

## The Tortured Logic of Obama's Drone War

*Hillel Ofek*

During the 2008 presidential campaign season, Barack Obama accused the Bush administration of not having “acted aggressively enough” in pursuing the leadership of the al Qaeda terrorist network. An Obama administration, he said, would more vigorously pursue top al Qaeda figures, even while “restoring the adherence to rule of law that helps us win the battle for hearts and minds.”

Restoring the rule of law, for President Obama, has meant reversing many of his predecessor's most prominent domestic anti-terrorism policies. To be sure, there are exceptions—the president has quietly embraced the continuation of the Patriot Act, warrantless wiretapping, and military tribunals. But on the whole, the Obama administration has sought to scrap traditional domestic war powers, instead adopting a law-enforcement approach to dealing with America's enemies. From promising to close the Guantánamo Bay detention facilities to threatening to prosecute Bush administration lawyers to seeking a civilian trial for 9/11 mastermind Khalid Sheikh Mohammed to granting terrorists Miranda protections, the Obama administration has largely rejected the Bush administration's war on terror in favor of a law-enforcement paradigm.

Yet overseas, President Obama has expanded the CIA's drone program, making it the centerpiece of his administration's counterterrorism policy. The program is generally effective and, even with its costs, an important element of U.S. efforts against Islamic terrorism. But the CIA's drone program runs counter to nearly every argument that President Obama has made against his predecessor's anti-terrorism policies. President Obama and his allies claim that Bush-era policies like waterboarding and Gitmo undermined our security, were illegal, and were immoral—but the same criticisms can and have been leveled against Obama's expanded drone program. In implementing his vision to “restor[e] the adherence to rule of law,” President Obama has, judged by his own standards, compensated abroad—strategically, legally, and morally.

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## What the Program Entails

The CIA's drone program is distinct from the use of remotely-piloted aircraft (also called unmanned aerial vehicles, or UAVs) by the United States military. In military settings, small robotic planes are controlled by troops on the ground, and larger ones, like the Predators, are controlled by so-called "combat commuters" who go to work every day at an Air Force base in Nevada. The use of these UAVs by the military is overt, is governed by the laws of war and the official rules of engagement, and is relatively uncontroversial.

The CIA's drone program, meanwhile, is controversial indeed. Using Predators equipped with video cameras and armed with Hellfire missiles, the program targets al Qaeda and Taliban commanders outside of combat zones, usually in the mountainous and lawless region of northwestern Pakistan, but also occasionally in Yemen and Somalia. This covert drone program, which the Bush administration used sporadically, has been expanded into a major policy under Obama. The first strike under the new administration occurred just three days after President Obama's inauguration. Fifty-three drone attacks have been reported just in Pakistan in 2009—more than during the entirety of the Bush presidency. And 2010 is likely to see a still greater number.

Although these targeted killings are part of a major Obama policy program with huge implications for American security and foreign relations, the administration has refused to talk about the program's key aspects, including the CIA's rules of engagement. We do know from press reports—including two illuminating *National Journal* reports and a widely cited article by Jane Mayer in *The New Yorker*—that the unmanned planes usually depart from a secret base in Pakistan but are controlled by civilian officers at CIA headquarters in Langley, Virginia. Pakistani security agencies often aid in finding targets. The number of Predators operated by the CIA isn't publicly known, and it is not even clear whether the agency owns its own Predators or whether it uses Predators owned by the U.S. Air Force. But we do know that the Air Force's Predator fleet has grown from about fifty in 2001 to nearly two hundred today—and many more Predators (and their bigger cousins, the Reapers) are on the way.

