

LOFTIER STANDARDS FOR THE CIA'S REMOTE-CONTROL KILLING

Statement for the House Subcommittee on National Security & Foreign Affairs

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... [CIA] sharpshooters killed eight people suspected of being militants of the Taliban and Al Qaeda ... in a compound that was said to be used for terrorist training. Then, the job in North Waziristan done, the CIA officers could head home from the agency's Langley, Va., headquarters, facing only the hazards of the area's famously snarled suburban traffic.¹

I. INTRODUCTION

The Bush administration started using drones to target and kill leaders of al Qaeda and the Taliban.² Since President Obama has embraced this targeted killing, the number of strikes has soared.³ The Obama administration has even added an American citizen who lives in Yemen—Anwar al-Awlaki—to the list of persons targeted for death.⁴

Killer drones are the future of warfare. The drone's extraordinary capabilities have expanded our government's range for finding, tracking, and destroying human targets. As a result, targeted killing—whether by the CIA or anyone else—is controversial.

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¹ Scott Shane, *C.I.A. to Expand Use of Drones in Pakistan*, N.Y. TIMES, Dec. 3, 2009.

² Eric Schmitt & Mark Mazzetti, *Bush Said to Give Orders Allowing Raids in Pakistan*, N.Y. TIMES, Sept. 10, 2008, (reporting that, by 2008, the CIA Predator campaign in Pakistan had been proceeding for several years).

³ See Christopher Drew, *Drones are Weapon of Choice for Fighting Qaeda*, N.Y. TIMES, March 16, 2009 (reporting several dozen CIA Predator attacks preceding March 2010); Christopher Drew, *Drones Are Playing a Growing Role in Afghanistan*, N.Y. TIMES, Feb. 19, 2010 (reporting conclusion of independent researchers that CIA conducted 69 drone attacks in Pakistan during 2009 and the beginning of 2010).

⁴ Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, APR. 6, 2010 (reporting al-Awlaki was approved for targeting because he is a recruiter for Al Qaeda).

Proponents contend it is legal to use armed drones in self-defense or as part of an armed conflict under international humanitarian law (IHL). Critics decry targeted killing as extra-judicial assassination.

I believe IHL covers the CIA's drone campaign, particularly in parts of Pakistan. The Obama administration, of course, shares this belief.⁵ I also believe that operational parts of al Qaeda and the Taliban are civilians "directly participating in hostilities." Until they renounce violence, they are functional combatants, subjecting them to American targeting under the law. I am confident a consensus will emerge that, under some circumstances, targeted killing of suspected terrorists is legal. Ahead of that consensus, I try to shape specific limits on the level of certainty for targeting and on the standard for independent review of strikes.

I note but do not examine the implications of having a civilian agency involved in lethal action. Some say the Defense Department should have an exclusive role in America's targeted killing. But this is not the first time the CIA has been asked to kill, and I assume the CIA will continue to take a piece of the high-profile action on the drone. While CIA officers are unlikely to wear uniforms and to follow other military formalities, they take it for granted, whether engaged in intelligence gathering or in covert action, that they will not be treated as privileged belligerents (POWs) if al Qaeda captures them. They have more basic concerns.

Several IHL principles should moderate the CIA's targeted killing. (Similar principles also apply if the legal justification is self-defense separate from an armed conflict.) First, IHL requires *distinction*, separating combatants from civilians and precluding the targeting of peaceful civilians. Second, IHL insists that *military necessity* justify all attacks: an attack should be reasonably expected to create a concrete and direct military advantage. Third, IHL requires *proportionality*: attacks must not cause excessive collateral damage. To give effect to these principles, IHL also speaks of *precaution*, which requires all feasible measures to minimize harm to peaceful civilians and property.

⁵ See Press Release of the American Society of Int'l Law, *U.S. State Department Adviser Lays Out Obama Administration Position on Engagement*, "Law of 9/11," March 25, 2010 (supplying partial transcript of public remarks of Harold H. Koh, State Department legal adviser, who stated that, as part of its armed conflict with al Qaeda, the United States "has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al Qaeda leaders who are planning attacks").

