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## Drones and Cognitive Dissonance

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# DRONES AND COGNITIVE DISSONANCE

ROSA BROOKS

Draft chapter for DRONES, REMOTE TARGETING AND THE PROMISE OF LAW, Peter Bergen and Daniel Rothenberg, Eds. Forthcoming, Cambridge University Press (2013)

There's something about drones that makes sane people crazy. Is it those lean, futurist profiles? The activities drone technologies enable? Or perhaps it's just the word itself – *drone* – a mindless, unpleasant, dissonant thrum. Whatever the cause, drones seem to produce an unusual kind of cognitive dissonance in many people.

Some demonize drones, denouncing them for causing civilian deaths or enabling long-distance killing, even as they ignore the fact that the same (or worse) could be said of many other weapons delivery systems. Others glorify them as a low-cost way to “take out terrorists,” despite the strategic vacuum in which most drone strikes occur. Still others insist that US drone policy is just “business as usual,” despite the fact that these attacks may undermine US foreign policy goals while creating an array of new problems.

It is worth taking a closer look at what is and is not new and noteworthy about drone technologies and the activities they enable. Ultimately, “drones” *as such* present few new issues—but the manner in which the US has been using them raises grave questions about their strategic efficacy and unintended consequences. In fact, the legal theories used to justify many US drone strikes risk dangerously hollowing out the rule of law itself.

## 1. DEMONIZING DRONES

For many on the political left (and more than a few in the middle), drone strikes are the paradigmatic example of US militarism run amok. But many of the most common objections to drones don't hold up well under serious scrutiny – or, at any rate, there's nothing uniquely different or worse about drones, compared to other military technologies.

Consider the most common anti-drone arguments:

*Drone strikes kill innocent civilians* – This is undoubtedly true, but it is

not an argument against drone strikes as such. After all, *war* kills innocent civilians. And there are some means and methods of warfare that tend to cause more unintended civilian deaths than others.

The website for Code Pink, a women's peace group, states:

Drones scout over [Afghanistan and Pakistan] launching Hellfire missiles into the region missing their intended targets, resulting in the deaths of many innocent people.<sup>1</sup>

Similarly, the Anti-War Committee asserts "the physical distance between the drone and its shooter makes lack of precision unavoidable."<sup>2</sup>

But to paraphrase the NRA, "Drones don't kill people, people kill people." At any rate, drone strikes kill civilians at no higher a rate, and almost certainly at a lower rate, than most other common means of warfare. Drones actually permit far greater precision in targeting. Today's unmanned aerial vehicles (UAVs) carry highly accurate ordinance that generally produces far less widespread damage than other munitions. Their low profile and relative fuel efficiency permit them to spend more "time on target" than any manned aircraft. And unlike pilots of manned aircraft, pilots of unmanned vehicles can regularly be replaced while on a mission to avoid fatigue and ensure greater accuracy.

Drones can engage in "persistent surveillance." That means they do not just swoop in, fire missiles and fly off. Instead, they can spend hours, days, weeks or even months monitoring a potential target. Equipped with imaging technologies that enable operators who may be thousands of miles away to see details as fine as individual faces, modern drone technologies allow their operators to distinguish between civilians and combatants far more effectively than most other weapons systems.

That does not mean that civilians are not killed in drone strikes. They are. But how many civilians are killed in these actions, and are these casualties greater than if other weapons systems had been used? The numbers are not completely clear. The British Bureau of Investigative Journalism analyzed reports by "government, military and intelligence officials, and by credible media, academic and other sources."<sup>3</sup> They

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<sup>1</sup> 'Take Action!', *Code Pink* (last visited 18 July 2013), <http://www.codepinkalert.org/article.php?id=5974>.

<sup>2</sup> Harrison Schmidt, Jennie Eisert, and Meredith Aby, 'Stop Drone Warfare!', *Anti-War Committee* (20 June 2012), <http://antiwarcommittee.org/2012/06/20/stop-drone-warfare/>.

<sup>3</sup> 'Obama 2013 Pakistan Drone Strikes', *The Bureau of Investigate Journalism* (3 January 2013, since updated regularly),

determined that of the 344 known drone strikes in Pakistan between 2004 and 2012, between 2,562 and 3,325 people were killed of whom they estimated that between 474 and 881 were civilians (the numbers for Yemen and Somalia are less accurate.)<sup>4</sup> The New America Foundation came up with slightly lower numbers, estimating that in roughly the same time period, 1,948 to 3,263 people were killed in Pakistan, of whom between 258 and 307 were reported to be civilians (and a further 196 to 330 were difficult to categorize as either civilians or militants.)<sup>5</sup>

Behind the numbers, regardless of which data set is right, lie the mangled bodies of human beings. And whether drones strikes cause “a lot” or “only a few” civilian casualties depends on what we regard as the right point of comparison. Compared to the mass bombing campaigns of the Vietnam era or the Second World War (to say nothing of the use of atomic weapons) drone strikes involve relatively few civilian casualties. Yet these comparisons may not tell us anything useful.

Should we compare the civilian deaths caused by drone strikes to the civilian deaths caused by large-scale armed conflicts? One study by the International Committee for the Red Cross found that on average, 10 civilians died for every combatant killed during the armed conflicts of the 20<sup>th</sup> century.<sup>6</sup> For the Iraq War, estimates vary widely; different studies place the ratio of civilian deaths to combatant deaths anywhere between 10 to 1 and 2 to 1.<sup>7</sup>

The most meaningful point of comparison for drones is probably manned aircraft. It’s difficult to get solid numbers here, but one analysis published in the *Small Wars Journal* suggested that in 2007 the ratio of civilian deaths due to coalition air attacks in Afghanistan may have been as high as 15 to 1.<sup>8</sup> More recent UN figures suggest a far lower rate, with as

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<http://www.thebureauinvestigates.com/2013/01/03/obama-2013-pakistan-drone-strikes/>.

<sup>4</sup> ‘Obama 2013 Pakistan Drone Strikes’, *The Bureau of Investigate Journalism* (3 January 2013, since updated regularly),

<http://www.thebureauinvestigates.com/2013/01/03/obama-2013-pakistan-drone-strikes/>.

<sup>5</sup> ‘The Drone War in Pakistan’, *New America Foundation* (last updated 8 July 2013), <http://natsec.newamerica.net/drones/pakistan/analysis>.

<sup>6</sup> Sabrina Tavernise and Andrew W. Lehren, ‘A Grim Portrait of Civilian Deaths in Iraq’, *New York Times*, A1 (23 October 2010).