There is no denying that the CIA program is achieving its central goal. Drones have killed scores of low-level al Qaeda and Taliban operatives and commanders, and many of the CIA's twenty most-wanted "high-value targets." During the last year of the Bush presidency, the program reportedly killed a major al Qaeda spokesman (Abu Laith al-Libi) and the suspected

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planners of the 1998 bombings of American embassies in East Africa (Osama al-Kini and Sheikh Ahmed Salim Swedan). During the Obama administration, the program has killed the eldest son of Osama bin Laden (Saad bin Laden); a notorious Taliban terrorist (Baitullah Mehsud) responsible for attacks in Pakistani cities, kidnapping soldiers, and (it is suspected) masterminding the 2007 assassination of former Pakistani Prime Minister Benazir Bhutto; and the al Qaeda trainer (Sadam Hussein Al Hussami) who helped oversee a suicide bombing at a CIA base in Khost, Afghanistan.

In November 2008, then-CIA director Michael Hayden testified that through Predator drone strikes, “We force [al Qaeda] to spend more time and resources on self-preservation, and that distracts them, at least partially and at least for a time, from laying the groundwork for the next attack.” Six months later, Hayden’s successor, Leon Panetta, went one step further, noting: “Very frankly, it’s the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership.”

### Strategic Concerns

The Obama administration has not been blind to the effectiveness of these targeted killings. And perhaps the administration’s opposition to Guantánamo and to enhanced interrogation has led it to see even more clearly the convenience of taking the fight to the enemies’ homes and hideouts and killing them before they come within the purview of the U.S. justice system. For example, the *Los Angeles Times* reported that an al Qaeda-linked suspect named Saleh Ali Saleh Nabhan was killed by a September 2009 helicopter attack in Somalia, rather than captured, because “officials had debated trying to take him alive but decided against doing so in part because of uncertainty over where to hold him.”

Targeted killing may be expedient for a president who disdains detention and interrogation, but as a matter of strategy, it is not costless. First, a dead terrorist isn’t always as good as a detained terrorist. As Jeffrey Smith, a former CIA general counsel, put it in 2002: “If they’re dead, they’re not talking to you, and you create more martyrs.” When possible, argues Daniel Byman, the director of Georgetown University’s Center for Peace and Security Studies, “It’s almost always better to arrest terrorists than to kill them. You get intelligence then. Dead men tell no tales.”

Second, while U.S. drones have impressive surveillance and targeting capabilities, the intelligence they rely on is never infallible; many Predator strikes are planned in response to tips from local informants who have their own agendas. This can result in the deaths of innocent civilians.

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As Jane Mayer put it in *The New Yorker*, “The history of targeted killing is marked by errors.” According to a New America Foundation report assessing reliable press accounts of the strikes, the 123 reported drone attacks in northwest Pakistan from 2004 to March 29, 2010 have killed between 871 and 1,285 individuals, about a third of whom were civilians. The Long War Journal, a blog that tracks terrorist groups, calculates a much lower civilian casualty rate, with 1,114 militants and 94 civilians killed in Pakistan since 2006. (Of course, it should go without saying that the real blame for innocent deaths will, at bottom, always lie with terrorists, who refuse to follow the laws of war that require combatants to separate themselves from civilians.)

As David Kilcullen, the retired Australian soldier and author of *The Accidental Guerrilla*, and Andrew Exum, a fellow at the Center for a New American Security, have argued, when innocents are inadvertently killed, drone strikes can foment public anger and increase the popularity of militants. “Every one of these dead noncombatants represents an alienated family, a new desire for revenge, and more recruits for a militant movement that has grown exponentially even as drone strikes have increased,” they wrote in the *New York Times* in May 2009. At the same time, the benefits of killing the terrorist leaders are not always cut-and-dry, they argue, especially given the reformat structure of today’s terrorist groups. Killing Abu Musab al-Zarqawi in Iraq, for instance, “bought only eighteen days of quiet before al Qaeda returned to operations under new leadership.”

Third, there is evidence that the Taliban and al Qaeda are quick to capitalize on drone strikes by highlighting the practice in their propaganda. Al Qaeda, for example, has called its December 2009 suicide bombing of the CIA base in Khost an act of “revenge” for the deaths of militants in drone attacks in Pakistan. Shortly after the al Qaeda trainer responsible for the Khost attack was killed in March 2010, his “martyrdom” was boasted on jihadist websites, according to Bruce Riedel of the Brookings Institution. Other propaganda sometimes claims that the victims of drone attacks were all innocent civilians.