II. CONTROLLING THE CIA'S DRONES

The CIA should have standards for identifying targets and for carrying out strikes. Depending on one's perspective, these controls can be viewed as developing general IHL principles or as departing from rules that apply in traditional armed conflicts.

First, the agency should impose a very high standard in identifying targets. Except in extraordinary circumstances, the agency may strike only if it is satisfied beyond a reasonable doubt that its target is a functional combatant of al Qaeda or a similar terrorist group. Those who believe that reasonable doubt carries too much baggage from criminal law or that it inappropriately mixes criminal justice with war should substitute another label for a very high level of certainty. My idea, however labeled, is for the drone operator to be really sure before pulling the trigger. Drone strikes, in effect, are executions without any realistic chance for appeal to the courts through *habeas corpus* or other procedures.

Second, to ensure the inter-related goals of accuracy, legality, and accountability, all CIA targeted killings should be subject to independent review by the CIA's Inspector General that is as public as national security permits.

A. *Distinction Beyond Reasonable Doubt*

Imagine two American fighters. A Marine is on the ground in the Helmand province of Afghanistan while a drone pilot is in the United States, many miles away from the action. These two Americans, soldier and pilot, are both on the watch for bad guys. The two Americans try their best to follow the rules—which include IHL and any rules of engagement (ROEs) produced back at the Pentagon and the CIA.

The soldier on the ground must often make quick decisions based on inadequate information. The enemy's practice of hiding among peaceful civilians makes it quite difficult for him to determine who is a legal target—especially when civilians carry weapons for protection from thieves, bandits, and insurgents.⁶ So what does the

⁶ See Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan* in THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS 307, 313 (2009) (“Enemy forces wore no uniforms or other distinctive clothing that allowed immediate visual identification. Merely being armed was an insufficient indicator, as Afghans in remote areas often carry weapons for protection ...”); see generally Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT'L L. 683, 751

Marine do about another man walking down the street with an AK-47? “When in doubt,” one not so imaginary Marine says about this situation, “empty the magazine.”⁷ This response is wrong as a matter of law, but it highlights circumstances that must be considered in any realistic assessment of the soldier’s legal obligations.

A drone pilot—supplied with multiple sources of intelligence, armed with the latest technology, and located thousands of miles from the enemy—must be more circumspect. Her instructions to kill are based on a deliberative process. Once the drone is in place, the pilot and a team of analysts may be able to spend hours studying the ground to confirm the target’s identity.

Because the soldier and the pilot operate in different circumstances, the law does not expect the same from them. The law expects much more from the drone pilot than from the soldier on the ground.⁸ Because precise technology increases the CIA’s ability to control its force, IHL imposes a corresponding duty to do so.⁹

But just telling the drone pilot that she must be more careful with her missiles than the soldier must with his gun is not enough. A more precise instruction is necessary: targeted killing by drone may go forward only where it is clear beyond reasonable doubt that the target is legitimate according to the facts and the law. Before firing the missile, the drone pilot (or whoever else gives the order to kill) should be quite certain that the target functions as a member of al Qaeda who plans, commands, or carries out attacks.

A high level of certainty is consistent with America’s official stance. In a public defense of drone attacks, the State Department’s legal adviser, Harold Koh, remarked:

(2009) (discussing the practice of insurgent and terrorist groups blending into civilian populations to take advantage of civilian immunity from direct attack).

⁷ Email from [name withheld by request], retired Sergeant, U.S. Marine Corps, to Christopher Proczko, student, William Mitchell College of Law (Sept. 22, 2009, 09:47 CST).

⁸ Cf. Michael N. Schmitt, *Precision Attack and International Law*, 87 INT’L REV. RED CROSS 445, 455 (2005) (“[T]hose with advanced [intelligence, surveillance, and reconnaissance] will have a much more difficult time convincing others that an attack striking civilians and civilian objects was a case of mistaken identity rather than an indiscriminate act of recklessness (or intent).”).

⁹ Dakota S. Rudesill, *Precision War and Responsibility: Transformational Military Technology and the Duty of Care Under the Laws of War*, 32 YALE J. INT’L L. 517, 532 (2007).

