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## Known and Unknowns: President Obama's Lethal Drone Doctrine

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### *Abstract*

*Under President Barack Obama, the use of armed unmanned aerial vehicles (UAVs) in Pakistan and Yemen has become an increasingly important tool in America's war against al-Qaida and its associated forces. While much remains unknown, members of the Obama administration have answered some of the major questions about the legality, ethics, efficacy, and decision-making behind the CIA's covert drone strikes.*

For President Clinton it was the cruise missile. For President Obama, it is the drone. Since taking office, US President Barack Obama has decidedly embraced armed unmanned aerial vehicles (UAVs), or drones, as his tool-of-choice for targeting and killing enemy combatants. Indeed, for four years under a cloud of secrecy, his administration has exponentially expanded the scope and frequency of the jointly administered Central Intelligence Agency (CIA) - Joint Special

Operation Command (JSOC) covert drone campaign in Pakistan and Yemen.<sup>1</sup> According to independent estimates, the CIA has conducted a total of 351 drone strikes in Pakistan (48 of which were under President Bush), 53 in Yemen (1 under President Bush), and 2 in Somalia as part of its global counterterrorism strategy.<sup>2</sup>

In recent weeks, however, the Obama administration has been under a firestorm of criticism for its opaque lethal drone campaign, with Republicans and Democrats alike demanding more information on how and when the government deploys these weapons. While the President has remained relatively tight-lipped on the topic, over the past two years, he, his legal and intelligence teams, and counterterrorism adviser (now

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1. These drone strikes are different than the use of armed drones by the US Air Force in Afghanistan, Iraq, and Libya as part of America's official military operations in those countries.

2. Tracking America's Drone War, *Washington Post*, <http://apps.washingtonpost.com/foreign/drones/>.

CIA director) have made a handful of detailed remarks to answer some of the major questions surrounding the use of lethal drones. These statements highlight both what is transparent, and what remains unsaid, or perhaps unresolved, about America's drone war.

## Who is the Target?

In a speech at the Wilson Center, then-counterterrorism adviser John Brennan identified the target of US drone-fired missile strikes as a member of al-Qaida, the Taliban, or associated forces that poses a significant and imminent threat – someone “who is an operational leader” or “an operative in the midst of actually training for or planning to carry out attacks against US persons or interests.”<sup>3</sup> President Obama, in a Google+ “Hangout” also named the target as “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.” According to Attorney General Eric Holder, U.S. citizens can be targeted if they meet these criteria.<sup>4</sup>

These statements seem to fit the definition of a “**personality**” strike – strikes targeting named, high-value terrorists who are known to be planning an attack. The administration has not spoken publicly on the contentious “**signature**” strikes – strikes targeting “groups of men who bear certain signatures, or defining characteristics associated with terrorist activity, but whose identities aren't known.”<sup>5</sup> Several major news outlets and investigative reporters contend that President Obama has largely expanded the use of drones to include these “pattern of life” targets, calling signature strikes the “hallmark” of his drone war.<sup>6</sup>

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3. John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, “The Efficacy and Ethics of U.S. Counterterrorism Strategy,” Remarks at the Woodrow Wilson International Center for Scholars (April 30, 2012), <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>. This speech is the most comprehensive outline of the Obama Administration's drone policy to date.

4. Eric Holder, Attorney General, Department of Justice, Address at Northwestern University School of Law, March 5, 2012. <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>;

5. International Human Rights and Conflict Resolution Clinic of Stanford Law School and the Global Justice Clinic at New York University School of Law, “Living Under Drones” Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan,” September 2012. <http://livingunderdrones.org/report/>

6. Daniel Klaidman, “Drones: How Obama Learned to Kill,” Daily Beast (May 28, 2012). <http://www.thedailybeast.com/newsweek/2012/05/27/drones-the-silent-killers.html>; Peter Bergen and Megan Braun,

What constitutes evidence of an imminent threat is also relevant. According to several sources, in addition to leaders of al Qaeda, armed UAVs have intentionally struck dozens of low-ranking foot soldiers. Whether the target must be a named individual, and how the administration decides what threats are imminent remain unclear.

