chairman of the Committee on the Judiciary, May 22, 2013. <http://www.nytimes.com/interactive/2013/05/23/us/politics/23holder-drone-lettter.html>. The official justification for killing Anwar al-Awlaki, a senior al-Qaeda operational leader, hinged upon al-Awlaki’s past and “continuing” threat to the United States, not that he was actively planning an attack at the time he was killed.

35. See *supra* notes 13–20 and accompanying text, regarding the level violence needed to trigger self-defense under Article 51.

36. See note 15 and accompanying text. State cannot consent to the use of excessive force.

Chapter Five

1. President Barack Obama, Remarks by the President on National Security (May 21, 2009).

2. Authorization for Use of Military Force, PL 107–40, September 18, 2001, 115 Stat. 224.

3. Memorandum from Assistant Attorney General Jay S. Bybee for Attorney General Alberto R. Gonzales (January 22, 2002). <http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf>.

4. See also Andrew C. McCarthy, “Torture: Thinking about the Unthinkable” in *The Torture Debate in America*, edited by Karen J. Greenberg (Chicago: University of Chicago Press, 2006), 105.

5. See, e.g., David W. Bowker, “Unwise Counsel: The War on Terrorism and the Criminal Mistreatment of Detainees, in U.S. Custody” in *The Torture Debate in America*, 187–88.

6. Russ Feingold, *While America Sleeps: A Wake-up Call for the Post-9/11 Era* (New York: Crown Publishers, 2012), 22.

7. See 147 Cong. Rec. S9948–02 (2001)

8. Jane Mayer, *The Dark Side: The Inside Story of How The War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2009), 294.

9. *Boumediene v. Bush*, 553 U.S. 723 (2008).

10. 3 C.F.R. 199–203 (2009).

11. “White House: ‘War on Terrorism Is Over,’” *Washington Times*, August 6, 2009. http://www.washingtontimes.com/news/2009/aug/06/white-house-war-terrorism-over/?feat=home_headlines (accessed July 3, 2013).

12. Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo, In re: Guantanamo Bay Detainee Litigation, Misc. No. 08–442 (TFH) (expanding the justification of the detention policy to include international laws of war, in addition to the AUMF).

13. See Respondents’ Memorandum.

14. Respondents’ Memorandum.

15. Paul Wolfowitz, Deputy Secretary of Defense, Memorandum for the Secretary of the Navy, “Order Establishing Combatant Status Review Tribunal,” July 7, 2004.

16. *Boumediene v. Bush*, 583 F.Supp.2d 133 (2008).

17. Authorization for Use of Military Force, Pub. L. No. 107–40, § 2, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541 note); quoted in “Respondents’ Memorandum.”

18. Respondents’ Memorandum.

19. Obama, Remarks.

20. Obama, Remarks.

21. Micah Zenko, Foreign Policy. See also Daniel Byman, “Why Drones Work: The Case for Washington’s Weapon of Choice,” *Foreign Affairs* (July/August 2012). <http://www.foreignaffairs.com/articles/139453/daniel-byman/why-drones-work> (accessed July 3, 2013); Audrey Kurth Cronin, “Why Drones Fail,” *Foreign Affairs* (July/August 2012). <http://www.foreignaffairs.com/articles/139454/audrey-kurth-cronin/why-drones-fail> (accessed July 3, 2013). http://www.foreignpolicy.com/articles/2013/04/10/an_inconvenient_truth_drones.

22. Harold Koh, March 25, 2010, speech. <http://www.state.gov/s/l/releases/remarks/139119.htm>.

23. Respondents’ Memorandum.

24. Department of Justice White Paper on Drone Strikes, February 4, 2013 (as reported by NBC News).

25. Attorney General Eric Holder, Department of Justice, Speech at Northwestern University (March 5, 2012); Mary Ellen O’Connell, “Combatants and the Combat Zone,” *University of Richmond Law Review* 43 (2009): 845.

26. O'Connell, "Combatants and the Combat Zone," 845.
27. Holder, Speech at Northwestern University.
28. Jameel Jaffer, ACLU Blog of Rights, February 4, 2013. <https://www.aclu.org/blog/national-security/justice-departments-white-paper-targeted-killing>.
29. Department of Justice White Paper on Drone Strikes.
30. Holder, Speech at Northwestern University; Obama, Remarks.

Chapter Six

1. The spelling "Al-Aulaqi" is used throughout this chapter, to reflect the spelling used in the court filings on behalf of the Aulaqi family.

2. Dana Priest, "U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes," *Washington Post*, January 27, 2010 (reporting that Anwar Al-Aulaqi had been added to "a shortlist of U.S. citizens" that the Joint Special Operation Command was specifically authorized to kill). http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012604239_pf.html.

3. Greg Miller, "Muslim Cleric Awlaki Is 1st U.S. Citizen on List of Those CIA Is Allowed to Kill," *Washington Post*, April 7, 2010. <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/06/AR2010040604121.html?hpid=moreheadlines>.

4. See Greg Miller, "U.S. Citizen in CIA's Cross-Hairs," *Los Angeles Times*, January 31, 2010 (describing the CIA's process for selecting targets and carrying out strikes as "highly secretive" and "remarkably self-contained"). <http://articles.latimes.com/2010/jan/31/world/la-fg-cia-awlaki31-2010jan31>.

5. Miller, "Muslim cleric Awlaki Is 1st U.S. Citizen."

6. *Al-Aulaqi v. Obama*, Case No. 10-cv-1469 (JDB) (D.D.C.), filed August 30, 2010. <http://www.ccrjustice.org/files/Al-Aulaqi%20v.%20Obama%20Complaint.pdf>.

7. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (granting the government's motion to dismiss on the basis of standing and the political question doctrine).

8. See White House, Office of the Press Secretary, "Remarks by the President at the 'Change of Office' Chairman of the Joint Chiefs of Staff Ceremony," September 30, 2011. <http://www.whitehouse.gov/the-press-office/2011/09/30/remarks-president-change-office-chairman-joint-chiefs-staff-ceremony>; Mark Mazzetti et al., "Two-Year Manhunt Led to Killing of Anwar Al-Awlaki," *New York Times*, September 30, 2011. <http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html>.

9. See Peter Finn and Greg Miller, "Anwar al-Awlaki's Family Speaks out against His Son's Death in Airstrike," *Washington Post*, October 17, 2011.

http://articles.washingtonpost.com/2011-10-17/world/35279713_1_anwar-al-awlaki-ibrahim-al-banna-aqap.

10. *Al-Aulaqi v. Panetta*, Case No. 12-cv-1192 (RMC) (D.D.C.), filed July 18, 2012. <http://ccrjustice.org/files/July-18-2012-Nasser-Al-Aulaqi-Complaint.pdf>.

11. *Al-Aulaqi v. Panetta*, 2014 U.S. Dist. LEXIS 46689 (D.D.C. April 4, 2014).