<sup>7</sup> ‘Casualties of the Iraq War’, *Wikipedia* (last visited 18 July 2013), [http://en.wikipedia.org/wiki/Casualties\\_of\\_the\\_Iraq\\_War](http://en.wikipedia.org/wiki/Casualties_of_the_Iraq_War) (comparing statistics compiled by various reporting organizations).

<sup>8</sup> Lara M. Dadkhah, ‘Close Air Support and Civilian Casualties in Afghanistan’, *Small Wars Journal* (30 December 2008),

few as one civilian killed for every ten airstrikes in Afghanistan.<sup>9</sup>

It is also important to note that drone strikes have become far less lethal for civilians in the last few years. The New America Foundation concludes that between 89 to 102 five civilians or “unknowns” were killed by 48 US drone strikes in 2011, for instance.<sup>10</sup> Reductions in civilian casualties are due to technological advances in drones, surveillance and targeting systems as well as far more stringent rules for when drones can release weapons.

Pacifists willing to condemn all forms of violence can condemn drone strikes without a trace of cognitive dissonance. However, for non-pacifists, a *per se* condemnation of drone strikes makes less sense. While it is reasonable to condemn a particular war or particular policy, why fixate on a specific method of ordinance delivery? Why focus special attention on drone strikes, which cause relatively low numbers of civilian deaths and largely ignore the many civilian deaths that occur during raids by ground troops, at vehicle checkpoints, or as a result of close air support?

*Drones strikes are bad because killing at a distance is unsavory* – If killing from a safe distance is somehow “wrong,” what should be our preferred alternative? Should we set aside the technological advantages that protect soldiers, stripping troops of body armor, taking away guns that allow attacks from far away and requiring troops to engage in hand-to-hand combat?

Here again, it requires more than a little cognitive dissonance to condemn drone strikes for allowing us to kill from a safe distance. If drone strikes enable us to kill enemies without exposing our own personnel, this should presumably be considered a good thing, not a bad thing. Maybe we shouldn’t kill anyone, or maybe we’re killing the wrong people -- but these are assertions about ethics, intelligence and strategy, not about drones.

And drones are hardly the only technology that has facilitated killing from a distance. Drones do not present any “new” issues not already presented by aerial bombing -- or by guns or bows and arrows, for that matter. In the early 1600s, Cervantes called artillery a “devilish invention”

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<http://smallwarsjournal.com/jrnl/art/close-air-support-and-civilian-casualties-in-afghanistan>.

<sup>9</sup> United Nations Assistance Mission in Afghanistan and UN Office of the High Commissioner on Human Rights, *Afghanistan Annual Report 2011; Protection of Civilians in Armed Conflict*, United Nations (February 2012), [http://photos.state.gov/libraries/usnato/562411/PDFs\\_001/UNAMA%20POC%202011%20Report\\_Final\\_Feb%202012.pdf](http://photos.state.gov/libraries/usnato/562411/PDFs_001/UNAMA%20POC%202011%20Report_Final_Feb%202012.pdf).

<sup>10</sup> *The Drone War in Pakistan*, <http://natsec.newamerica.net/drones/pakistan/analysis>.

allowing “a base cowardly hand to take the life of the bravest gentleman,” with bullets “coming nobody knows how or from whence.”<sup>11</sup> Much like drones. The longbow and crossbow were also once considered immoral, or at any rate distinctly unchivalrous. In 1139, the Second Lateran Council of Pope Innocent II is said to have “prohibit[ed] under anathema that murderous art of crossbowmen and archers, which is hateful to God” -- at least when used against Christians.<sup>12</sup>

Historically, virtually every significant advance in distance killing has caused anxiety, but there’s no reason to regard drones as presenting fundamentally new issues.

*Drones Turn Killing into a Video Game* – Writing in the *Guardian*, Phillip Alston, the United Nations special rapporteur on extrajudicial, summary or arbitrary executions and Hina Shamsi of the ACLU criticized “the PlayStation mentality” created by drone technologies.

Young military personnel raised on a diet of video games now kill real people remotely using joysticks. Far removed from the human consequences of their actions, how will this generation of fighters value the right to life?<sup>13</sup>

But are drones any more “video game-like” than other modern military technologies such as laser guided munitions, remote sensing, satellite imaging or placing cameras in the noses of cruise missiles? Those old enough to remember the first Gulf War will recall the once-shocking novelty of images taken by cameras inside US Tomahawk missiles, the jolting, grainy images in the crosshairs before everything went ominously black.

Regardless, there’s little evidence that drone technologies “reduce” their operators’ awareness of human suffering. If anything, drone operators may have a far greater sense of the harm they help inflict than any sniper or bomber pilot, precisely because the technology enables such clear and long-term visual monitoring.

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<sup>11</sup> J. F. C. Fuller, *Armament & History: The Influence of Armament of History From the Dawn of Classical Warfare to the End of the Second World War* (New York: First Da Capo Press, 1998), pp. 91-2.

<sup>12</sup> ‘Second Lateran Council (1139)’, *Eternal World Television Network* (last visited 18 July 2013), <http://www.ewtn.com/library/COUNCILS/LATERAN2.HTM>.

<sup>13</sup> Philip Alston and Hina Shamsi, ‘A Killer Above the Law?’, *The Guardian* (8 February 2010), <http://www.guardian.co.uk/commentisfree/2010/feb/08/afghanistan-drones-defence-killing>.

Journalist Daniel Klaidman reports the words of one CIA drone operator, a former Air Force pilot, “I used to fly my own air missions . . . I dropped bombs, hit my target load, but had no idea who I hit.” CITE With drones, it was a different story:

I can look at their faces . . . see these guys playing with their kids and wives . . . 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.<sup>14</sup>

Increasingly, there is evidence that drone pilots, just like combat troops, can suffer from post-traumatic stress disorder. They watch a man play with his children and live his life, sometimes for extended periods of time. And then they drop ordinance on the man and see his mangled body. Surely this takes a psychological toll. A recent *Air Force* study found that 29 percent of drone pilots suffered from “burnout,” with 17 percent “clinically distressed.”<sup>15</sup>

*Targeted killings are creepy* – Many critics of drone strikes also express discomfort with “targeted killings,” viewing them as little more than assassinations or simple murder. In targeted killings, lethal force is aimed at specific, named individuals. Note, not all targeted killings involve drone strikes – some may involve bombs dropped from manned aircraft, or missiles fired from an aircraft carrier, or a boots-on-the-ground raid -- just as not all drone strikes are targeted killings.