For all these reasons, the CIA’s drone program has incited anger and anti-American sentiment among the Pakistani public. A July 2009 poll conducted by Gallup Pakistan found that only 9 percent of Pakistanis supported the drone strikes and 67 percent opposed them. And despite its private assistance in carrying out Predator attacks, the Pakistani government has publicly protested them. In January 2010, for instance, Prime Minister Yousaf Raza Gillani told his country’s parliament that drone attacks could “undermine the war on terror.”

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Of course, every tactic in combat operations—whether it involves infantry, special forces, fighter jets, or UAVs—has some strategic cost. And drones have obvious benefits over other tactics, especially in reducing the risk to American personnel. However, the strategic costs of the drone program are almost identical to the ones that President Obama has attributed to the Bush anti-terrorism policies that he has now countermanded. President Obama's argument that Gitmo has "become a tremendous recruiting tool for al Qaeda" can also be said of his own CIA's Predator operations. The same goes for his contention that waterboarding (in words he approvingly repeated from Senator John McCain) "serves as a great propaganda tool for those who recruit people to fight against us." President Obama and his allies criticized the Bush administration for policies that hurt America in "the battle for hearts and minds," but the Obama drone war is itself such a policy.

### **Considerations of International Law**

President Obama and officials in his administration have also criticized the legal rationales for some Bush administration anti-terrorism policies. For example, the president has stated that waterboarding is torture and therefore a violation of international law. But the CIA drone program violates international law too, at least according to a growing group of critics. Even as the Obama administration searched for a legal rationale for the policy, activists, lawyers, and U.N. officials began paving the way for a campaign to brand the CIA's strikes as war crimes. On March 16, 2010, for example, the American Civil Liberties Union (ACLU) filed a Freedom of Information Act lawsuit for the government to release details on the legal basis for the CIA's operations. But it is not just activists who have opposed targeted killing. Before 9/11, the United States routinely denounced Israel's use of targeted killing against Palestinian terrorists. In July 2001, Martin Indyk, then the U.S. ambassador to Israel, said, "The United States government is very clearly on record as against targeted assassinations. . . . They are extrajudicial killings, and we do not support that."

American proponents of the drone program contend that it is lawful. In 2001, Congress authorized the use of force "against those responsible for the recent attacks launched against the United States," thus classifying terrorists as enemies, rather than criminals, and creating a domestic legal basis for targeting them. As for international law, proponents of the program argue that killing al Qaeda-linked terrorists is a legitimate response in an armed conflict that was initiated by the 9/11 attacks.

The reality is more complicated. According to customary international law and Common Article 3 of the Geneva Conventions, a threshold of “armed conflict” must be met before killing in a war with non-state actors can be considered legal. But as Kenneth Anderson, a law professor at American University in Washington, D.C., has argued, this threshold is only met through “sustained, persistent fighting occurring in a theater of conflict.” International law experts dispute whether the “war on terror”—a phrase that has, at any rate, been stripped from the Obama administration lexicon—meets that threshold in a way that justifies targeting militants in countries like Pakistan, which we are not at war with. Many international lawyers, particularly on the left, argue that absent sustained fighting on an active, recognizable battlefield, drone killings are illegal—especially when executed by CIA operatives, who are not members of the armed forces and who are not trained in the law of armed conflict.

Perhaps beginning to feel the heat, the Obama administration has attempted to respond to such objections. On March 25, 2010, U.S. State Department Legal Advisor Harold Koh delivered a speech in which he stated that targeted killings “comply with all applicable law, including the laws of war.” Koh said that his review of the program led him to conclude that the CIA’s counterterrorism operations strictly adhere to the just war principles of distinction and proportionality, “to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.” Koh’s legal justification makes explicit what was implicit within the Bush administration: that using lethal force against, and denying legal process to, al Qaeda and the Taliban is lawful because we are in what international law would recognize as an armed conflict with them. Indeed, Koh arguably even went beyond the Bush administration and its “armed conflict” justification for the use of lethal force: his added “self-defense” justification is broader in that it does not require a threshold of sustained battlefield combat.