12. See Defs' Motion to Dismiss, 9, *Al-Aulaqi v. Panetta*, Case No. 12-cv-1192 (D.D.C. filed Dec. 14, 2012) (asserting that the missile strikes that killed the decedents "would have been taken in furtherance of the Nation's self-defense in an armed conflict with al-Qa'ida and associated forces"); *id.* at 20 (asserting that "in addition to its inherent national self-defense prerogative, the Executive's alleged conduct is consistent with an affirmative act of Congress—the Authorization for the Use of Military Force"); see generally, e.g., U.S. Dep't Justice, "Attorney General Eric Holder Speaks at Northwestern University School of Law," March 5, 2012. <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

13. See Office of the Attorney General, Letter to the Honorable Patrick J. Leahy, May 22, 2013 (in a letter confirming US responsibility for the killings of US citizens Anwar Al-Aulaqi, Samir Khan, Abdulrahman Al-Aulaqi, and Jude Kenan Mohammed, discussing accusations against Anwar Al-Aulaqi while stating only that Khan, Abdulrahman Al-Aulaqi, and Mohammed were "not specifically targeted"). <http://www.justice.gov/slideshow/AG-letter-5-22-13.pdf>; Defs' Motion to Dismiss, *Al-Aulaqi v. Panetta* (arguing against the court's jurisdiction to review Plaintiffs' constitutional claims). <http://ccrjustice.org/files/Dec%2014-2012%20%20Defendants%27%20Motion%20to%20Dismiss.pdf>.

14. Bureau of Investigative Journalism, Covert War on Terror—the Datasets (showing data for Pakistan, Yemen, and Somalia). <http://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/> (accessed May 25, 2014).

15. See White House, Office of the Press Secretary, Remarks by the President at the National Defense University, May 23, 2013 (announcing a new Presidential Policy Guidance with ostensibly narrower targeting criteria, plans to "review proposals to extend oversight of lethal actions outside of warzones," and future efforts to "refine, and ultimately repeal, the AUMF's mandate"). http://articles.washingtonpost.com/2013-05-23/politics/39467399_1_war-and-peace-cold-war-civil-war.

16. See, e.g., Harold H. Koh, Keynote Address at the Annual Meeting of the American Society of International Law, Washington, D.C., March 25, 2010. <http://www.state.gov/s/l/releases/remarks/139119.htm>; US Department of Justice, "Attorney General Eric Holder Speaks"; John Brennan, Assistant to the President for Homeland Security and Counterterrorism, "The Ethics and Efficacy of the President's Counterterrorism Strategy," Wilson Center, April 30, 2012 (discussing the legality and wisdom of targeted killings by the United States outside of "hot battlefields").

17. U.S. Department Justice, "Attorney General Eric Holder Speaks."

18. See Laurie R. Blank, "Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications," Emory University School of Law, Legal Studies Research Paper Series, Research Paper No. 12–217 (2012). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1981379.

19. Charter of the United Nations, Article 51.

20. UN Human Rights Council, *UN Human Rights Council: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston*, May 28, 2010, A/HRC/14/24/Add.6. <http://unispal.un.org/UNISPAL.NSF/0/69633D6116C53C898525773D004E8C13>.

21. *UN Human Rights Council . . . Philip Alston*, para. 45.

22. US Department of Justice, "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 White Paper 2013.

23. John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Strengthening Our Security by Adhering to Our Values and Laws (September 16, 2011). <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>; see also Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (New York: Houghton Mifflin, 2012), 218 (discussing former Department of State Legal Advisor Harold Koh's view that the use of force outside of battlefields would be permissible in self-defense under a standard of "elongated imminence").

24. See, e.g., White House, Office of the Press Secretary, Remarks by the President; see also White House, Office of the Press Secretary, "Fact Sheet: The President's May 23 Speech on Counterterrorism," May 23, 2013 ("Under domestic law, and international law, the United States is at war with al-Qaeda, the Taliban, and their associated forces"). <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-president-s-may-23-speech-counterterrorism>.

25. Office of the Attorney General, Letter to the Honorable Patrick J. Leahy (acknowledging the killing of U.S. citizens Anwar Al-Aulaqi, Samir Khan, and Abdulrahman Al-Aulaqi in Yemen and Jude Kenan Mohammed in Pakistan, "outside of areas of active hostilities"); see Scott Shane and Eric Schmitt, "One Drone Victim's Trail from Raleigh to Pakistan," *New York Times*, May 22, 2013 (reporting that Mohammed was killed in a CIA drone strike in Pakistan in November 2011). http://www.nytimes.com/2013/05/23/us/one-drone-victims-trail-from-raleigh-to-pakistan.html?_r=0.

26. Shane and Schmitt, "One Drone Victim's Trail from Raleigh to Pakistan."

27. See, e.g., Mary Ellen O'Connell, "Combatants and the Combat Zone," *University of Richmond Law Review* 43 (2009): 845, 858. ("In addition to exchange, intensity, and duration [of fighting], armed conflicts have a spatial dimension. It is not the case that if there is an armed conflict in one state—for

example, Afghanistan—that all the world is at war, or even that Afghanis and Americans are at war with each other all over the planet.”); *UN Human Rights Council* . . . Philip Alston, paras. 53–56 (expressing skepticism that the United States is in armed conflict with al-Qaeda outside Afghanistan and Iraq).

28. 31st International Conference of the Red Cross and Red Crescent, November 28–December 1, 2011, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 10, I.C.R.C. Doc. 31IC/11/5.1.2 (October 2011).

29. Ben Emmerson, Special Rapporteur on Counter-Terrorism and Human Rights, United Nations, Speech at Harvard Law School, October 25, 2012. <http://harvardhumanrights.files.wordpress.com/2012/10/harvard-speech.doc>. See also Brennan, Strengthening Our Security by Adhering to Our Values and Laws (“An area in which there is some disagreement is the geographic scope of the conflict. The United States does not view our authority to use military force against al-Qa’ida as being restricted solely to “hot” battlefields like Afghanistan. . . . Others in the international community—including some of our closest allies and partners—take a different view of the geographic scope of the conflict, limiting it only to the ‘hot’ battlefields.”); see also Jennifer C. Daskal, “The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone,” *University of Pennsylvania Law Review* 161, (2013), 5 (on file with author) (recognizing that key European allies of the United States view the conflict with al-Qaeda as limited to “hot” battlefields).

30. “31st International Conference of the Red Cross and Red Crescent.

31. Brennan, “The Ethics and Efficacy of the President’s Counterterrorism Strategy” (mentioning Al Shabab in Somalia, AQAP in Yemen, al-Qaeda in the Islamic Maghreb in North and West Africa, and Boko Haram in Nigeria as “affiliates” and “adherents” of al-Qaeda that threaten the United States).

32. At a Senate Armed Services Committee hearing on the AUMF in May 2013, the Department of Defense Acting General Counsel took the position that the AUMF could be read to authorize lethal force against “associated forces” in Mali, Libya, and Syria. US Senate Committee on Armed Services, Oversight: The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for the Use of Military Force,” May 16, 2013 (transcript available at <http://www.armed-services.senate.gov/Transcripts/2013/05%20May/13-43%20-%205-16-13.pdf>).

33. White House, Office of the Press Secretary, Remarks by the President.

34. Jeh Johnson, “National Security Law, Lawyers and Lawyering in the Obama Administration,” Dean’s Lecture at Yale Law School, February 22, 2012 (“An ‘associated force’ . . . has two characteristics: (1) it is an organized, armed group that has entered the fight alongside al Qaeda, and (2) it is a cobelligerent with al Qaeda in hostilities against the United States or its coalition partners”).

35. See, e.g., Tess Bridgeman, “The Law of Neutrality and the Conflict

with Al Qaeda, Note,” *New York University Law Review* 85 1186, 1197 (2010) (“Broadly speaking, the law of neutrality regulates the coexistence of states at war and states at peace”).