## When Does the President Pull the Trigger?

In addition to the issue of who makes the so-called “kill list” is the question of the circumstances under which President Obama, who acts as the final decision-maker,<sup>7</sup> gives the authority to carry out a strike. Brennan defined these conditions as “when we believe that capturing the individual is not feasible” and when “we have a high degree of confidence that innocent civilians will not be injured or killed, except in the rarest of circumstances.”<sup>8</sup> In 2009, then CIA Director Leon Panetta said in an interview that “If there were any women or children we would not take the shot... that became a rule that we abided by.”<sup>9</sup> President Obama and his advisers have offered support for this policy, stating in several public remarks that civilian casualties are “exceedingly rare.”<sup>10</sup> Chair of the Senate Intelligence Committee Diane Feinstein reaffirmed last month that “the number of civilian casualties that have resulted from such strikes each year has typically been in the single digits.”<sup>11</sup>

Independent researchers have challenged this assertion, citing specific strikes that were ordered in areas with known civilian presences, for

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“Drone is Obama's Weapon,” CNN, September 19, 2012. <http://edition.cnn.com/2012/09/05/opinion/bergen-obama-drone/index.html>

7. President Obama signaled that he makes the final call on drone strikes in an interview with CNN's Jessica Yellin, September 5, 2012. <http://security.blogs.cnn.com/2012/09/05/obama-reflects-on-drone-warfare/>

8. Brennan, “The Efficacy and Ethics of U.S. Counterterrorism Strategy”; President Barack Obama, Interview with CNN's Jessica Yellin, September 5, 2012. <http://security.blogs.cnn.com/2012/09/05/obama-reflects-on-drone-warfare/>

9. Leon Panetta, Interview with NPR, February 03, 2013. <http://www.npr.org/templates/transcript/transcript.php?storyId=170970194>

10. President Barack Obama in a Google + Hangout, January 30, 2012. <http://www.whitehouse.gov/photos-and-video/video/2012/01/30/president-obama-s-googlehangout>.

11. She said she had the opportunity to look at figures obtained from the executive branch. Senator Diane Feinstein, CIA Confirmation Hearing, February 7, 2012. [http://www.youtube.com/watch?feature=player\\_embedded&v=CPZF960aVuA](http://www.youtube.com/watch?feature=player_embedded&v=CPZF960aVuA)

example, a 2009 strike in Yemen.<sup>12</sup> The New American Foundation is one of several independent organizations that estimate drone casualties, and records that out of 2,424 to 3,967 people killed by drone strikes in Pakistan and Yemen since 2004, 276-368 were civilians.<sup>13</sup>

Journalists explain that the administration's estimates differ considerably from those of other sources because of the CIA's "guilt by association" method for counting casualties. Based on off-the-record conversations with administration officials, they explain that the CIA "counts all military-age males in a strike zone as combatants... unless there is explicit intelligence post-humously proving them innocent."<sup>14</sup>

This approach raises the question of whether the conditions under which the President orders a strike are as stringent as purported. That is, if unknown military-age males are not considered civilians, their presence in a potential strike zone may not change the calculus of whether to pull the trigger.

### Are Drone Strikes Legal?

Attorney General Eric Holder, General Counsels Harold Koh (State Department), Jeh Johnson (Defense Department), and Stephen W. Preston (CIA) have all delivered public statements on the legal framework for America's use of lethal UAVs.<sup>15</sup>

With respect to domestic law, the administration's legal team draw on two legislative bases

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12. Dexter Filkins, "What We Don't Know About Drones," *New Yorker*, February 7, 2013. <http://www.newyorker.com/online/blogs/comment/2013/02/john-brennan-and-the-truth-about-drones.html>

13. "The Year of the Drone," New America Foundation. <http://counterterrorism.newamerica.net/about/militants>

14. Jo Becker & Scott Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will," *New York Times*, May 29, 2012. <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-alqaeda.html?pagewanted=all>