In U.S. operations against al Qaeda and its associated forces – including lethal operations conducted with the use of unmanned aerial vehicles – *great care* is taken to adhere to these principles [of distinction and proportionality] in both planning and execution, to ensure that *only legitimate objectives are targeted* and that collateral damage is kept to a minimum.¹⁰

Strictly speaking, Koh’s remarks do not address the CIA. But his speech was obviously intended to reassure an uncertain audience about CIA activities. In line with Koh’s comments, recall the general IHL rule that targeting should be reasonable based on the circumstances. So my proposal for a high level of certainty in CIA targeting is a straightforward application of IHL’s rule of reason based on specific facts. Factored into the equation are the multiple sources of intelligence, the time for deliberation, and the relative safety of the drone pilot.

The principle of military necessity reinforces my conclusion. This principle condemns an attack if it will cause suffering not reasonably necessary to achieve a concrete and direct military advantage. With drones, however, force protection is largely irrelevant because the air vessels are unmanned. Therefore, unless the drones are seen as part of a larger American military force, targeted killing by this new weapon satisfies military necessity only if it causes sufficient harm to the enemy—and it does not create a disproportionate number of new recruits for al Qaeda and the Taliban.

There are, of course, exceptions to my general rule for CIA targeting. I summarize these exceptions under the label of extraordinary circumstances. The target, for example, may play an irreplaceable role in al Qaeda. A drone operator may see a person on the screen who is probably Bin Laden—but not Bin Laden beyond any doubt. Even so, the military advantage of killing Bin Laden, compared to a mid-level terrorist, may justify the additional risk of mistakenly harming a peaceful civilian. Targeting the man at the top, it turns out, does not have to be as certain. Yet the relevant agency (whether the CIA or the Air Force) bears the burden of justifying any departure from the default rule of heightened certainty. This burden, of course, is met within the internal due process of the Executive branch, not in any external due process before a court.

¹⁰ Press Release, *supra* note 5, at 2-3 (emphasis added).

B. Precaution and Independent, Ex Post Review

IHL insists that attackers take all feasible measures to get things right. Despite the agency's reputation for playing fast and loose with the law, CIA officials must be acutely aware that, for many observers, targeted killings come close to prohibited assassinations. To stay safe, CIA officials seek both political and legal cover. From past lessons on controversial programs, CIA officials have learned to obtain presidential authorization in writing, to brief the oversight committees, and to obtain legal opinions. So, I bet President Obama has blessed the CIA drone strikes; the oversight committees have not been kept in the dark; the CIA has developed internal procedures; and the agency has presented these procedures to the Justice Department's Office of Legal Counsel for approval.

Because the concept of precaution is so vague, the procedures to fulfill this IHL duty might reasonably take many forms. If experience from the classified setting shows a particular set of procedures results in too much collateral damage, then the CIA must adopt stricter procedures. This is a "feedback loop" the Defense Department is accustomed to in its "after-action" studies from prior bombing campaigns. The CIA must do the same.

Whatever the CIA's standards and procedures, they are much more likely to be enforced when the decision-maker is required to explain her decision to an independent authority at a later time. For CIA drone strikes, the interest in accountability is acute given the veil of secrecy over CIA activities and the specter that targeted killing could become distorted into random acts of murder. At the same time, the CIA has an interest in protecting sources and methods for national security. The question, in reconciling democracy with secrecy, is what sort of accountability best balances these interests.

Answering that question requires a leap from IHL. The military model is distinct for several reasons: (a) a traditional armed conflict requires hundreds of people to make decisions, often under stress, fatigue, and danger; (b) many decisions are straightforward because the enemy is easy to identify (*e.g.*, it is obviously legal for a soldier to shoot at an enemy tank with no civilians near it); (c) much of the information needed to second-guess these decisions is covered in the rubble of war; and (d) the self-evident boundaries to the conflict allay concerns that supposed combatants will be killed anywhere in the world in the name of national security.

The CIA's drone campaign, to repeat, differs from traditional armed conflict. First, the limited number of strikes means it is practicable to subject every strike to independent investigation. Second, by definition, all strikes have lethal consequences, and the danger from a misfired missile is much higher than the danger from a misfired pistol. Third, the information to evaluate these strikes stays available: video, audio, cables, and other documents. All this information provides for meaningful *ex post* review.