36. John C. Dehn and Kevin Jon Heller, “Debate, Targeted Killing: The Case of Anwar Al-Aulaqi,” *University of Pennsylvania Law Review* 159 (2011), 175, 200. <http://www.pennlawreview.com/debates/index.php?id=40> (“There are actually numerous reasons why cobelligerency does not apply to nonstate actors in NIAC. The most important, of course, is the complete absence of state practice or *opinio juris* supporting the existence of such a customary rule.”); see *Al-Bihani v. Obama*, 590 F.3d 866, 873 (D.C. Cir. 2010) (describing as “folly” an “attempt to apply the rules of co-belligerency” to a nonstate entity).

37. Johnson, “National Security Law, Lawyers and Lawyering” (“an ‘associated force’ is not any terrorist group in the world that merely embraces the al Qaeda ideology”).

38. See, e.g., Daniel L. Byman, “Breaking the Bonds between Al-Qa’ida and Its Affiliate Organizations,” Saban Center for Middle East Policy at Brookings, Analysis Paper, 2012, 12 (“[T]he Shebaab is still largely independent [from the al-Qaeda core].”).

39. Stephanie Hanson, “Al-Shabaab,” *Council on Foreign Relations*. <http://www.cfr.org/somalia/al-shabaab/p18650> (accessed August 10, 2011).

40. See, e.g., *Scott v. Harris*, 550 U.S. 372, 384 (2007) (requiring a concrete and imminent threat of deadly harm for lethal force to be reasonable under the Fourth Amendment); *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, principles 4, 9, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (August 27–September 7, 1990) (requiring an imminent threat and use of non-violent means before resort to lethal force).

41. The administration has not asserted this rationale in its public statements about its targeting operations. See also Kenneth Roth, “The War against al-Qaeda Is Over,” *Washington Post*, Opinions, August 2, 2013 (arguing that “[t]he al-Qaeda threat to the United States, while still real, no longer meets” international standards for armed conflict). http://articles.washingtonpost.com/2013-08-02/opinions/41000898_1_war-powers-perpetual-war-human-rights-watch.

42. Brennan, “The Ethics and Efficacy of the President’s Counterterrorism Strategy.”

43. See Article 3 common to the four Geneva Conventions, 1949; see also Gabor Rona, “Thoughts on Brennan’s Speech,” *Opinio Juris* (May 2, 2012, 3:18 A.M.). <http://opiniojuris.org/2012/05/02/thoughts-on-brennans-speech/> (objecting to Brennan’s assertion that individuals who are “part of al-Qa’ida or its associated forces” are legitimate targets as a “sweeping and incorrect claim of who is targetable under international law”).

44. White House, U.S. Policy Standards and Procedures for the Use of Force

in Counterterrorism Operations Outside the United States and Areas of Active Hostilities. http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf.

45. See Mark Mazzetti and Mark Landler, “Despite Administration Promises, Few Signs of Change in Drone Wars,” *New York Times*, August 2, 2013 (reporting that “there is little public evidence of change” in the administration’s strategy). <http://www.nytimes.com/2013/08/03/us/politics/drone-war-rages-on-even-as-administration-talks-about-ending-it.html?pagewanted=all>; Eric Schmitt, “Embassies Open, but Yemen Stays on Terror Watch,” *New York Times*, August 11, 2013. http://www.nytimes.com/2013/08/12/world/embassies-open-but-yemen-stays-on-terror-watch.html?_r=0 (reporting that administration officials believed the embassy terror threat “expanded the scope of people we could go after” in Yemen); Greg Miller, “Obama administration authorized recent drone strikes in Yemen,” *Washington Post*, August 6, 2013. http://articles.washingtonpost.com/2013-08-06/world/41107162_1_u-s-embassy-u-s-drone-activity-yemeni-government-officials (reporting that the new policy rules “allow for strikes to resume in response to an elevated threat”).

46. See, e.g., John Podesta, “Obama Should Lift Secrecy on Drones,” Opinion, *Washington Post*, March 13, 2013 (“The Obama administration is wrong to withhold [its legal opinions and memorandums governing targeted killing] from Congress and the American people”). http://articles.washingtonpost.com/2013-03-13/opinions/37670829_1_obama-administration-president-obama-citizen-on-american-soil; Mary McCarthy and Paul R. Pillar, “Shedding light on targeted killing program,” Opinion, *Washington Times*, March 15, 2013 (“We recently joined with a bipartisan group of colleagues . . . to urge the administration to lift the veil of secrecy around the targeted killing program”). <http://www.washingtontimes.com/news/2013/mar/15/mccarthy-and-pillar-shedding-light-targeted-killin/>.

47. Jeh Johnson, “National security law, lawyers and lawyering in the Obama Administration,” Dean’s Lecture at Yale Law School, February 22, 2012. <http://www.cfr.org/defense-and-security/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448>.

48. Jeh Johnson, “Keynote address at the Center on National Security at Fordham Law School,” Mar. 18, 2013. <http://www.lawfareblog.com/2013/03/jeh-johnson-speech-on-a-drone-court-some-pros-and-cons/>.

49. Brennan, “The Ethics and Efficacy of the President’s Counterterrorism Strategy.” <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counter-terrorism-strategy>; see also US Department of Justice, “Attorney General Eric Holder Speaks”; Johnson, “National Security Law, Lawyers and Lawyering in the Obama Administration”; ; Harold H. Koh, Keynote Address. <http://www.state.gov/l/releases/remarks/139119.htm>.

50. Office of the Attorney General, Letter to the Honorable Patrick J. Leahy.

51. White House, Office of the Press Secretary, Remarks by the President.

52. See Ryan Goodman and Sarah Knuckey, “What Obama’s New Killing Rules Don’t Tell You,” *Esquire*, May 24, 2013. <http://www.esquire.com/blogs/politics/obama-counterterrorism-speech-questions-052413>.

53. See White House, U.S. Policy Standards and Procedures (“One constant is our commitment to conducting counterterrorism operations lawfully. In addition, we consider the separate question of whether force should be used as a matter of policy”; stating “a preference” for capture); see also Brennan, “The Ethics and Efficacy of the President’s Counterterrorism Strategy” (“Even if we determine that it is lawful to pursue the terrorist in question with lethal force, it doesn’t necessarily mean we should”).

54. See, e.g., Emptywheel, “Obama to Release OLC Memo after Only 24 Requests from 31 Members of Congress,” May 20, 2014. <http://www.emptywheel.net/2014/05/20/obama-to-release-olc-memo-after-only-24-congressional-requests/>.

55. See Emptywheel, “After over 23 Requests, Congress Draws Closer to Issuing Subpoenas,” April 16, 2013. <http://www.emptywheel.net/2013/04/16/after-over-23-requests-congress-draws-closer-to-issuing-subpoenas/>; Jennifer Koons, “DOJ Agrees to Share Drone Strike Memos with House Judiciary Committee,” *Main Justice*, April 17, 2013. <http://www.mainjustice.com/2013/04/17/doj-agrees-to-shares-drone-strike-memos-with-house-judiciary-committee/>.

56. Josh Gerstein, “White House Offers Drone Memo to Whole Senate,” *Politico*, May 6, 2014. <http://www.politico.com/blogs/under-the-radar/2014/05/white-house-offers-drone-memo-to-whole-senate-188050.html>.