But assuming the law of war applies—or that the right to national self-defense has legitimately been triggered – it is hard to see any *inherent* problem with targeted killing. Should we prefer *untargeted* killing? Isn’t it better to strike only those named individuals about whom we have specific evidence of terrorist activities than target unnamed individuals about whom we know far less?

## 2. GLORIFYING DRONES

For every critic who demonizes drones while ignoring their

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<sup>14</sup> Daniel Klaidman, ‘*Daniel Klaidman on the Mind of a Drone Strike Operator*’, *The Daily Beast* (8 June 2012), <http://www.thedailybeast.com/articles/2012/06/08/daniel-klaidman-on-the-mind-of-a-drone-strike-operator.html>.

<sup>15</sup> Rachel Martin, ‘*Report: High Level of ‘Burnout’ in US Drone Pilots*’, *NPR* (18 December 2011), <http://www.npr.org/2011/12/19/143926857/report-high-levels-of-burnout-in-u-s-drone-pilots>.

similarities to other less-demonized technologies, there are twice as many people who seem to regard drones as a near-panacea – an almost magical new technology that will allow us to economically stave off foreign threats from the safety of home.

The notion that we can kill bad guys with a cheap, replaceable unmanned vehicle in a manner that lets us minimize unintended casualties, without risking American lives, is appealing – indeed, vastly more appealing than, say, sending scores of thousands of troops off to war. Had it not been for the availability of drone technologies, it is not clear that the United States would have intervened in Libya, for instance: once Libya's air defenses had been eliminated by US missiles (many launched by old-fashioned manned aircraft), the intervention in Libya became to a great extent a drone war. In that case, the United States was able to reduce the risk to human pilots by sending in drones to take out targets on the ground.

However, the advantages of drones are often as overstated and misunderstood as the problems they pose. In some ways, the perceived advantages of drones cause new problems, which are generally ignored by their proponents. In particular, drone technologies temptingly lower or disguise the costs of lethal force. Yet their apparent benefits may mask their potentially dangerous longer-term costs and the broader strategic consequences of an increasing reliance on drones.

Armed drones lower the perceived costs of using lethal force in at least three ways. First, drones reduce the financial cost of using lethal force in foreign countries. Most drones are substantially less expensive than the available alternatives. For example, manned aircraft are quite costly: Lockheed Martin's F-22 fighter jets cost around \$400 million each;<sup>16</sup> F-35s are \$130 million;<sup>17</sup> and F-16s are \$47 million.<sup>18</sup> But the 2011 price of a Reaper drone was \$28 million,<sup>19</sup> while Predator drones cost only about \$4.5 million.<sup>20</sup>

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<sup>16</sup> W. J. Hennigan, 'Sky-High OVERRUNS, Safety Ills Plague Jet', *Los Angeles Times* (7 August 2011), <http://articles.latimes.com/2011/aug/07/business/la-fi-fighter-jets-grounded-20110807>.

<sup>17</sup> Larry Abramson, 'At \$130 Million A Plane, Critics Question The Cost Of The F-34', *NPR* (2 January 2013), <http://www.npr.org/2013/01/02/167201865/at-130-million-a-plane-critics-question-the-cost-of-the-f-35>.

<sup>18</sup> 'Lockheed Martin F16 Flying Falcon', *Aircraft Compare* (last visited 18 July 2013), <http://www.aircraftcompare.com/helicopter-airplane/Lockheed-Martin-F16-Fighting-Falcon/169>.

<sup>19</sup> Medea Benjamin, *Drone Warfare; Killing by Remote Control* (London: Verso Books, 2013), ch. 2.

<sup>20</sup> *Ibid.*; 'Disruptive Innovation; Case Study: Unmanned Aerial Vehicles (UAVs)', *Deloitte* (2012), <https://www.deloitte.com/assets/Dcom->



Some assert that the true costs of drones are (or will soon be) far higher, both because the United States is in the process of developing more sophisticated and expensive drones and because production costs don't reflect the expenses of the underlying research and development. As with so many things, putting a dollar figure on drones is difficult as it depends what costs are counted, and what time frame is used. However, the issue here is not only whether drones are truly less expensive than alternative technologies but also the degree to which they are *perceived* as cheaper by government decision-makers.

Second, relying on drone attacks unquestionably reduces the domestic political costs of using lethal force. Sending special operations forces after a suspected terrorist places the lives of US personnel at risk, and full-scale invasions and occupations endanger even more American lives. In contrast, using armed drones eliminates all short-term risks to the lives of US personnel involved in the operations. And because drone attacks don't involve "sustained fighting ... active exchanges of fire ... [or] US ground troops,"<sup>21</sup> any need for congressional notification and approval under the War Powers Resolution can conveniently be avoided.<sup>22</sup> It is no coincidence that while Americans generally view the Iraq and Afghanistan wars as costly mistakes, substantial majorities approve of President Obama's drone policies.

Third, by reducing accidental civilian casualties, precision drone technologies reduce the perceived moral and reputational costs of using lethal force.<sup>23</sup> Most US officials care greatly about avoiding civilian casualties, and even those who might be willing to discount the moral cost of civilian deaths understand the reputational costs. Dead civilians upset local populations and host-country governments, alienate the international community, and sometimes even disturb the sleep of American voters.<sup>24</sup>

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Australia/Local%20Assets/Documents/Industries/Government%20Services/Public%20Sector/Deloitte\_DefenseUAV\_DI\_CaseStudy\_2Apr2012.pdf.

<sup>21</sup> 'White House Report on US Actions in Libya', *New York Times* (15 June 2011), [http://www.nytimes.com/interactive/2011/06/16/us/politics/20110616\\_POWERS\\_DOC.html?ref=politics](http://www.nytimes.com/interactive/2011/06/16/us/politics/20110616_POWERS_DOC.html?ref=politics).

<sup>22</sup> Charlie Savage and Mark Landler, 'White House Defends Continuing US Role in Libya Operation', *New York Times* (15 June 2011), <http://www.nytimes.com/2011/06/16/us/politics/16powers.html?pagewanted=all>.

<sup>23</sup> Scott Shane, 'The Moral Case for Drones', *New York Times* (14 June 2012), <http://www.nytimes.com/2012/07/15/sunday-review/the-moral-case-for-drones.html>.

