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Invisible Precedents: The U.S. Drone Strike Program under the Obama Administration

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Introduction

On December 12 2013, the United States launched a drone strike in Yemen, based on the claim that the individuals targeted by the strike were terrorists associated with Al-Qaeda in the Arabian Peninsula (AQAP) (Human Rights Watch, 2014). The strike resulted in twelve deaths and fifteen injuries. After the fact, eyewitnesses revealed that most participants were attending a wedding procession and were civilians. Due to conflicting accounts, it is unclear as to whether the procession did in fact include terrorists associated with the AQAP (Human Rights Watch 2014). The legality of this attack, as with all drone attacks, depends on the designation of targets as civilians or combatants. The norms of international humanitarian law and the “policy requirements on targeted killings that President Barack Obama outlined in May 2013”¹ clearly indicate that drone attacks on civilians are illegal (Human Rights Watch 2014). Such incidents, although not a representation of the drone strike program entirely, raise troubling questions. What are the legal precedents that undergird the drone strike campaign? Furthermore, how are these legal precedents related to US counterterrorism strategy? Along with the humanitarian and ethical concerns regarding the drone strike campaign, there are clear political and legal problems at play.

The drone strike program has been expanded in an unprecedented manner under the Obama administration, both legally and in terms of total drone missions. Under the Obama administration, drone strikes increased fourfold, followed by a significant legal and bureaucratic infrastructure built to sustain the campaign (Masters 2013, 3). This expansion is latent with “invisible precedents,” which I define in this paper as implicit norms that are not made apparent by existing legal language. Invisible precedents create a precarious environment for counterterrorism policy in the long run. Therefore, this article shifts the nexus of focus from a mere evaluation of the effectiveness of the drone strike program to an examination of the norms undergirding the legality and legitimacy of drone strikes, calling into question the core norms of the program. Two central arguments follow this shift in perspective. First, the drone strike campaign should be viewed within a larger US counterterrorism policy set up by the Authorization for Use of Military Force (AUMF) under the Bush Administration. Second, the expansion of the drone campaign is latent with “invisible precedents,” which are disjoint with the norms that undergird international humanitarian law.

¹ The policy requirements here refer to the Presidential Policy Guidance (PPG) which is also commonly known as the drone playbook.

To frame these claims, I will review existing literature on drone strike policy to show how current counterterrorism rhetoric fails to accurately address long-term implications of drone strikes, such as the possible radicalization of the very groups the strikes seek to hinder. The focus on long-term implications of counterterrorism policy will then inform the historical and political background behind the expansion the drone program, namely the AUMF and the Bush administration's framing of a borderless War on Terror. Building on this political history, I will look at the Presidential Policy Guidance (PPG) as the culmination of the ambiguous legal language that mirrors the legacy set by the AUMF.

The Existing Literature: Misinformed Counterterrorism Policy

To understand the problematic nature of the drone strike program, we must first look at how the literature on "effectiveness" shapes the language and latent assumptions in U.S. counterterrorism policy. The current counterterrorism rhetoric has potential to harm future US strategic interests and further the radicalization of the very terrorist groups these policies seek to eliminate.

Most of the literature on the effectiveness of drones focuses on benefits such as fewer civilian casualties, elimination of key leaders, and deconstruction of terrorist safe havens (Byman 2013). Such rationale measures the success of the drone program according to its tactics alone, rather than a broader scale strategy that views counterterrorism strategy in terms of both short term and long term goals (Cronin 2013). Furthermore, the rationale for the "effectiveness" of the drone campaign fails to consider elements of secrecy and ambiguity of the law. For example, civilian casualty counts recorded by the government largely differ from those of independent research groups that track public information about drone strikes (Jaffar 2016, 14). This means that the apparent "effectiveness" of the current counterterrorism policy is masked by a lack of public knowledge and accountability measures. Therefore, although drones can serve U.S. interests in the short term, they "may be creating sworn enemies out of a sea of local insurgents" in the long term (Cronin 2013).

Furthermore, the question of effectiveness only applies in the "narrow sense that drone strikes sometimes [kill] their targets" (Jaffar 2016, 15). The dichotomous portrayal of the drone program in the literature creates a dangerous precedent for meaning and the way in which the law is interpreted. In essence, it contributes to an oversimplification of the narrative of counterterrorism. Analysis based on effectiveness alone creates policies that lead to further radicalization. For example, the drone strikes conducted in Pakistan have led to the perception of indifference for the lives of Muslims and alienation of local populations, all while driving "new recruits to the very terrorist and insurgent groups" the United States was trying to initially disband (Jaffar 2016, 15). The potential for further radicalization reveals the importance of understanding the connection between local responses to drone strikes and US counterterrorism policy in the long run. A broader conceptualization of the effects of drone strikes, one that considers long term and local effects, is apparently necessary given the dominant discourse and literature analyzing their effectiveness.