57. See Brief for Defs’-Appellees, *New York Times Co. et al., v. Dep’t Justice et al.*, Case No. 13–0445 (2nd Cir.), filed June 14, 2013. http://www.aclu.org/files/assets/95._govt_reply_brief_2013.06.14.pdf; Def. CIA Motion for Summary Judgment, *ACLU v. CIA*, Case No. 10–436 (D.D.C.), filed August 9, 2013.

58. *ACLU v. CIA*, 710 F.3d 422, 431 (D.C. Cir. 2013).

59. Jack Goldsmith, “Thoughts on Today’s Important Drone FOIA Oral Argument in DC Circuit,” *Lawfare* (September 20, 2012, 6:34 A.M.). <http://www.lawfareblog.com/2012/09/thoughts-on-todays-important-drone-foia-oral-argument-in-dc-circuit/>.

60. *N.Y. Times Co. v. United States DOJ*, 2014 U.S. App. LEXIS 7387 (2nd Cir. N.Y. April 21, 2014).

61. *N.Y. Times Co. v. United States DOJ*, 2014 U.S. App. LEXIS at *50.

62. Nedra Pickler, “AP Sources: Justice Dept. to Reveal Drone Memo,” *Associated Press*, May 21, 2014. <http://abcnews.go.com/Politics/wireStory/ap-sources-justice-dept-reveal-drone-memo-23802330>.

63. See, e.g., Johnson, “National Security Law, Lawyers and Lawyering” (“targeting decisions are not appropriate for submission to a court”).

64. Johnson, “National Security Law, Lawyers and Lawyering”; see also

Scott Shane, “Judge Challenges White House Claims on Authority in Drone Killings,” *New York Times*, July 19, 2013 (reporting the government’s position at oral argument that there are “multiple” checks within the Executive Branch to ensure that targeted killings are lawful). <http://www.nytimes.com/2013/07/20/us/politics/judge-challenges-white-house-claims-on-authority-in-drone-killings.html>.

65. US Department of Justice, “Attorney General Eric Holder Speaks.”

66. See, e.g., Brief for Respondents at 1, 12, 43, 47–50, *Rasul v. Bush*, 542 U.S. 446 (2004) (Nos. 03–334, 03–343).

67. *Rasul v. Bush*, 542 U.S. 446 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2004); *Boumediene v. Bush*, 553 U.S. 723 (2008).

68. Despite dismissing the *Al-Aulaqi v. Panetta* lawsuit, which sought damages for the killings of Anwar Al-Aulaqi, Samir Khan, and Abdulrahman Al-Aulaqi, the district court rejected the broadest of the government’s arguments—that the “political question” barred the court from any inquiry into the plaintiffs’ constitutional claims. “The powers granted to the Executive and Congress to wage war and provide for national security does not give them *carte blanche* to deprive a U.S. citizen of his life without due process and without any judicial review.” [sic] *Al-Aulaqi v. Panetta*, 2014 U.S. Dist. LEXIS 46689 *34 (D.D.C. April 4, 2014).

69. Robert Chesney, “Military-Intelligence Convergence and the Law of Title 10/Title 50 Debate,” *Journal of National Security and Policy* 5 (2012): 539, 611.

70. Chesney, “Military-Intelligence Convergence,” 543, 613–15.

71. See Scott Shane, “Nominee to Lead CIA Clears Hurdle after Release of Drone Data,” *New York Times*, March 5, 2013 (noting, however, that the administration withheld its legal opinions governing strike targeting foreign citizens and that, “[a]s a result, the detailed rules for a vast majority of strikes . . . remain secret even from the Congressional intelligence committees”). <http://www.nytimes.com/2013/03/06/us/politics/brennan-vote-by-senate-intelligence-panel.html>.

72. White House, Office of the Press Secretary, Remarks by the President.

73. See Mark Mazzetti and Mark Landler, “Despite Administration Promises, Few Signs of Change in Drone Wars,” *New York Times*, August 2, 2013 (reporting that although the president “pledged a greater transparency and public accountability for drone operations, he and other officials still refuse to discuss specific strikes in public” and that there has been “little public debate on Capitol Hill” about targeted killing in recent months).

74. See, e.g., Jeh Charles Johnson, Keynote Address at the Center on National Security at Fordham Law School—A “Drone Court”: Some Pros and Cons, March 18, 2013. <http://centeronnationalsecurity.org/sites/default/files/Jeh%20Johnson%20Speech%20at%20Fordham%20LS.pdf>.

Chapter Seven

1. The U.S. Air Force prefers “Remotely Piloted Aircraft” (RPAs).
2. According to a now erased report posted by the US Air Force and reported by the London-based Bureau of Investigative Journalism, unmanned aircraft fired about 25 percent of all missiles used in coalition air strikes in Afghanistan. See “Erased US data shows 1 in 4 missiles in Afghan Airstrikes now fired by drone,” Bureau of Investigative Journalism, March 12, 2013; accessed at <http://www.thebureauinvestigates.com/2013/03/12/erased-U.S.-data-shows-1-in-4-missiles-in-afghan-airstrikes-now-fired-by-drone/>.
3. Obviously intelligence, surveillance, and reconnaissance also occurs in areas where targeted killings then follow.
4. Statement before the House Armed Services Committee, Subcommittee on Intelligence, Emerging Threats and Capabilities, February 27, 2013.
5. For much more on this argument, see Audrey Kurth Cronin, *How Terrorism Ends: Understanding the Decline and Demise of Terrorist Campaigns* (Princeton, NJ: Princeton University Press, 2009).
6. Cronin, “How Al-Qaeda Ends: The Decline and Demise of Terrorist Groups” *International Security*, 31, no. 1 (Summer 2006): 7–48; and Cronin, *How Terrorism Ends*.
7. Mark Landler, “A Wartime Leader Ends a War He Never Wanted,” *New York Times*, December 8, 2011. This amounts to about 73 percent of the top leadership. Strangely, in 2005 President Bush claimed that 75 percent of known al-Qaeda leaders had been killed or captured. “Pentagon Takes Aim at Rank and File of al-Qaeda,” *Washington Times*, June 7, 2005.
8. Felicia Sonmez and Matt DeLong, “Panetta: 50–100 al-Qaeda remain in Afghanistan,” *Washington Post*, June 27, 2010. <http://voices.washingtonpost.com/44/2010/06/panetta-50-100-al-qaeda-remain.html?wprss=44>.
9. Greg Miller, “CIA Seeks New Authority to Expand Yemen Drone Campaign,” *Washington Post*, April 18, 2012. http://www.washingtonpost.com/world/national-security/cia-seeks-new-authority-to-expand-yemen-drone-campaign/2012/04/18/gIQAsaumRT_story.html.
10. New America Foundation, International Security Program, Drone Wars Database. <http://securitydata.newamerica.net/drones/yemen/key-findings>.
11. Robert F. Worth, Mark Mazzetti, and Scott Shane, “Drone Strikes’ Risks to Get Rare Moment in the Public Eye,” *New York Times*, February 5, 2013. <http://www.nytimes.com/2013/02/06/world/middleeast/with-brennan-pick-a-light-on-drone-strikes-hazards.html?hp>. Greg Miller and Karen DeYoung, “Brennan Nomination Exposes Criticism on Targeted Killings and Secret Saudi Base,” *Washington Post*, February 5, 2013. <http://www.washingtonpost.com/world/national-security/brennan-nomination-opens-obama-to-criticism-on>

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12. Bureau of Investigative Journalism. <http://www.thebureauinvestigates.com/2013/02/04/naming-the-dead-bureau-announces-new-drones-project/>.