<sup>24</sup> Kevin Drum, 'Do Americans Care About Civilian Deaths in Drone Attacks?', *Mother Jones* (28 August 2012),

Government officials are extremely sensitive to financial, political, and reputational costs. Thus, when new technologies appear to reduce the costs of using lethal force, their threshold for deciding to use lethal force correspondingly drops. If killing a suspected terrorist based in Yemen or Somalia will endanger expensive manned aircraft, the lives of US troops, and/or the lives of many innocent civilians, US officials will reserve such killings for situations of extreme urgency and gravity (stopping another 9/11; finally getting Osama bin Laden). But if all that appears to be at risk is an easily replaceable drone, officials will be tempted to use lethal force more often and more casually.

The trouble with drones is that they make it a little *too* tempting and perhaps too easy to use force.<sup>25</sup> When you have a tool that allows you to target potential bad guys with very little risk, why *wouldn't* a government use it ever more frequently? Thus, we have seen drone strikes evolve in the last decade from a technology with limited deployment used to target specifically identified high-ranking al Qaeda officials to a tool used in an increasing number of countries to attack an apparently endlessly lengthening list of putative bad guys, some identified by name, others targeted on the basis of suspicious behavior patterns, with an increasingly tenuous link to grave or imminent threats to the United States.

As their use has grown, drones strikes have targeted militants who are lower and lower down the terrorist food chain,<sup>26</sup> rather than terrorist masterminds.<sup>27</sup> Although drone strikes are believed to have killed more than 3,300 people since 2004,<sup>28</sup> by most accounts only a small fraction of those successfully targeted have been so-called “high-value targets.”<sup>29</sup> In addition, drone strikes have spread ever further away from “hot” battlefields such as Afghanistan and northern Pakistan to Yemen to

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<http://www.motherjones.com/kevin-drum/2012/08/do-americans-care-about-civilian-deaths-drone-attacks>.

<sup>25</sup> Rosa Brooks, *'Take Two Drones and Call Me in the Morning'*, *Foreign Policy* (12 September 2012), [http://www.foreignpolicy.com/articles/2012/09/12/take\\_two\\_drones\\_and\\_call\\_me\\_in\\_the\\_morning](http://www.foreignpolicy.com/articles/2012/09/12/take_two_drones_and_call_me_in_the_morning)

<sup>26</sup> Peter Bergen and Megan Braun, *'Drone is Obama's Weapon of Choice'*, *CNN* (19 September 2012), <http://www.cnn.com/2012/09/05/opinion/bergen-obama-drone/index.html>.

<sup>27</sup> Greg Miller, *'Increase US Drone Strikes in Pakistan Killing Few High-Value Militants'*, *Washington Post* (21 February 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html>.

<sup>28</sup> *'The Drone War in Pakistan'*, <http://natsec.newamerica.net/drones/pakistan/analysis>.

<sup>29</sup> Miller, *'Increased US Drone Strikes'*.

Somalia (and perhaps to Mali<sup>30</sup> and the Philippines<sup>31</sup> as well).

So, while drone technologies enable the United States to reduce some of the costs of using lethal force inside the borders of other states, an increasing reliance on drones, justified partly on their “reduced costs”, may have potentially devastating costs.

For one thing, drones encourage a “short-term fix” approach to counterterrorism that relies excessively on eliminating specific individuals deemed to be a threat, with limited discussion of whether this strategy is likely to produce long-term security gains. Most counter-terrorism experts agree that in the long-term, terrorist organizations are rarely defeated through military action. After all, terrorists hold no territory and often lack centralized command structures; you can’t “invade” Al Qaeda, or force its parliament to accept a peace treaty. Instead, terrorist groups tend to fade away when they lose the support of the populations where they operate. They die out when their ideological underpinnings come undone: when new recruits stop appearing, when local communities stop providing active or passive assistance, when respected leaders speak out against them and residents report their activities and identities to the authorities.

For these reasons an effective, comprehensive counterterrorist strategy requires activities that undermine terrorist credibility within populations as well as on activities designed to disrupt terrorist communications and financing. This is not to deny the role for military actions such as targeted killings, but rather to emphasize the fact that a strategy that emphasizes kinetic force is unlikely to dismantle these types of organizations. As we have already seen, killing “Al Qaeda’s #3” doesn’t do us much good when a #4 stands ready to take his place (after all, as several political commentators have claimed, the United States has supposedly killed AQ’s “#3 official” dozens of times).<sup>32</sup>

Meanwhile, drone strikes -- lawful or not, justifiable or not – can have the unintended consequence of increasing both regional instability and anti-American sentiment. Drone strikes sow fear among the “guilty” and the innocent alike, and the use of drones in Pakistan and Yemen has

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<sup>30</sup> Bill Roggio and Lisa Lundquist, ‘*Did the US Launch a Drone Strike on AQIM in Northern Mali?*’, *Threat Matrix Blog* (24 June 2012), [http://www.longwarjournal.org/threat-matrix/archives/2012/06/did\\_the\\_us\\_launch\\_a\\_drone\\_stri.php](http://www.longwarjournal.org/threat-matrix/archives/2012/06/did_the_us_launch_a_drone_stri.php).

<sup>31</sup> Akbar Ahmed and Frankie Martin, ‘*Deadly Drone Strikes on Muslims in the Southern Philippines*’, *Brookings Institution* (5 March 2012), <http://www.brookings.edu/research/opinions/2012/03/05-drones-philippines-ahmed>.

<sup>32</sup> See, e.g., Robert Mackey, ‘*Eliminating Al Qaeda’s No. 3, Again*’, *New York Times* (1 June 2010), <http://thelede.blogs.nytimes.com/2010/06/01/eliminating-al-qaedas-no-3-again/>.

increasingly been met with popular resentment and—in Pakistan at least -- diplomatic and political protests.<sup>33</sup> As the Obama administration increases its reliance on drone strikes as the counterterrorism tool of choice, it is quite possible that we are trading short-term tactical gains for long-term strategic losses.

What impact will US drone strikes ultimately have on the stability of Pakistan, Yemen, or Somalia?<sup>34</sup> To what degree -- especially as we reach further and further down the terrorist command structure, killing lower level operatives who may be motivated less by ideology than economic need -- are we actually creating new grievances within the local population?<sup>35</sup> As Defense Secretary Donald Rumsfeld asked during the Iraq war, are we creating terrorists faster than we kill them?<sup>36</sup>

It's not hard to imagine hypothetical situations in which drone strikes would be both lawful and strategically effective. Yet even if this is true, many drone strike boosters seem unable to acknowledge it, there's little persuasive evidence that current US drone policy will benefit us in the long term.