15. See Eric Holder, Attorney General, Department of Justice, Address at Northwestern University School of Law, March 5, 2012. <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>; Jeh C. Johnson, General Counsel, Department of Defense, National Security Law, Lawyers and Lawyering in the Obama Administration, Address at Yale Law School, February 22, 2012. <http://www.cfr.org/national-security-and-defense/jeh-johnsons-speech-national-security-law-lawyerslawyering-obama-administration/p27448>; Harold K. Koh, Legal Advisor, Department of State, The Obama Administration and International Law, Address at the Annual Meeting of the American Society of International Law, March 25, 2010. <http://www.state.gov/s/l/releases/remarks/139119.htm> Stephen W. Preston, General Counsel, Central Intelligence Agency, "The CIA: Lawless Rogue or Regulated Business?" Address at Stanford Law School, February 21, 2012.

for the use of lethal drones: 1) the **US Constitution**, which empowers the President to protect the nation from any imminent threat of attack, and 2) the **Authorization to Use Military Force (AUMF)**, the joint resolution passed by Congress three days after 9/11, which grants the President the authority to use "all necessary and appropriate force" against those whom he determined "planned, authorized, committed or aided" the September 11th attacks, or who harbored said persons or groups. According to General Counsel Johnson, the administration interprets this authority to include people with a link to the terrorist attacks on 9/11 or "associated forces."<sup>16</sup>

Under international law, the administration draws on the principle of national **self-defense**, upheld in Article 51 of the UN Charter. Its posture is that the US is at war with al-Qaida, and in this ongoing conflict, has the right to use force without official consent of the local government to disrupt and prevent future attacks.

While the administration has allocated the most on-the-record time to the legal basis for its drone activity, these remarks have not sufficiently answered the myriad of legal questions posed both domestically and internationally. The US Congress appears most concerned with the legal basis for killing an American citizen, and has asked for access to US Department of Justice classified legal memos justifying these operations. Legal scholars have challenged the assertion that the AUMF covers today's drone activity, particularly as it expands to Somalia and Yemen. International bodies are demanding more information on the degree to which international humanitarian law and/or human rights law apply. In response to these recent cries for greater transparency, the administration has promised to reveal more about the legal rationale for drone strikes in the near future.

### Are Drone Strikes Ethical?

To make the moral argument for armed drone strikes, the administration maintains that its use of armed drones uphold the four law of war principles governing the use of force, or *jus in bello* – necessity, distinction, proportionality, and humanity.<sup>17</sup> Drones are **necessary**, they explain, because "their targets have definite military value" and **discriminating** insofar as only military objectives are targeted intentionally. Tar-

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16. He defines an associated force, as "(1) an organized, armed group that has entered the fight alongside Al Qaeda, and (2) a co-belligerent with Al Qaeda in hostilities against the United States or its coalition partners."

17. See footnote 15.

geted strikes conform to the principle of **proportionality** – “the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated military advantage” – given the precision of the technology. Lastly, drones conform to principle of **humanity** in that they do “not inflict unnecessary suffering.”<sup>18</sup> By meeting these four principles, they conclude that targeted strikes against al-Qaida terrorists are indeed just and ethical.

The aforementioned issues of signature strikes and civilian casualties raise the question of whether all drone strikes are in fact necessary, discriminating, proportional and humane. However, considering the armed UAV program within the context of other weapons the US could be launching in its war against al-Qaida places ethical questions in an important context.<sup>19</sup>

In addition to *jus in bello*, just war theory necessitates establishing criteria for *jus ad bellum*, the right to go to war, and *jus post bellum*, justice after a war. For example, *jus ad bellum* dictates that force may be used only as a last resort, after all feasible alternatives have been exhausted. *Jus post bellum* concerns questions of post war reparations and war crimes trials. These pre- and post-war facets are notably absent from the administration’s ethical justifications, perhaps in part because of the nebulous and unconventional nature of the war America is fighting.<sup>20</sup>