13. Elisabeth Bumiller, "Soldier, Thinker, Hunter, Spy: Drawing a Bead on Al Qaeda," *New York Times*, September 3, 2011.

14. Patrick B. Johnston and Anoop K. Sarbahi, "The Impact of US Drone Strikes on Terrorism in Pakistan and Afghanistan," January 3, 2013. <http://patrickjohnston.info/materials/drones.pdf> on 8 March 2013, draft.

15. In their analysis, they combine both surveillance and targeting, including Afghan war zones and Pakistani territory; mix insurgency and terrorism; and include actions taken not just against al-Qaeda but members of a range of other groups. The metric measured is a short-term decrease in violence in the wake of drone strikes, not the effectiveness of US counterterrorism. Johnston and Sarbahi, "The Impact of US Drone Strikes on Terrorism."

16. Johnston and Sarbahi, "The Impact of US Drone Strikes on Terrorism." See also David A. Jaeger and Zahra Siddique, "Are Drone Strikes Effective in Afghanistan and Pakistan? On the Dynamics of Violence between the United States and the Taliban," IZA Discussion Paper No. 6262. <http://ideas.repec.org/p/iza/izadps/dp6262.html>.

17. Rukmini Callimachi, "How to Avoid Drones: Al Qaeda Tips on Evading Unmanned Aircraft Found in Mali," *Associated Press*, February 21, 2013.

18. Megan Smith and James Igoe Walsh, "Do Drone Strikes Degrade Al Qaeda? Evidence from Propaganda Output," *Terrorism and Political Violence* 25 (2013): 311–27. <http://www.jamesigoewalsh.com/tpv.pdf>.

19. Smith and Walsh, "Do Drone Strikes Degrade Al Qaeda?" 315.

20. The figure was compiled by looking at the country of origin of victims, with those from Muslim-majority countries presumed to be Muslims. Scott Helfstein, Nassir Abdullah, and Muhammad al-Obaidi, "Deadly Vanguard: A Study of al-Qa'ida's Violence against Muslims," Occasional Paper Series, Combating Terrorism Center at West Point, December 2009. <http://www.ctc.usma.edu/posts/deadly-vanguards-a-study-of-al-qaidas-violence-against-muslims>.

21. The Real Irish Republican Army was severely damaged by its 1998 Omagh bombing that resulted in unified popular revulsion in Northern Ireland; Euskadi Ta Askatasuna bombings resulted in repeated public demonstrations against the group in Spain; and al-Gama'a al-Islamiyya killed sixty-two tourists in the town of Luxor, sparking a popular backlash in Egypt.

22. Under the Obama administration, 13–17 percent of the victims of drone attacks in Pakistan were reported to be either "civilian" or "unknown." See the database project and report, "Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004–2012: Key Observations." <http://counterterrorism>

.newamerica.net/sites/newamerica.net/files/program_pages/attachments/Year_of_the_drone_key_observations.pdf.

23. Jenna Jordan, "When Heads Roll: Assessing the Effectiveness of Leadership Decapitation," *Security Studies* 18, no. 4 (2009): 719–55, 747.

24. Bryan C. Price, "Targeting Top Terrorists: How Leadership Decapitation Contributes to Counterterrorism," *International Security* 36, no. 4 (Spring 2012): 9–46.

25. Price, "Targeting Top Terrorists."

26. "Including leaders at all levels would be an improvement over this study, but it is too difficult to accomplish using open source material." Price, "Targeting Top Terrorists," 25. In a 2012 analysis, Patrick Johnston examined the effectiveness of leadership targeting (at all levels) in counterinsurgency campaigns, concluding that targeting insurgents works. His data set included insurgent campaigns from 1975 to 2003 and did not include Islamist insurgencies post-9/11; thus, it shed no new light upon the viability of al-Qaeda's global terrorist campaign. Patrick B. Johnston, "Does Decapitation Work?: Assessing the Effectiveness of Leadership Targeting in Counterinsurgency Campaigns," *International Security* 36, no. 4 (Spring 2012): 47–79.

27. Peter Bergen and Katherine Tiedemann, "Washington's Phantom War: The Effects of the U.S. Drone Program in Pakistan," *Foreign Affairs*, July/August 2011.

28. On repression, see chapter five in Cronin, *How Terrorism Ends*.

29. The statement was made defiantly during his sentence hearing. See *Daily Mail*, London, June 22, 2010. <http://www.dailymail.co.uk/news/article-1288523/Muslim-soldier-Faisal-Shahzad-pleads-guilty-Times-Square-car-bombing.html>.

30. On the complex US terrorist sanctions regime, see Audrey Kurth Cronin, *The "FTO List" and Congress: Sanctioning Designated Foreign Terrorist Organizations*, CRS Report for Congress RL32120. <http://www.fas.org/irp/crs/RL32120.pdf>. Federal courts have since interpreted the law to include targeting "associated forces" of al-Qaeda and potentially now also "associates of associates." Greg Miller and Karen DeYoung, "Officials Debate Stretching 9/11 Law," *Washington Post*, March 7, 2013, pp. A1 and 11.

31. C. Christine Fair, Karl C. Kaltenthaler, and William J. Miller, "You Say Pakistanis All Hate the Drone War? Prove It," *Atlantic*, January 23, 2013; and Conor Friedersdorf, "Yes, Pakistanis Really Do Hate America's Killer Drones," *Atlantic*. Both at <http://www.theatlantic.com/international/archive/2013/01/yes-pakistanis-really-do-hate-americas-killer-drones/272468/>.

32. Susan B. Epstein and K. Alan Kronstadt, *Pakistan: U.S. Foreign Assistance*, CRS Report for Congress, #R41856, October 4, 2012.

33. Pew Global Attitudes Project, "Pakistani Public Opinion Ever More Critical of U.S.," June 27, 2012. <http://www.pewglobal.org/2012/06/27/pakistani-public-opinion-ever-more-critical-of-u-s/>.

34. Pew Global Attitudes Project, "Global Opinion of Obama Slips, International Policies Faulted," June 13, 2012. <http://www.pewglobal.org/2012/06/13/chapter-1-views-of-the-u-s-and-american-foreign-policy-4/>. One interesting finding is the degree to which women strongly disapprove more than men do, with a twelve- to thirty-point gap between them in ten states, including the United States, Britain, and Germany.

35. See Cronin, *How Terrorism Ends*, 28–29.

36. See the excellent analysis by Joshua Foust, "Targeted Killing, Pro and Con: What to Make of U.S. Drone Strikes in Pakistan," *Atlantic*, September 26, 2012. <http://www.theatlantic.com/international/archive/2012/09/targeted-killing-pro-and-con-what-to-make-of-obamas-afghan-drone-policy/262862/>.

37. Confirmation hearing before the Senate Intelligence Committee, February 7, 2013; as quoted by Mark Mazzetti and Scott Shane, "Drones Are Focus as C.I.A. Nominee Goes before Senators," *New York Times*, February 7, 2013.

38. The domestic threat is not confined to al-Qaeda and associates. The Federal Bureau of Investigations tracks violent anarchists, extremists, animal rights militants, antiabortion extremists, black separatists, militia/sovereign citizen groups, Puerto Rican radicals, and white supremacists. See Federal Bureau of Investigation Counterterrorism Division, Intelligence Assessment, "A Threat Assessment for Domestic Terrorism, 2005–2006," September 18, 2007; declassified and posted by the National Security Archive, edited by Jeffrey T. Richelson, July 19, 2012. <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB386>.