In sum, a discourse based in "effectiveness" fails to consider how notions of sovereignty

and safety have informed the radicalization of terrorist groups. Drone strikes are received well domestically and in the short run; however, in the long-run they set a dangerous precedent in terms of international perception while also simultaneously laying ground for unquestioned invisible precedents in U.S. counterterrorism policy. A question of “effectiveness” abstracts the consequences of drone strikes, one that is mirrored in our legal language. The prevalence of a discourse on drone strike “effectiveness,” calls for a shift in perspective, one that considers implicit norms that undergird the narrative of US counterterrorism policy.

Theoretical Framework of Analysis

In order to avoid the pitfalls of a limited discourse on “effectiveness” while also drawing attention to humanitarian concerns, this article takes a constructivist approach to analyzing drone strikes. Informed by constructivist traditions in international relations theory, this article views language as rule-based and socially defined (Fierke 2013,199). Key in this approach is not only viewing language as existing in an either/or subjective or objective realm, but instead viewing language put to use by social actors as they construct their world” (Fierke 2013, 197). This view is supplemented by a consideration of the ways in which language and the law can create “invisible precedents,” a term I will use in this paper to signify misguided norms underlying counterterrorism policy in the long run.

Furthermore, a constructivist approach complicates the unprecedented expansion of drone strike campaigns, as related to the long-term norms that have guided U.S. counterterrorism policy from the Bush administration and beyond. Legal language viewed in a socially constructed context takes on a whole different meaning. Counterterrorism policy relies on defining terms like “imminent threat,” creating meanings that are subjective and temporally bound. In turn, these subjective meanings frame “invisible precedents” set outside of the eye of the public, where meaning is identified by a small group of social actors.

A constructivist approach not only identifies invisible precedents set by legal reasoning such as the borderless war rationale for the War on Terror, but it also allows one to see how U.S. counterterrorism policy (the action on the part of social agents, interpreting meaning) can actually “contribute to the construction of the very problems [policymakers] seek to address” (Fierke 2013, 199). One answer to such a problem may be to consider the role of norms in legal language, viewed as different experiences of reality, some rooted in observational knowledge and others in institutional knowledge (Kratochwil 1989, 21). By understanding that there are various realms of possible truths, one could open up the complexity of the problem at hand. Embedded in this orientation towards multiple perspectives is also a question of security narratives, and the policies they create in the long run (Krebs 2015, 3).

There have been few studies on targeted killings from a constructivist perspective. The discourse on drones is often reduced to a traditional realist analysis, one concerned with the effectiveness of drones alone. The analytical utility of a constructivist approach is situated in not only its theoretical novelty, but also its scope of focus. In sum, the constructivist tradition allows one to consider the ways in which the U.S. drone strike campaign is situated in a larger counterterrorism policy framework latent with invisible precedents.

Long Term US Counterterrorism Policy: President's Bush, Obama, and the AUMF

In this section, I will take a step back from the drone strike program in particular to analyze the political and legal landscape that shaped US counterterrorism policy under President Obama. The nature of counterterrorism policy in the United States is closely related to the invisible precedents set forth from the legal and bureaucratic expansion of the drone strike program.

After the September 2001 terrorist attacks, the United States increased the magnitude of its counterterrorism policy. The ways in which the U.S. responded to the 9/11 attacks required a new language, a language that could encompass a state, the US government, fighting non-state actors, such as Al Qaeda and its affiliated terrorist networks. This shift in national security discourse was both quick and unprecedented. The result of this discourse was the AUMF, adopted only three days after the attacks occurred. The AUMF stated that the President could use “all necessary and appropriate force against all nations, organizations, or persons he determines planned, authorized or aided the terrorist attacks that occurred on September 11 2001” (Murray 2015,177). The AUMF provided the Bush administration expansive executive authority allowing the Executive Branch to “act contrary to federal statutes... [and] most notoriously to avoid limits on interrogations and surveillance” (Johnsen 2016, 4). The most dangerous legacy left by the Bush administration’s

use of the AUMF was the justification for a counterterrorism policy that primarily followed a “war-fighting model” (Murray 2015, 175-6). This model went on to be at the core of the legal rationale used by the Obama administration to justify the expansion of state-sanctioned targeted killing. Both Obama and Bush have used the AUMF to justify controversial legal practices, stretching the law “far beyond [its] original congressional intent” (Murray 2015, 175). The discourse shift post-911 signaled “terrorism” and “terrorists” as not actors and actions that did not exist materially, in an objective manner, but instead they constituted a “radical Other” (Buzan and Hansen 2009, 245). The implications of such a discourse carry much further than just the realm of security, affecting not only the law, but the legal precedents it obscures.