Fourth, and most important, since the CIA is given leeway to operate in the shadows, a countervailing check is needed. Even if the Obama administration is carrying out targeted killing accurately and wisely, the potential for abuse stays with us. How many countries are within the killing field? How many more countries are to come? Will Predators ever be used on American territory? As a check against abuses, IHL requires feasible precautions.

Who should conduct this review of drone strikes? And what should the scope of review be? The reviewing entity should not substitute its judgment, but should patrol against clearly unreasonable judgments. It is review, not micro-management. For the right balance, American administrative law is useful.

Administrative law tries both to ensure that an agency follows the law and to respect the agency's zone for reasonable discretion. The doctrine of "reasoned decision-making," in particular, provides a template for this delicate balance. Using this template, a court examines whether an agency made its decision based on all "relevant factors" or whether the agency made a "clear error of judgment."¹¹ We can also call this examination the "hard-look." Hard-look tries to learn what an agency *actually* considered in making its decision.¹² The court, in this sort of review, looks for an agency's contemporaneous explanation of its action.¹³ An agency is thus prevented from using post-hoc rationalizations for decisions reached on less defensible grounds.

On CIA drone strikes, the hard-look is a good fit, particularly on target selection done before an attack. To select a target, the agency

¹¹ For a seminal case on this point, *see, e.g.*, *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹² *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (declaring that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based").

¹³ *See, e.g.*, *State Farm*, 463 U.S. at 50 (rejecting explanation proffered by agency counsel during appellate proceedings because the record indicated the agency itself had not relied upon this explanation in making its decision).

must seek and assess all available intelligence. This assessment should be laid out in exhaustive findings that include: (a) grounds for concluding the target is a functional combatant; (b) any grounds for doubting this status; (c) whether killing the target creates a concrete and direct military advantage; (d) whether that advantage is sufficient to justify any risk of collateral damage, and if so, how much; and (e) any military or political disadvantages that might result from a strike. The hard-look insists that the agency memorialize its decision-making process; at the same time, it applies a deferential standard of clear error to outcomes in the field of armed conflict.

On the first question of *who* should conduct this sort of review, I propose the CIA's IG. As appropriate, the IG could recommend internal discipline, compensation to unwarranted victims of a strike, or, in an extreme case of abuse, referral to the Justice Department for criminal proceedings. The IG should also be involved in reviewing the CIA's procedures on target selection and execution of attacks. The IG's due process, so to speak, substitutes for what otherwise comes from the courts. To enhance accountability, IG reports could be made public. The CIA could thus acknowledge a general role in drone strikes without mentioning particular countries. This would balance the interests of accountability against the CIA's common need to keep secret the role of foreign governments in assisting American intelligence.

III. ONE PROCESS FOR ALL

The government's power to kill must be carefully controlled—or it could turn into a tyranny worse than terrorism. The traditional control, however, does not work for targeted killing; only the fanciful would propose a full judicial trial in which the government and the suspected terrorist make opening statements, admit evidence, and argue the suspect's fate to the jury. So a new model must be developed which recognizes that fighting terrorism is as much war as it is law enforcement. For that reason, I tend to propose hybrids and transplants.

IHL does not consider citizenship in distinguishing combatants from civilians. In traditional conflicts, the United States has had citizens switch to the other side. Switched, they become targets just like foreign combatants. Nonetheless, news that the Obama administration placed at least one American citizen on a hit list

caused some outrage.¹⁴ The outrage, it seems, stems from either a mistaken intuition or a flawed legal objection.

The intuition is that there is something especially wrong about the American government killing Americans. People, no doubt, treat members of their own group better than outsiders; to kill someone, it helps to label him an “outsider.” Yet, at a higher morality, the American government, independent of other factors, should not feel freer to kill non-Americans. The flip-side, morally speaking, is that the American government has just as much standing to kill Americans as non-Americans.