39. The Global Terrorism Database is part of the National Consortium for the Study of Terrorism and Responses to Terrorism (START). <http://www.start.umd.edu/gtd/>. One person was killed in the Little Rock shooting, and thirteen in the shooting at Fort Hood. See also Risa A. Brooks, "Muslim 'Homegrown' Terrorism in the United States: How Serious Is the Threat?" *International Security* 36, no. 2 (Fall 2011): 7–47, 28–29. As she studies only Muslim American homegrown plots and attacks, Brooks identifies the same number of fatalities (fourteen) but only eighteen terrorist incidents. The New America Foundation claims that seventeen Americans died in terrorist attacks in the United States between September 12, 2001, and June 6, 2012. Listed under "Deaths from Jihadist-Terrorist Attacks in the United States after 9/11" the New America Foundation tally includes two people who died in the 2002 attack on the El Al counter at Los Angeles International Airport and one person who was killed at a Jewish center in Seattle in 2006. <http://homegrown.newamerica.net/about/deaths-jihadist-terrorist-attacks-united-states-after-911>.

40. I reached these numbers by searching the database for incidents between 1970 and 1979 (or 1980–1989, 1990–1999, etc.), in the United States, with all criteria for terrorism, and all incidents included regardless of doubt. The post-9/11 search was September 12, 2001–December 31, 2010. The number of fatalities for the decade 2000–2010 (with the 9/11 attacks) is 3,011 in 184 incidents.

41. I am not including the total number of terrorist incidents globally, only those on US soil. For the former, also see the National Counterterrorism Center Report on Terrorism (various years). <http://www.nctc.gov/>. The 2011 report (with information through March 12, 2012) observes that the 2011 numbers represent five-year lows, dropping by almost 12 percent from 2010 and nearly 29 percent from 2007 (p. 9).

42. "CNN Poll: Fear of Terrorist Attack in U.S. Rises," CNN Opinion Research, May 21–23, 2010. <http://politicalticker.blogs.cnn.com/2010/05/28/cnn-poll-fear-of-terrorist-attack-in-u-s-rises/>.

43. Pew Center for the People and the Press, "United In Remembrance, Divided over Policies," September 1, 2011. <http://www.people-press.org/2011/09/01/united-in-remembrance-divided-over-policies/>.

44. Pew Center for the People and the Press, "Most Expect 'Occasional Acts of Terrorism' in the Future," April 23, 2013. <http://www.people-press.org/2013/04/23/most-expect-occasional-acts-of-terrorism-in-the-future/>.

45. Dina Temple-Raston, "FBI Tracking 100 Suspected Extremists in Military," NPR.org, June 25, 2012. The number of investigations likely went up after congressional pressure in the wake of the Hasan attack at Fort Hood and the publication shortly thereafter of a revised Domestic Investigations and Operations Guide manual. This figure is impossible to place into context without more data on Federal Bureau of Investigation investigations over time. See Joseph I. Lieberman and Susan M. Collins, *A Ticking Time Bomb: Counterterrorism Lessons from the U.S. Government's Failure to Prevent the Fort Hood Attack*, Special Report, U.S. Senate Committee on Homeland Security and Governmental Affairs, February 3, 2011; and Charlie Savage, "FBI Agents Get Leeway to Push Privacy Bounds," *New York Times*, June 12, 2011. The one hundred extremists figure was revealed in a closed hearing with the same committee in December 2011. Some databases on homegrown radicalization conflate domestic terrorist plots and foreign fighters departing for insurgencies abroad, potentially overstating the domestic threat. Thomas Hegghammer, "The Rise of Muslim Foreign Fighters," *International Security* 35, no. 3 (Winter 2010/11), 53–94.

46. For detailed analysis of arrests, investigations, sting operations, and incidents, see Risa A. Brooks, "Muslim 'Homegrown' Terrorism in the United States."

47. Mark Potok, "The 'Patriot' Movement Explodes," Southern Poverty Law Center, *Intelligence Report*, Spring 2012, no. 145. <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/spring/the-year-in-hate-and-extremism> (accessed August 8, 2012).

48. Micah Zenko and Emma Welch, "Where the Drones Are: Mapping the Launch Pads for Obama's Secret Wars," *Foreign Policy*, May 29, 2012. http://www.foreignpolicy.com/articles/2012/05/29/where_the_drones_are.

49. Daniel Byman, *A High Price: The Triumphs and Failures of Israeli*

Counterterrorism (Oxford: Oxford University Press, 2011), 323. For an earlier, more nuanced piece on this topic, see his “Do Targeted Killings Work?” *Foreign Affairs* 85, no. 2 (March–April 2006), 95–111.

50. A July 2001 poll found that 90 percent of the Israeli public supported the policy. Stephen R. David, “Fatal Choices: Israel’s Policy of Targeted Killing,” *Mideast Security and Policy Studies* no. 51, The Begin-Sadat Center for Strategic Studies, Bar-Ilan University, p. 71. <http://www.biu.ac.il/SOC/bsa/david.pdf>.

51. E.g., the 1996 killing of Hamas bomb maker Yahya Ayyash resulted in the killing of fifty Israelis in four retaliatory bus bombings. See Avery Plaw, *Targeting Terrorists* (New York: Ashgate, 2008), 167.

52. Mohammed M. Hafez and Joseph M. Hatfield, “Do Targeted Assassinations Work? A Multivariate Analysis of Israel’s Controversial Tactic during Al-Aqsa Uprising,” *Studies in Conflict and Terrorism* 29, no. 4 (June 2006): 359–82. David A. Jaeger and M. Daniele Paserman disagree, arguing that the targeted killings of Palestinian leaders by Israel reduce Palestinian violence. See “The Shape of Things to Come? On the Dynamics of Suicide Attacks and Targeted Killings,” *Quarterly Journal of Political Science* 4, no. 4 (2009): 315–42.

53. Byman, *A High Price*, 312.

54. See, inter alia, David Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate Means of Defence?” *European Journal of International Law* 16, no. 2 (2005): 171–212; Yael Stein, “By Any Name Illegal and Immoral: Response to Israel’s Policy of Targeted Killing,” *Ethics and International Affairs* 17, no. 3 (2003): 127–37; Hafez and Hatfield, “Do Targeted Assassinations Work?”

Chapter Eight

1. Leon Panetta, Address to the Pacific Council on International Policy in Los Angeles, May 18, 2009. Quoted in “U.S. Airstrikes in Pakistan Called ‘Very Effective,’” CNN.com. <http://www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/> (accessed January 7, 2013).

2. Micah Zenko, *Reforming U.S. Drone Strike Policies*, Center for Preventive Action, Council Special Report No. 65 (New York: Council on Foreign Relations), January 2013, 8.

3. Laurence R. Newcome, *Unmanned Aviation: A Brief History of Unmanned Aerial Vehicles* (Reston, VA: American Institute of Aeronautics and Astronautics, Inc., 2004), 95.

4. Newcome, *Unmanned Aviation*, 97–98.

5. Leila Hudson, Colin S. Owens, and Matt Flannes, “Drone Warfare: Blow-back from the New Way of War,” *Middle East Policy Council* 18 (2011): 123–24.

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7. Mazzetti, *The Way of the Knife*, 266.

8. Peter Bergen, "Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing," testimony presented before the U.S. Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Human Rights, April 23, 2013. www.judiciary.senate.gov/hearings/hearing.cfm?id=b01a319ecae60e7cbb832de271030205.