### 3. LEGALIZING DRONES

There is nothing mystical about drones. They are not inherently “evil,” and they're not a panacea, either. Drone strikes are just another tactic in America's lethal toolkit – just another means of delivering death, not inherently any worse or any better than any other way to kill people.

From a narrow legal perspective, drones are also just “business as usual”. Both the United States and the international community have long had rules governing armed conflicts and the use of force in national self-defense. These rules apply whether the lethal force at issue involves knives, assault weapons, grenades, tank-mounted machine guns, or weaponized drones. When drone technologies are used in traditional armed conflicts—

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<sup>33</sup> *'Don't Drone On', The Economist* (1 September 2012), <http://www.economist.com/node/21561927>.

<sup>34</sup> See Paul Harris, *'Drone Attacks Create Terrorist Safe Haven', Warns Former CIA Official', Guardian* (5 June 2012), <http://www.guardian.co.uk/world/2012/jun/05/al-qaida-drone-attacks-too-broad>.

<sup>35</sup> Sudarsan Raghavan, *'In Yemen, US Airstrikes Breed Anger, and Sympathy for al-Qaeda', Washington Post* (29 May 2012), [http://www.washingtonpost.com/world/middle\\_east/in-yemen-us-airstrikes-breed-anger-and-sympathy-for-al-qaeda/2012/05/29/gJQAUmKIOU\\_story.html](http://www.washingtonpost.com/world/middle_east/in-yemen-us-airstrikes-breed-anger-and-sympathy-for-al-qaeda/2012/05/29/gJQAUmKIOU_story.html).

<sup>36</sup> *'Rumsfeld's War on Terror Memo', USA Today* (16 October 2003), <http://usatoday30.usatoday.com/news/washington/executive/rumsfeld-memo.htm>.

on “hot battlefields” such as those in Afghanistan, Iraq or Libya, for instance – they pose no new legal challenges, and can and should be regulated using the existing laws of war.

But if drones used in traditional armed conflicts present no “new” legal issues, some of the activities and policies enabled and facilitated by drones pose enormous challenges to existing legal frameworks. For example, as discussed above, the availability of drone technologies makes it far easier for the United States to “expand the battlefield,” striking targets in places where it would be too dangerous or too politically controversial to send troops. Often this expansion challenges existing legal frameworks.

For example, drones enable the United States to strike targets inside foreign states, and do so quickly, efficiently and deniably.<sup>37</sup> As a result, drones have become the tool of choice for so-called “targeted killing” – the deliberate targeting of an individual or group of individuals, whether known by name or targeted based on patterns of activity, inside the borders of a foreign country. It is when drones are used in targeted killings outside of recognized armed conflicts that their use challenges existing legal frameworks.

Law is almost always out of date: we make legal rules based on existing conditions and technologies, perhaps with a small nod in the direction of predicted future changes. As societies and technologies change, law increasingly becomes an exercise in jamming square pegs into round holes. Eventually, that process begins to do damage to existing law: it gets stretched out of shape, or broken. Ideally, we update the laws before too much damage is done. Right now, US drone policy is on the verge of doing irreparable damage to the rule of law – and it’s not clear that either the President, Congress or the public cares.

Understanding how US drone policy challenges existing legal ideas, systems and norms requires a consideration of the concept of “rule of law” as well as a review of the relationship between the laws of war and “ordinary” law.

*The Rule of Law* – A lot of ink has been spilled defining the rule of law. At root, the concept is pretty simple. The rule of law requires that governments follow transparent, universally applicable and clearly defined laws and procedures. The goal of the rule of law is to ensure predictability and stability, and to prevent the arbitrary exercise of power. When you’ve got the rule of law, a government cannot fine you, lock you up, or kill you

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<sup>37</sup> Granted, existing technological limitations make drone strikes an effective tool only in states that either consent to their use or that lack sophisticated anti-aircraft technologies, since today’s drones are relatively vulnerable.

on a whim -- it can only do that in accordance with pre-established rules that reflect basic notions of humanity and fairness, through fair processes.

Precisely what constitutes a fair process is open to debate. Nevertheless, most would agree that at a minimum, fairness requires that individuals have reasonable notice of what the law is, reasonable notice that they are suspected of violating the law, a reasonable opportunity to respond to allegations against them as well as a reasonable opportunity to have the outcome of any procedures be reviewed by an objective individual or body.

In the domestic US context, for instance, respect for the rule of law means that the government cannot detain people on a mere hunch or harm or kill citizens solely based on a suspicion of wrongdoing. For the police to arrest and detain someone they must demonstrate that “probable cause” exists to suspect someone of a crime, and conviction and punishment (whether imprisonment or death) requires the state to prove, in court, guilt “beyond a reasonable doubt.” The accused is entitled to legal representation, to confront the evidence against him and to appeal an adverse ruling to a higher court.

International law recognizes the same core rights recognized within the US constitutional system. These rights are enshrined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and in other treaties and declarations endorsed by the United States and vast majority of states around the globe.

Normally, these universally acknowledged rights (together with international law principles of sovereignty) make it clearly unlawful for one state to target and kill an individual inside the borders of another state. In 1976, for instance, when the Pinochet regime in Chile killed Chilean dissident Orlando Letelier in Washington DC using a car bomb, it was understood as an unlawful political assassination; a case of murder.<sup>38</sup>

*The Laws of War* – However, during times of war, the “ordinary” legal rules do not apply. Certain state-sponsored actions that are considered illegal (as well as immoral) under “ordinary” circumstances are legally permissible in the context of an armed conflict. To start with the obvious, in war, the willful killing of human beings is permitted -- regardless of whether the act is committed with a gun, a bomb, or a long-distance drone strike.

The same is true for a wide range of other acts. In war, it is legal for a combatant to knowingly inflict injury and death on others as long as they are enemy combatants or otherwise participating in hostilities. In fact, it is

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<sup>38</sup> Larry Rohter, *Chile Seeks US Files on 1976 Assassination*, *New York Times* (21 September 2006), <http://www.nytimes.com/2006/09/21/world/americas/21chile.html?pagewanted=all&r=0>.

lawful for such acts to be committed against ordinary civilians as long as the actions are consistent with core principles of international humanitarian law such as proportionality, necessity<sup>39</sup> and distinction.<sup>40</sup> Ditto destruction of property and various restrictions on individual liberties. In war, enemy combatants can be detained with little or no due process for the duration of the conflict -- not because they have committed crimes, but to keep them from returning to the battlefield (although they must be treated humanely as defined by a detailed set of rules). In addition, civilians may also be detained if they pose specific threats.