In embracing the war model for fighting terrorists, Koh now finds himself in unlikely company with defenders of the Bush administration’s constitutional war powers. These include John Yoo, the lawyer perhaps best known as the author of the so-called “torture memos.” In his new book *Crisis and Command*, Yoo notes that targeted killing would be illegal if the United States were not at war. Drone strikes, after all, are “a far greater deprivation of civil liberties than detention, interrogation, and trial by military”—precisely those legal policies Koh inveighed against during the Bush years.

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Harold Koh's stature in the human rights community will no doubt protect him from being pilloried as Yoo was, and it might even help allay some apprehension on the left about the drone program. But his words will not settle the legal debate. After Koh's speech, Mary Ellen O'Connell, a professor at Notre Dame Law School, said she remains unconvinced. "A global war on terror by any other name would smell as bad," National Public Radio quoted her as saying. Philip Alston, the U.N.'s special rapporteur on extrajudicial killings, said Koh's statement was "evasive."

Here again it is worth revisiting the conflict between the Obama administration's rhetoric and its action. President Obama has justified his reversal of the Bush policies of enhanced interrogation and Guantánamo detention as a restoration of the rule of law. But just as there is no consensus about the legality of those policies, the legality of targeted killing outside of combat zones is unsettled. In fact, as O'Connell has argued, "The same rules that govern the prohibition of coercive interrogation also prohibit killing by persons who are not members of the regular armed forces. These are rules of international humanitarian law found in the Geneva Conventions and other international law sources." And as Matthew Waxman, an associate professor at Columbia Law School, has noted, "Drone attacks generally rest on similar legal premises as military detention, but detention has attracted much more legal controversy."

### Questions of Morality

Even if the CIA's drone program violates international law, that does not necessarily mean that it is morally wrong—for while the structure of international law is informed by longstanding traditions and theories of morality, its practice and application are a much messier affair. Is the drone program more deserving of moral approbation than anti-terrorism policies like detainment and waterboarding?

Michael Walzer, author of the classic *Just and Unjust Wars* (1977), has said that the U.S. government's refusal to divulge how many innocent people are dying in proportion to the legitimate targets is "a moral mistake." Walzer argues that the government should release its list of targets and publicly defend it: "You're using the coercive power of the state in a lethal way, and in a democracy—in a country committed to the rule of law—actions of that sort should be subject to some kind of public scrutiny." Amos Guiora, a University of Utah law professor who was personally involved in targeted-killing decisions during service in the Israel Defense Forces, argues that "there is a fundamental difference between

drone attacks as presently conducted and targeted killing, for the latter is person-specific whereas the former seems to result in not insignificant collateral damage”—a factor of immense moral import.

Meanwhile, some scholars have expressed concern about the facelessness of “virtual” warfare. Writing in these pages last year (“Military Robots and the Laws of War,” Winter 2009), Brookings Institution senior fellow P. W. Singer noted that, while every new military technology moves combatants “farther and farther from their foes,” unmanned systems like the CIA’s drones “have a more profound effect on ‘the impersonalization of battle,’ as military historian John Keegan has called it.” The great virtue of remote-controlled warfare—the physical distance between us and our enemies—is also a vice, in that it also creates “psychological distance and disconnection,” Singer argued. The literal distance of drone warfare can create in the minds of the operators, the policymakers who approve operations, and the public at large a psychological distance from the bloody reality and moral burden of dealing death.

Seen or unseen, those grim realities still exist. As Mayer noted in *The New Yorker*, it “appears to have taken sixteen missile strikes, and fourteen months, before the CIA succeeded” in killing Taliban terrorist Baitullah Mehsud. “During this hunt, between 207 and 321 additional people were killed”—many of whom were innocent, according to Pakistani and international news stories. Death by Hellfire missile, which can burn its victims alive, is no gentle way to leave this world.