The legal objection is that killing an American by drone strike violates due process under the United States Constitution. This objection depends on two misplaced premises. The first is that extra-territorial actions which the American government takes against non-citizens do not implicate due process. I argued in an earlier piece on targeted killing that the Supreme Court’s decision in *Boumediene v. Bush* suggests that this premise is mistaken.¹⁵ *Boumediene* leads to the conclusion that the United States Constitution applies overseas where it is practicable.¹⁶ At bottom, the right to due process is the right to fair and reasonable procedures.¹⁷ For CIA activities, the due process might come from some combination of CIA lawyers, the Inspector General, and the review boards within the CIA’s clandestine service.

The second premise is that due process requires a judicial trial before the United States may kill one of its own citizens. In a law-

¹⁴ See, e.g., *Drones, Targeted Killings and the Fifth Amendment*, ACLU BLOG OF RIGHTS, Feb. 4, 2010, available at <http://www.aclu.org/blog/national-security/drones-targeted-killings-and-fifth-amendment> (describing as “downright scary” that Director of National Intelligence “admitted that the Obama administration reserves the right to order the assassination of Americans abroad who are suspected of involvement in terrorism”); Glen Greenwald, *Presidential assassinations of U.S. citizens*, SALON, Jan. 27, 2010, available at http://www.salon.com/news/opinion/glenn_greenwald/2010/01/27/yemen (“Barack Obama, like George Bush before him, claimed the authority to order American citizens murdered ...”).

¹⁵ See Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 429-37 (2009) (contending that, properly understood, *Boumediene v. Bush*, 553 U.S. 723 (2008), subjects the United States government to due-process restrictions wherever it acts in the world).

¹⁶ See *id.* at 434-35 (discussing *Boumediene* majority’s functionalist approach to the availability of habeas corpus for detainees at Guantanamo Bay).

¹⁷ See, e.g., See Gary Lawson, Katharine Ferguson, & Guillermo A. Montero, “*Oh Lord, Please Don’t Let Me Be Misunderstood!*” *Rediscovering the Mathews v. Eldridge and Penn Central Frameworks*, 81 NOTRE DAME L. REV. 1, 14 (2005) (concluding, based on extensive survey of centuries of case law, that the touchstone of procedural due process is “a search for what procedures are fair under the circumstances of each particular case”).

enforcement context, the trial requirement holds true except where the target poses an immediate and severe threat. It does not hold true, however, under IHL. During World War II, for instance, it was legal for American soldiers—without a judicial trial—to fire on American citizens who fought for the Nazis.

Since World War II, the American courts have developed various models of due process: a due process of prisons;¹⁸ a due process for discipline in schools;¹⁹ and a due process for detaining American citizens as enemy combatants.²⁰ Our nation is now developing a due process for targeted killing by drone. If non-American lives are just as important as American lives, then one model of due process (or “precaution” to use an IHL term), should apply across the board. In negative terms, if the controls are not good enough for killing Americans, then they are not good enough for killing Pakistanis, Afghans, or Yemenis.

IV. CONCLUSION

International humanitarian law can be developed into specific regulations for the CIA’s targeted killing. Accordingly, the drone operator must be sure beyond a reasonable doubt that the trigger is being pulled on a functional enemy combatant. In addition, she must conclude that the requirements of military necessity and proportionality have been met. Afterward, the CIA’s Inspector General must review each CIA drone strike, including the agency’s compliance with a checklist of standards and procedures.

A program that establishes a very high certainty for targeting as well as a hard-look after each strike will be fair and reasonable whether the people in the cross-hairs are Americans or citizens from other countries. In the language of IHL, these are feasible precautions for the remote-control weapons of the new century.

¹⁸ *Sandin v. Conner*, 515 U.S. 472 (1995) (holding that liberty interests protected within prison are “generally limited to freedom from restraint ... [that] imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life”).

¹⁹ *Goss v. Lopez*, 419 U.S. 565 (1975) (holding that due process required at least an “informal give-and-take between student and disciplinarian” in connection with a short suspension of a student from public school).

²⁰ *Hamdi v. Rumsfeld*, , 533-34 (2004) (plurality) (holding that detainee had the right to notice and a fair opportunity to rebut enemy combatant status before a neutral decisionmaker; intimating that the government might invoke a rebuttable presumption in favor of its evidence and might also use hearsay).