9. Patrick B. Johnston, "Does Decapitation Work? Assessing the Effectiveness of Leadership Targeting in Counterinsurgency Campaigns," *International Security* 36, no. 4 (2012): 47–79; Patrick B. Johnston and Anoop K. Sarbahi, "The Impact of U.S. Drone Strikes on Terrorism in Pakistan and Afghanistan," unpublished manuscript, July 14, 2013. <http://patrickjohnston.info/materials/drones.pdf>.

10. See, e.g., "Does Decapitation Work?"; Bryan C. Price, "Targeting Top Terrorists: How Leadership Decapitation Contributes to Counterterrorism," *International Security* 36, no. 4 (2012), 9–46; Michael Tiernay, "Killing Kony: Leadership Change and Civil War Termination," *Journal of Conflict Resolution* (forthcoming).

11. Price, "Targeting Top Terrorists," 11–12.

12. Johnston, "Does Decapitation Work?" 62–69.

13. Data on drone strikes and militant leaders killed in Pakistan were accessed online at <http://natsec.newamerica.net/drones/pakistan/analysis> (accessed May 12, 2014).

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17. Kimball, *Nixon's Vietnam War*, 126; Young, *The Vietnam Wars*, 238.

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19. Young, *The Vietnam Wars*, 237.

20. President Nixon's Speech on Cambodia, April 30, 1970, *Public Papers of the Presidents of the United States: Richard Nixon*, 1970, 405–409.

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22. Ely, *War and Responsibility*, 32–33; Congressional Research Service, *Congressional Restrictions on U.S. Military Operations in Vietnam, Cambodia, Laos, Somalia, and Kosovo: Funding and Non-Funding Approaches*, January 16, 2007.

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66. Harold Hongju Koh, Legal Advisor U.S. Department of State, Testimony before the Senate Foreign Relations Committee, June 28, 2011. <http://www.state.gov/s/l/releases/remarks/167250.htm>.

67. Scott Shane, "Debating a Court to Vet Drone Strikes," *New York Times*, February 8, 2013. <http://www.nytimes.com/2013/02/09/world/a-court-to-vet-kill-lists.html?pagewanted=all>. See also Robert Chesney, Jack Goldsmith, Matthew Waxman, and Benjamin Wittes, "A Statutory Framework for Next-Generation Terrorist Threats," Hoover Institution. <http://www.scribd.com/doc/127191153/A-Statutory-Framework-for-Next-Generation-Terrorist-Threats>.

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69. See, e.g., Mason Druksman, *Wayne Morse: A Political Biography* (Portland: Oregon Historical Society Press, 1997), 401–36; Bill Hogan, “Alone on the Hill,” *Mother Jones*, September 20, 2001 (interview with Congresswoman Barbara Lee). <http://www.motherjones.com/politics/2001/09/alone-hill>.

Chapter Eleven

1. I was in Pakistan to make a film on Pakistan’s own “war on terror” against the TTP for Britain’s Channel 4 News. The military embed was the only means by which I was able officially to enter Waziristan. In terms of restrictions applied, the embeds were similar to those I had carried out with the British armed forces in Iraq and elsewhere, although the restrictions were more onerous than those imposed by the US military.

2. Between 2010 and 2013 I was a senior reporter with the bureau, where I led its investigations team, examining aspects of the US covert War on Terror.

3. “Nine Killed in US Drone Attack on Militants,” Sky News, May 9, 2009. <http://news.sky.com/story/692139/nine-killed-in-us-drone-attack-on-militants> (accessed June 29, 2013).

4. The maximum number allows for the maximum range of possible additional drone strikes in Yemen. All casualty estimates unless otherwise stated are via the Bureau of Investigative Journalism’s (TBIJ) “Covert War on Terror: the Datasets.” <http://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/> (accessed January 20, 2015).

5. The office of the UN Special Rapporteur on Extrajudicial Killings has contested since 2003 that all such strikes outside the hot battlefield are potentially outside international law. Additionally, it has been argued that while strikes against al-Qaeda and its allies might be covered by the 2001 Authorization for the Use of Military Force passed by the US Congress, the majority of US covert drone strikes are in fact now against insurgent groups unconnected to the events of 9/11.

6. Justin Elliott et al., “Interactive: How Obama Drone Death Claims Stack Up,” *ProPublica*, June 18, 2012. <http://www.propublica.org/special/how-obama-drone-death-claims-stack-up> (accessed June 24, 2013). The graphic illustrates how anonymous officials often contradict each other. While some claim no more than thirty civilian deaths between 2008 and 2011, another official reports thirty deaths just in the year from August 2009. A third source insists that no civilian casualties occurred after May 2010, while others have stated instead that no civilian deaths occurred after September 2010.

7. Opening remarks of Senate Select Committee on Intelligence Chairman Senator Dianne Feinstein for confirmation hearing of John Brennan, Febru-

ary 7, 2013. Transcript. <http://www.whatthefolly.com/2013/02/11/transcript-sen-dianne-feinsteins-opening-statement-on-the-nomination-of-john-brennan-as-the-next-cia-director/> (accessed June 24, 2013).

8. "Transcripts: Segment of Brennan Confirmation Hearing Aired," CNN, February 7, 2013. <http://transcripts.cnn.com/TRANSCRIPTS/1302/07/cnr.14.html> (accessed June 30, 2013).

9. Brennan has continued to develop this theme. In a June 2013 interview he described as "intentional misrepresentations" reports of high civilian death counts from covert drone strikes. Reid Cherlin, "Obama's Drone-Master," *GQ*, June 17, 2013. <http://www.gq.com/news-politics/big-issues/201306/john-brennan-cia-director-interview-drone-program?currentPage=1> (accessed June 24, 2013).

10. President Obama's Google town hall address of January 31, 2012, transcript by this author: Chris Woods, "Analysis: Obama Outs CIA Drone Campaign—But Do His Words Add Up?" *TBIJ*, February 1, 2012. <http://www.thebureauinvestigates.com/2012/02/01/analysis-obama-outs-secret-cia-drone-campaign-but-do-his-words-add-up/> (accessed June 29, 2013).

11. Speech by President Barack Obama at National Defense University, Washington DC, May 23, 2013, transcript as issued by the White House. <http://www.npr.org/2013/05/23/186305171/transcript-obama-addresses-counterterrorism-drones> (accessed June 24, 2013).

12. CIA director John Brennan has, however, indicated that he would like to see such data published. In postconfirmation correspondence with the SSCI he noted that "to the extent that U.S. national security interests can be protected, the U.S. Government should make public the overall numbers of civilian deaths resulting from U.S. strikes targeting al-Qa'ida." John Brennan, "Written Follow-up Answers to SSCI Hearing." <http://www.intelligence.senate.gov/130207/posthearing.pdf> (accessed June 24, 2013).

13. The definition of "civilian" in the context of the US targeted-killing campaign remains highly controversial. Even where known militants are killed beyond the battlefield, a strong body of legal opinion holds that under international human rights law and the laws of war they must be defined as civilians rather than as combatants. The US government strongly asserts the legality of its campaign. However, it refuses to release legal opinions on which such claims are based, and no US federal court has yet ruled on the issue. This paper refers to those individuals self-reported by communities as being civilians and takes no position on the legality or otherwise of the targeted killing of alleged militants.