The moral complexity of counterterrorism operations abroad and of anti-terrorism policies at home must not be minimized, and this sketch of the questions of morality and justice raised by the CIA’s drone program is necessarily incomplete. But on strictly moral grounds, it is difficult to see how the policies that President Obama and his supporters have rejected—subjecting known terrorists to indefinite detention at Guantánamo Bay, for example, or simulating drowning under the supervision of a physician and psychologist—are more repugnant than the policy he has endorsed: incinerating suspected terrorists and knowing, as a matter of course, that innocents will be killed.

### **Out of Sight, Out of Mind**

All of the major justifications that President Obama has offered for terminating the anti-terrorism policies of his predecessor can be applied to the CIA drone program that he has made the centerpiece of his own policy against global terrorism. But the Obama administration insists that, in

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contrast to the Bush policies, its own approach is strategically sound, legally justified, and morally licit—and that we can, in the president's words, “reject the false choice between our security and our ideals.”

In a sense, the drone program fits into the broader trend of pushing ugly and uncomfortable national security measures out of sight only to unleash even uglier unintended consequences. Consider interrogation: President Obama signed an executive order banning enhanced interrogation techniques, but his administration reaffirmed the U.S. extraordinary rendition program, which sends suspects to countries with dubious human rights records for interrogation. As a sop to his supporters, the president threw in a morsel of “monitoring mechanisms,” but many observers continue to consider the CIA's rendition program, which was first approved by the Clinton administration, to be little more than a tacit torture policy. “Extremely disappointing,” was how the ACLU greeted the news of Obama's rendition policy. With U.S. personnel disallowed from conducting enhanced interrogations, who can doubt that future suspects will undergo treatment more brutal at the hands of, say, Egypt's interrogators?

Something similar has happened with detention policy. “A little-noticed consequence of elevating standards at Guantánamo is that the government has sent very few terrorist suspects there in recent years,” wrote Jack Goldsmith, an assistant attorney general in the Bush administration, in a May 2009 *Washington Post* op-ed. “Instead, it holds more terrorists—without charge or trial, without habeas rights, and with less public scrutiny—at Bagram Air Base in Afghanistan. Or it renders them to countries where interrogation and incarceration standards are often even lower.” There are about eight hundred prisoners at Bagram, and the Obama administration is apparently now considering whether to expand the detention facility, which exists outside the jurisdiction of U.S. courts—a proposal that would seem to conflict with President Obama's stated desire to reform American anti-terrorism institutions “with an abiding confidence in the rule of law and due process; in checks and balances and accountability.” As the *Los Angeles Times* has reported, the proposal is meeting resistance from Army General Stanley McChrystal, the top U.S. commander in Afghanistan, who worries that detaining more suspects in the facility would compromise military efforts in the country by serving the propaganda purposes of militants.

It is difficult to look at the results of the CIA drone program without concluding that, in terms of U.S. national security interests, its benefits outweigh its costs. Given the notorious fecklessness of other domestic

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anti-terrorism efforts—the perennially ridiculed Transportation Security Administration comes to mind—President Obama should be commended for deciding to expand what seems to be a largely successful offensive program.

But this expansion comes as the result of a kind of “balloon effect” in national security policymaking—that is to say, as the result of squeezing out what many experts (and most Americans) regard as effective wartime domestic policies, such as those permitting detention at Guantánamo and enhanced interrogation techniques. Yet the strategic, legal, and moral justification for elevating the drone program and rejecting wartime domestic efforts in fighting terrorism rests on the assumption that if a bellicose policy is less noticeable to Americans and exists outside our judicial purview, it is somehow more virtuous. The sooner President Obama recognizes this to be folly, the sooner he can begin to weigh honestly the difficult but very real compromises between our security and our ideals.