Obama inherited a climate from Bush with a suspended notion of the rule of law, one he hoped to end with a “recalibration” of the War on Terror (Bergan and Rowland 2013, 7). The Obama administration claimed to reject the narrative of the Global War on Terror and instead to see counterterrorism policy “as a series of persistent targeted efforts to dismantle specific networks of violent extremists” (Jaffar 2016, 37-8). However, his counterterrorism policy in the area of drone strikes is a clear example of a policy area in which the Obama administration failed to recalibrate the complicated legal precedents set by the Bush administration’s use of the AUMF. The AUMF set the precedent for a theory of borderless war, which gave the United States government legal rationale to conduct complicated counterterrorism policy in far reaching places such as Pakistan and Yemen (Bergan and Rowland 2013).

The secrecy about counterterrorism policies in both the Bush and Obama administrations further complicates the conversation of legality. It seems that the “instinct towards secrecy in the national security sphere transcends political parties and administrations... whatever their rhetorical commitment to openness” may be (Jaffar 2016, 28). Under the Obama administration,

details regarding the drone strike program such as statistics on civilian casualties, identities of targets and the legal reasoning developed to undergird the program were kept secret. The dimension of secrecy in counterterrorism policy creates the possibility for the language of the law to be defined behind closed doors. Furthermore, the discourse that shaped the drone strike campaign fell under the same legal precedents set by the AUMF. The drone strike program is no stranger to the dominant discourse in security narratives. Without considering the precedents behind the drone strike program—that is the norms that undergird the counterterrorism program as a whole—the United States risks more than just its strategic interests; the drone strike program threatens the very stability of international humanitarian law.

Invisible Precedents in Action: The Presidential Guidance (PPG)

To exemplify the problematic legal language the drone strike program was justified in, I will now look at how the PPG mirrors the language and legal rationale set up by the AUMF. The PPG, the most formal legal justification for the drone campaign thus far, is an example of the ways in which a misinformed legal rationale can transfer across presidencies, all the while contributing to problematic narratives focused on the “effectiveness” of counterterrorism policy instead of its long term implications.

The PPG is often called the “drone playbook,” and it is seen as the culmination of the Obama administration’s attempt to “govern the use of lethal force against suspected terrorists” (Jaffar 2016, 21). The document was signed in 2013, but the full (albeit heavily redacted) document was only made public in the summer of 2016 due to a federal court order initiated by the American Civil Liberties Union (ACLU)². The PPG largely normalized and bureaucratized the drone campaign by delineating the ways in which Executive Branch officials decided to use lethal force against terrorist targets. The document was seen as attempt to defend both the legality and effectiveness of the drone campaign by including more legal rationale rooted in human rights principles instead of rules of war (Jaffar 2016, 41-4). However, it instead served to “preserve executive discretion” in drone strike policy (Jaffar 2016, 41-4).

The language of the PPG fails to clearly delineate a legal and logical rationale for the drone strike campaign. For example, it describes future terrorist threats that warrant actions as both “imminent” and “continuing” and fails to describe the conditions in which such a threat would materialize (Jaffar 2016, 21). The language of that the PPG fails to substantially change the paradigms in which we view counterterrorism policy, further situating the drone campaign in the complicated “borderless war” rationale set initially by the AUMF and the Bush administration.

The PPG is a clear example of the danger in leaving unanswered questions, masked in the language of the precision of the law. These unanswered questions range anywhere from the specific rationale between choosing kill or capture missions to deciding which threats are

² A redacted copy of the Presidential Policy Guidance (PPG) can be found at the following link: https://www.aclu.org/sites/default/files/field_document/presidential_policy_guidance.pdf.

supposedly “imminent”. The PPG may be termed as the President’s “playbook,” but it is a playbook without rules, one that leaves too much room for invisible precedents to continue taking a dominant place in US security narratives and policy.

Summary

The core problem with Obama’s extension of the drone strike campaign is the legal dilemma created by circular counterterrorism policy rooted in the theory of borderless war, a discourse initially set up by the AUMF post 9/11. The PPG, as well as the drone strike program as a whole, create invisible precedents for future counterterrorism policy, as well as a complicated domino effect on the growing prevalence of terrorism. Alongside the need for decreased secrecy and release of public information, a clear legal rationale that undergirds drone strikes as a counterterrorism policy is imperative and necessary.

The constructivist theoretical tradition invoked in this essay points to the need for a paradigm shift in U.S. counterterrorism policy. Counterterrorism policy should focus more on long-term implications instead of short term “effectiveness”. Inherent in this paradigm shift is the need to re-evaluate the core legal rationale underlying American counterterrorism policy, which is that of a borderless war decided by executive powers. Moving towards a policy with “legally justified, transparent, and rare” drone strikes is a place to start (Cronin 2013, 7). But to solve the core of the problem, there must be a “publically explained legal and moral framework for the use of drones, making sure they are a part of a long-term political strategy” (Cronin 2013, 7). Ideally, changing the law would also constitute a change in practice as well as a broader consideration of the shaky legal basis of post-9/11 counterterrorism policy. However, the invisible legal precedents that underlie U.S. security narratives and policy paint a different story.

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