14. E.g., "'The numbers cited by this organization are way off the mark,' the official told CNN. The official spoke on condition of anonymity because of the sensitivity of the drone program." Pam Benson and Elise Labott, "US Denies Report Alleging Drone Strikes Kill 160 Kids in Pakistan," CNN. http://articles.cnn.com/2011-08-12/world/pakistan.us.drone.strikes_1_drone-strikes-drone-campaign-drone-program?_s=PM:WORLD (accessed June 29, 2013).

15. Scott Shane, "CIA Is Disputed on Civilian Toll In Drone Strikes," *New York Times*, August 11, 2011. http://www.nytimes.com/2011/08/12/world/asia/12drones.html?pagewanted=3&hp&_r=0 (accessed June 29, 2013).

16. Chris Woods, "Attacking the Messenger: How the CIA Tried to Undermine Drone Study," TBIJ, August 12, 2011. <http://www.thebureauinvestigates.com/2011/08/12/attacking-the-messenger-how-the-cia-tried-to-undermine-drone-study/> (accessed June 29, 2013).

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18. CIA media briefing August 2011, leaked to the author.

19. While TBIJ publishes a range both for overall casualties and for reported civilian deaths, its preferred reference point is the minimum reported casualty figure in each field.

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22. "The Drone War in Pakistan," New America Foundation. <http://natsec.newamerica.net/drones/pakistan/analysis> and Bill Roggio (accessed June 29, 2013). "Charting the Data for US Air Strikes in Pakistan, 2004–2013," *Long War Journal*. <http://www.longwarjournal.org/pakistan-strikes.php> (accessed June 29, 2013).

23. Christopher Rogers, "Civilian Harm and Conflict in Northwest Pakistan," Center for Civilians in Conflict (formerly Civic), October 20 2010. http://civiliansinconflict.org/uploads/files/publications/civilian_harm_in_nw_pakistan_oct_2010.pdf (accessed June 29, 2013).

24. Professors James Cavallaro and Sarah Knuckey, "Living under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan," Stanford Law School/NYU School of Law, September 2012. <http://livingunderdrones.org/wp-content/uploads/2012/10/Stanford-NYU-LIVING-UNDER-DRONES.pdf> (accessed June 29, 2013).

25. Jilani was addressing the Pakistan Senate's Foreign Affairs Committee on February 9, 2013, with his comments widely reported, e.g., "Pakistan Urges US to End Drone Strikes," *Al Jazeera English*, February 8, 2013. <http://www>

.aljazeera.com/news/asia/2013/02/201328144014811658.html (accessed June 29, 2013).

26. Ben Emmerson QC, "Statement of the Special Rapporteur Following Meetings in Pakistan," issued by the Office of the UN High Commissioner for Human Rights, March 14 2013. <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13146&LangID=E> (accessed June 29, 2013).

27. Chris Woods, "Leaked Report Shows High Civilian Toll from US Drone Strikes," Salon/ TBIJ, July 22, 2013. http://www.salon.com/2013/07/22/leaked_report_shows_high_civilian_death_toll_from_cia_drone_strikes/.

28. Peshawar High Court Writ Petition no. 1551-P/2012, judgment issued May 9, 2013. <http://www.thebureauinvestigates.com/2013/05/09/pakistani-court-rules-cia-drone-strikes-are-illegal-and-war-crimes/> (accessed June 29, 2013).

29. Video of John Brennan's speech at <http://www.c-spanvideo.org/program/AdministrationCo>. Transcript of relevant section at "U.S. Claims of No Civilian Deaths Are Untrue," TBIJ, July 18, 2011. <http://www.thebureauinvestigates.com/2011/07/18/washingtons-untrue-claims-no-civilian-deaths-in-pakistan-drone-strikes/> (accessed June 29, 2013).

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31. For a chronology of prior claims in 2011 of zero civilian casualties by US officials to Bloomberg, the *Los Angeles Times*, and the *National Journal* see Chris Woods, "The CIA Drone Strike That Rewrote the Rules," TBIJ. <http://www.thebureauinvestigates.com/2011/07/18/the-cia-drone-strike-that-rewrote-the-rules/> (accessed June 29, 2013).

32. "This Week Transcript: John Brennan Interview with George Stephanopoulos," ABC News April 29, 2012. <http://abcnews.go.com/Politics/week-transcript-john-brennan/storynew?id=16228333&page=4#.Uc7DpfnVApk> (accessed June 29, 2013).

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35. For a full summary of this episode, see Chris Woods, "New Questions over CIA Nominee Brennan's Denial of Civilian Drone Deaths," TBIJ, January 9, 2013. <http://www.thebureauinvestigates.com/2013/01/09/new-questions-over-cia-nominee-john-brennans-denial-of-civilian-drone-deaths/> (accessed June 29, 2013).

36. Wali Mohammad interview by Ahmed Wali Mujeeb for “Inside Pakistan’s Drone Country,” BBC, October 4, 2012. <http://www.bbc.co.uk/news/world-asia-india-19714959> (accessed June 29, 2013).

37. Ismail Khan and Dilawar Khan Wazir, “Night Raid Kills Nek, Four Other Militants: Wana Operation,” *Dawn*, June 19 2004. <http://archives.dawn.com/2004/06/19/top1.htm> (accessed June 29, 2013).

38. Mark Mazzetti, “A Secret Deal on Drones, Sealed in Blood,” *New York Times*, April 6, 2013. http://www.nytimes.com/2013/04/07/world/asia/origins-of-cias-not-so-secret-drone-war-in-pakistan.html?pagewanted=all&_r=0 (accessed June 29, 2013). A former senior Pakistan intelligence official with direct knowledge of the attack later insisted to this author that Mazzetti’s report is an overstatement, since Nek Mohammad was responsible for logistical support to al-Qaeda. However, he accepted that Pakistan benefited significantly from the strike.

39. Dr. Christine Fair, “The Problems with Studying Civilian Casualties from Drone Usage in Pakistan: What We Can’t Know,” *Monkey Cage*, August 17, 2011. <http://themonkeycage.org/blog/2011/08/17/the-problems-with-studying-civilian-casualties-from-drone-usage-in-pakistan-what-we-can%E2%80%99t-know/> (accessed June 29, 2013).

40. See, e.g., Bob Dietz, “The Last Story: Hayatullah Khan,” Committee to Protect Journalists, September 20, 2006. <https://www.cpj.org/reports/2006/09/khan.php> (accessed June 29, 2013).

41. Pakistan has appeared in the top five most dangerous nations for journalists every year since 2005, with forty-four journalists known to have been murdered during that time. Data from Committee to Protect Journalists. <https://www.cpj.org/killed/asia/pakistan/> (accessed June 29, 2013).

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43. “In response to questions, U.S. officials in Washington, who spoke on the condition of anonymity because of the sensitivity of the matter, said it was a Defense Department aircraft, either a drone or a fixed-wing warplane, that fired on the truck.” Sudarsan Raghavan, “When US Drones Kill Civilians, Yemen’s Government Tries to Conceal It,” *Washington Post*, December 25, 2012. http://www.washingtonpost.com/world/middle_east/when-us-drones-kill-civilians-yemens-government-tries-to-conceal-it/2012/12/24/bd4d7ac2-486d-11e2-8af9-9b50cb4605a7_print.html (accessed June 29, 2013).

44. See, e.g., pp. 9–10, Alkarama and Center for Constitutional Rights, “Drone Wars: The Constitutional and Counterterrorism Implications of Tar-

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