While this is a radical oversimplification of a very complex body of law,<sup>41</sup> as with the rule of law, the basic idea is pretty simple. When there is no war -- when ordinary, peacetime law applies -- agents of the state are not supposed to lock you up, take your things, or kill you, unless they have first jumped through multiple formal legal processes. In other words, you are protected both by domestic law and (in theory) by international human rights law.<sup>42</sup>

However, when there is a war, everything changes. While war, as managed by law, is not a free-for-all --actions such as torture, rape, and killing that is willful, wanton, and “not justified by military necessity”<sup>43</sup> remain crimes<sup>44</sup> under the law of war -- but there are far fewer constraints on state behavior.

Technically, the law of war is referred to using the Latin term *lex specialis* – special law. It is applicable in—and *only* in -- special circumstances, and in those special circumstances, it supersedes “ordinary law,” or *lex generalis*, the “general law” that prevails in peacetime. We have one set of laws for “normal” situations, and another, more flexible set of laws for “extraordinary” situations, such as armed conflicts.

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<sup>39</sup> ‘Customary IHL: Rule 14’, *International Committee of the Red Cross* (last visited 18 July 2013), [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter4\\_rule14](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14).

<sup>40</sup> ‘Customary IHL: Practice Relating to Rule 1. The Principle of Distinction between Civilians and Combatants’, *International Committee of the Red Cross* (last visited 18 July 2013), [http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule1](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule1).

<sup>41</sup> See, e.g., ‘IHL Primer #1 – What is IHL?’, *International Humanitarian Law Research Initiative* (last updated June 2009), <http://ihl.ihlresearch.org/index.cfm?fuseaction=page.viewpage&pageid=2083>.

<sup>42</sup> See Harold Hongju Koh, ‘How Is International Human Rights Law Enforced? Addison C. Harris Lecture January 21, 1998’, *Indiana Law Journal* 74 (1999).

<sup>43</sup> International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2 November 2000), art. 8(2)(a)(iv).

<sup>44</sup> See The War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (codified in part at 18 USC. § 2441).

Of course, the *lex specialis* of the law of war does not pose any inherent problem for the rule of law. The rule of law is as much a set of moral commitments as a specific body of rules and it is that bundle of rules, institutions and norms that we rely on to ensure fairness and predictability and prevent the abuse of power. Having one body of rules that tightly restricts the use of force and another body of rules that is far more permissive doesn't fundamentally undermine these commitments as long as we have a reasonable degree of consensus on what circumstances trigger this "special" law.

In other words, the different rules of war do not challenge ordinary law as long as war is the exception and not the norm. In addition, it is essential that there is general agreement as to what constitutes war, clarity as to when war begins and ends, and rules that discriminate between combatants and civilians and between those places where there is war and places where there is peace.

Now, how does this discussion relate to drones and targeted killings? Where these distinctions are clear, the use of drones in targeted killings does not necessarily present a legal or policy problem. In Libya, for instance, a state of armed conflict clearly existed inside the borders of the country and between Libyan government forces and NATO states. In that context, the use of drones to strike Libyan military targets was no more controversial than the use of manned aircraft in attacks.

That is because our core rule of law concerns have generally been satisfied: we know there is an armed conflict, in part because all parties to it agree that there's an armed conflict, in part because we can objectively verify the presence of uniformed military personnel engaged in using force, and in part because the violence is, from an objective perspective, widespread and sustained: it's not a mere skirmish or riot or criminal law enforcement situation that got out of control. We know *who* the "enemy" is: Libyan government forces. We know *where* the conflict is and isn't: it's in Libya, but not in neighboring Algeria or Egypt. We know *when* the conflict began, we know who authorized the use of force (the United Nations Security Council, which is legally empowered under the UN Charter to authorize such actions) and we know whom to hold accountable in the event of error or abuse (the various governments involved).

Another recent example is Afghanistan. Here, the enemy is not another state's organized, uniformed armed services, but rather a loosely knit network of allied insurgent forces. Nevertheless, the existence of an armed conflict in Afghanistan is not disputed and can be objectively verified by journalists and international monitors. Large numbers of US, NATO nation and Afghan troops are visibly engaged with an armed conflict. Taliban and other armed groups are organized, can be identified by local informants and are openly engaged in an armed conflict. Afghans



understand that there is a war in their country. When large-scale violence occurs, it does not come as a surprise and almost all groups involved in the country have a reasonably clear understanding of what constitutes “participating in hostilities” and what does not.

To be sure, there are mistakes and abuses, in which civilians are killed, but it is appropriate to call these situations what they are: mistakes and abuses within an armed conflict that is otherwise defined by the laws of war. And, where those specific cases violate the laws of war, they are war crimes and can and should be prosecuted using existing legal mechanisms. War causes terrible suffering, but as long as war is the exception, not the norm, it does not fundamentally challenge the *lex generalis* or the rule of law. In fact, the *lex specialis* of the laws of war allow a law-abiding society the capacity to engage in the devastating practice of armed conflict in a manner that creates a set of clear and enforceable limits on possible actions, thereby respecting the spirit and principles of the rule of law.

*Targeted Killings and the Law of War* – Once you take targeted killings outside hot battlefields, it’s a different story. The Obama Administration is using drones to strike terror suspects in Pakistan, Somalia, Yemen, and – perhaps Mali and the Philippines as well. Defenders of the administration’s increasing reliance on drone strikes in such places assert that the United States is in an armed conflict with “al Qaeda and its associates” and on that basis, they assert that the law of war is applicable -- in any place and at any time -- with regard to any person the administration deems a combatant.

The trouble is, no one outside a small group within the US executive branch has the ability to evaluate who is and who isn’t a combatant. The war against al Qaeda and its associates is not like World War II or the conflict in Libya or Afghanistan: it is an open-ended conflict with an inchoate, undefined adversary. After all, what does it mean to be one of al Qaeda’s “associates”?

What’s more, targeting decisions in this nebulous “war” are based largely on classified intelligence reporting. As a result, the Administration’s assertions about who is a combatant and what constitutes a threat are entirely non-falsifiable since they are based on secret and undisclosed evidence. Add to this still another problem: most of these strikes are considered covert actions, so although the United States sometimes takes public credit for the deaths of alleged terrorist leaders, most of the time, the administration will not officially acknowledge targeted killings.