### Are They Effective?

The US National Strategy for Counterterrorism lists “Disrupt, Degrade, Dismantle, and Defeat al-Qaida and Its Affiliates and Adherents” as a primary objective.<sup>21</sup> To that end, President Obama and his advisers have communicated to the American people and the world that drone strikes – with their “surgical precision” and “laser like focus”<sup>22</sup> – are indeed effective. In

2011, President Obama boasted taking “twenty-two of the thirty top al-Qaida leaders” off the field.<sup>23</sup> In his remarks at the Wilson Center, Brennan affirmed that, “With the help of targeted strikes, we have turned al-Qaida into a shadow of what it once was. They are on the road to destruction.”<sup>24</sup>

While armed drones do effectively take out militants, the administration has yet to articulate how these strikes complement or bolster the nation’s long-term counterterrorism strategy and broader foreign policy objectives. Critics argue that drones are actually counter-productive in that they foster anti-American sentiment in Pakistan, facilitate recruitment to non-state armed groups, and motivate further violent attacks.<sup>25</sup> Some former and current government officials believe that the US relies too heavily on drone strikes at the expense of longer-term strategies to prevent conditions that foster international terrorism.<sup>26</sup> Indeed, President Obama’s increased reliance on drones raises questions on the direct impact of these strikes on al-Qaida’s effectiveness, criteria for the relative “success” of this campaign, and the long-term impact of an enduring attrition strategy against militant organizations. Addressing these and other broader strategic issues will likely shape the future use of these weapons.

The Obama administration has answered some of the basic questions on its drone policy, but much remains unknown about the legality, long-term strategy of, and decision making behind these lethal strikes. Furthermore, it is unclear whether these gaps stem from secrecy or the lack of an internal formal rulebook. While drone strikes will remain a central component of U.S. counterterrorism operations, mounting domestic and international pressure for increased transparency will likely force President Obama to reevaluate his drone policy and address some of the practical and ethical questions.

18. See footnote 15.

19. However, because drones are so precise, the calculus for their use is inherently different than that of other weapons systems. This therefore raises the question of how much moral arguments can and/or should be grounded in a comparison with other tools in the US arsenal.

20. The military employment of remotely operated aerial vehicles raises a variety of other moral issues, particularly those that stem from the extreme asymmetry between those who wage war and those they fight. Despite their importance, these high-level ethical questions will likely only occupy the halls of academia and think tanks, not White House press conferences.

21. “National Strategy for Counterterrorism,” June 2011. [http://www.whitehouse.gov/sites/default/files/counterterrorism\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf)

22. Brennan, “The Efficacy and Ethics of U.S. Counterterrorism Strategy.”

23. President Barack Obama, White House Press Conference, December 8, 2011. <http://abcnews.go.com/blogs/politics/2011/12/obama-fires-back-at-gop-appeasement-charge-ask-osama-bin-laden/>

24. Brennan, “The Efficacy and Ethics of U.S. Counterterrorism Strategy.”

25. International Human Rights and Conflict Resolution Clinic of Stanford Law School and the Global Justice Clinic at New York University School of Law, “Living Under Drones” Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan,” September 2012. <http://livingunderdrones.org/report/>

26. Micah Zenko, “Reforming U.S. Drone Strike Policies,” Council Special Report No. 65, January 2013. <http://www.cfr.org/wars-and-warfare/reforming-us-drone-strike-policies/p29736>

Articulating clear guidelines for the use of drones, however, may ultimately be in America's long-term national interest. Drone technology is proliferating, and experts contend that other State and non-State actors could possess these weapons within the next decade.<sup>27</sup>As the administration has acknowledged, "If we want other nations to use these technologies responsibly, we must use them responsibly."<sup>28</sup> While the US may not be able to

control who acquires armed drones, it may be able to establish a precedent for when and how they are deployed. Thus, establishing a "code of conduct," a normative framework with institutional checks, for the acceptable use of armed UAVs will be a challenge and strategic impera-

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27. Zenko, "Reforming U.S. Drone Strike Policies."

28. Brennan, "The Efficacy and Ethics of U.S. Counterterrorism Strategy."

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