The US government has not offered clear, full, and consistent answers to any of the key rule-of-law questions related to the ongoing war

against al Qaeda and its “associates.”<sup>45</sup> If this is an armed conflict, what changes will indicate that the war is over? Is there a future point at which the end of this war will allow those detained to be released, fulfilling key criteria of the laws of war? Based on what measure might someone be considered a combatant or directly participating in hostilities? Is serving as Osama bin Laden’s cook enough evidence to be designated for a targeted killing? What about an elderly Somali woman in Detroit who unwittingly gives money to an Islamic charity that serves as a front, or even a partial front, for a terrorist organization? Can she be targeted? What constitutes hostilities, and what does it mean to participate in them?

And just where is this war? Does the war (and thus the law of war) somehow “travel” with combatants? That is, if a suspected al Qaeda operative goes to Pakistan, Yemen, or Somalia, do the laws of war apply to all US actions in those countries? Or, does this body of law only apply to some actions in some situations? Does the United States have a “right” to target enemy combatants anywhere on earth, or do such actions require the consent of the state where the attack occurs?

These questions matter. What if, for example, the CIA uses an unmanned aerial vehicle to kill a US citizen whom it suspects is a member of Mali’s *Ansar Dine*, a militant Islamist group alleged to be allied with al Qaeda?<sup>46</sup>

If being a suspected member of *Ansar Dine* makes someone a combatant in a war on al Qaeda and the laws of war apply with regard to combatants regardless of the sovereign state within which they operate, then the hypothetical drone strike is perfectly lawful, US citizenship notwithstanding. Where there is a war, the laws of war apply; enemy combatants can be targeted and killed; and such actions are legal and above board.

But if there is no war -- or if the suspected *Ansar Dine* member is neither a combatant nor a civilian engaged in hostilities, or if there *is* a war, somewhere, but not in Mali -- then the hypothetical drone strike would be state-sanctioned murder (of a US citizen, no less).<sup>47</sup>

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<sup>45</sup> See ‘Q & A: US Targeted Killings and International Law’, *Human Rights Watch* (19 December 2011), <http://www.hrw.org/news/2011/12/19/q-us-targeted-killings-and-international-law>.

<sup>46</sup> See Lydia Polgreen, ‘Faction Splits From Islamist Group in Northern Mali’, *New York Times* (24 January 2013), [http://www.nytimes.com/2013/01/25/world/africa/faction-splits-from-islamist-group-in-northern-mali.html?\\_r=0](http://www.nytimes.com/2013/01/25/world/africa/faction-splits-from-islamist-group-in-northern-mali.html?_r=0).

<sup>47</sup> Ategh Khaki and Hannah Mercuris, ‘Why Targeted Killing is “Unlawful and Dangerous”’, *American Civil Liberties Union* (13 June 2012), <http://www.aclu.org/blog/national-security/why-targeted-killing-unlawful-and-dangerous>.

The rule of law problem here should be obvious: we have no principled basis for deciding how to categorize such targeted killings. Are they, as the US government argues, legal under the laws of war? Or are they unlawful murder?

The law of war was developed in a different era, with a different set of realities in mind. The world has changed since these principles were developed and codified. And, at least when it comes to terrorism, we're stuck today trying to make legal arguments based on once-clear categories that no longer have much value. The result? Neither law nor political institutions now offer any limiting principles on state use of coercion and force.

In this murky context, it requires a substantial capacity for cognitive dissonance to assert that US drone strikes are "obviously" legal under the laws of war and leave it at that. Every individual detained, targeted, and killed by the US government may well deserve his or her fate. However, when a government claims for itself the unreviewable power to kill anyone, anywhere on Earth, at any time, based on secret criteria and secret information discussed in a secret process by largely unnamed individuals, it has blown a gaping hole in the rule of law.

*Self-Defense* – When faced with criticisms of the law of war framework as a justification for targeted killing, the US Administration and its supporters often shift their position, arguing that international law rules on national self-defense provide an additional or alternative legal justification for targeted killing. Here, their argument is that if a person located in a foreign state poses an "imminent threat of violent attack" against the United States, the United States can lawfully use force in self-defense, provided that the defensive force used is otherwise consistent with law of war principles.

Like those arguments based on the law of war, this general principle is largely uncontroversial. For example, if an individual overseas is about to launch a nuclear weapon at New York City, the United States has the right – and the president has a constitutional duty – to use force to prevent the attack, regardless of the attacker's nationality, location or other similar issue.

But once again, the devil is in the details. First of all, what action or actions constitute an "imminent" threat? Traditionally, both international law and domestic criminal law understand that concept quite narrowly: for a threat to be "imminent" it cannot be distant or speculative.<sup>48</sup> However,

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<sup>48</sup> Anthony Clark Arend, 'International Law and the Preemptive Use of Military Force', *The Washington Quarterly* 26 (2003), 90-1 (discussing the *Caroline* incident).

for the Obama Administration, however, “distant and speculative” are apparently perfectly consistent with “imminent”: According to a 2011 Justice Department white paper—the most detailed legal justification that is publicly available, the principle of imminence “does not require the United States to have clear evidence that a specific attack on US persons and interests will take place in the immediate future.”<sup>49</sup> In other words, “imminence” as defined by the Administration does not require actual *imminence*.

On the contrary, since “certain members of al Qaeda are continually plotting attacks . . . and would engage in such attacks regularly [if] they were able to do so, [and] the US government may not be aware of all . . . plots as they are developing and thus cannot be confident that none is about to occur,” the United States can, in effect, target anyone deemed to be an operational leader of al Qaeda or its “associated forces.”<sup>50</sup>

In effect, the concept of “imminent threat” becomes conflated with status or identity. Under this definition, any “operational leader” of al Qaeda or its “associates” is, by definition, *always* presenting an imminent threat and can, under this argument, be subjected to a targeted killing by a drone or other military action.

This concept of imminence is as loose, ill defined and self-serving as might be imagined. Although the Justice Department white paper notes that the use of force to prevent imminent threats of violent attacks must comply with general principles of the law of war, including proportionality, and discrimination, it offers no guidance on how these principles might, in practice, guide decisions on whether a particular proposed strike would be permissible.

From a traditional international law perspective, necessity relates to the imminence and gravity of a threat itself. In the example of a terrorist group about to launch a nuclear weapon aimed at the US, few would question the “necessity” of a drone strike to prevent such an act. However, there are many examples of potential acts by individual terrorists and their affiliates that might meet the general definition of imminence as outlined by the Justice Department, but would hardly seem legitimate, legal or necessary: consider, for instance, a fundraising effort for an armed group, an angry mob of youth throwing rocks at a US embassy, or a vitriolic lecture on the evils of American society.

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<sup>49</sup> ‘Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a US Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force’, Department of Justice (released 4 February 2013), available at [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf).

<sup>50</sup> *Ibid.* p. 8.

Here again, the DOJ document leaves many of the most important questions unanswered: Is any threat of “violent attack” sufficient to justify killing someone in a foreign country? What if the individual is a US citizen? Is every potential suicide bomber targetable? And at what point would they be a legitimate target? Are we justified in drone strikes against targets that might, if given a chance at some unspecified future point, place an IED that could, if successful, kill one person? Two people? Twenty? Two thousand? How grave a threat must there be to justify the use of lethal force against an individual abroad?

Defenders of administration policy acknowledge that the criteria for determining how to answer these questions have not been made public. However, they insist that this should not cause concern. Insiders<sup>51</sup> consistently reassure critics and the public in general that executive branch officials go through an elaborate process in which they carefully consider every possible issue before determining that a drone strike is lawful.<sup>52</sup> While this may be true, formal processes tend to further normalize once-exceptional activities -- and “trust us” is a pretty shaky foundation for the rule of law.

After raising -- and quickly rejecting -- potential constitutional arguments against the targeting of US citizens overseas, the DOJ white paper concludes that the determination of whether an American citizen overseas can be killed can be made by “an informed, high-level official of the US government,”<sup>53</sup> and that neither Congress nor any Court can countermand or question these decisions. That’s because “matters intimately related to foreign policy are rarely proper subjects for judicial interventions,” and such matters “frequently turn on standards that defy judicial application.”<sup>54</sup>

This restates the problem nicely: generally speaking, standards that would “defy judicial application” are effectively no standards at all. They consist of sweeping generalizations about legality, but offer no criteria for actually determining legality (or necessity, or strategic wisdom). This is not a

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<sup>51</sup> See, e.g., Harold Hongju Koh, ‘*The Obama Administration and International Law*’, speech at *Annual Meeting of the American Society of International Law* (25 March 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

<sup>52</sup> Jo Becker and Scott Shane, ‘*Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*’, *New York Times* (29 May 2012), <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all&r=0&gwh=BED2C2B36482F9B95C884E231A66624E>.

<sup>53</sup> ‘Department of Justice White Paper’, p. 16.

<sup>54</sup> *Ibid.* p. 10 (quoting *Haig v. Agee*, 453 US 280, 292 (1981) and *Baker v. Carr*, 369 US 186, 211 (1962)).

reason to *reject* any notion of judicial review. Rather this is the very reason one might consider a review outside the executive branch as essential.

As with law of war arguments, stating that US targeted killings are obviously legal under traditional self-defense principles requires more than a little cognitive dissonance. Law exists to restrain untrammelled power. Certainly, it's possible to make a plausible legal argument justifying each and every US drone strike -- but this merely suggests that we're working with a legal framework that has begun to outlive its usefulness.

The real question isn't whether US drone strikes are "legal." The real question is: Do we really want to live in a world in which the US government's justification for killing is so malleable?

*The example we set* – Another reason to worry about the US overreliance on drone strikes is that if other states were to follow America's example, the results might be quite disturbing. Consider the Letelier murder previously referenced. In 1976, this was an international scandal; it significantly delegitimized the Chilean government (and later led to a number of civil and criminal legal cases). If the Letelier assassination took place today, you can imagine that Chilean authorities would insist on their national right to engage in "targeted killings" of individuals deemed to pose imminent threats to Chilean national security -- and they would justify such killings based on the same legal theories the United States currently uses to justify targeted killings in Yemen or Somalia.

Right now, the United States has a decided technological advantage when it comes to armed drones, but that situation will not last long. Rather than continue on the present path, our government should use this window to advance a robust legal and normative framework that will help protect against abuses by those states whose leaders can rarely be trusted.

Unfortunately, we are doing exactly the opposite. Instead of articulating norms based on transparency and accountability, the US is effectively legitimizing the sorts of policies that have traditionally been used by authoritarian regimes, handing other countries – perhaps China Russia, Iran or North Korea – a playbook for how to use legal arguments to foment instability and get away with murder.

Take the issue of sovereignty. *Sovereignty* has long been a core concept of the Westphalian international legal order.<sup>55</sup> The basic idea is that within the international arena, all states are formally considered equal and possessed of the right to control their own internal affairs free from the interference of other states. One expression of this idea is the principle of

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<sup>55</sup> John H. Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept', *American Journal of International Law* 97 (2003), 782.

non-intervention, which means, among other things, that it is generally a fundamental violation of international law for one sovereign state to use force inside the borders of another sovereign state.<sup>56</sup>

There are some well-established exceptions, but these are few in number. For example, a state can lawfully use force inside another sovereign state with that state's invitation or consent, in self-defense "in the event of an armed attack",<sup>57</sup> or when force is authorized by the U.N. Security Council, pursuant to the U.N. Charter.<sup>58</sup>

The principle of sovereignty might appear to pose substantial problems for US drone policy: How can the US lawfully use force to kill suspected terrorists inside Pakistan, or Somalia, or Yemen, or -- hypothetically -- in other states in the future? Obviously, the US does not have Security Council authorization for drone strikes in those states, so the justification has to rest either on consent or on some theory of self-defense. Thus, the DOJ white paper blithely asserts that targeted killings carried out by the United States don't violate another state's sovereignty as long as that state either consents or is "unwilling or unable to suppress the threat posed by the individual being targeted."

Superficially, this position appears plausible. However woven into this argument is an idea of American exceptionalism in which the US views itself as the sole arbiter of whether a state is "unwilling or unable" to suppress a threat. This presents a circular logic: the US, using its own infinitely malleable definition of "imminent," decides that Person X, residing in a sovereign state, poses a threat to the US such that removing this threat requires that he or she must be killed. Once the US decides that Person X must be killed, the principle of sovereignty presents no barriers, because either 1) the state will *consent* to the US use of force inside its borders, in which case the use of force presents no problem (except for Person X, of course), or 2) the state will *not* consent to the US use of force inside its borders, in which case the US will deem the state to be "unwilling or unable to suppress the threat" posed by Person X. That is, regardless of the position taken by sovereign state, the use of force by the US government will be interpreted as lawful -- by the US, at any rate -- rendering that state's sovereignty meaningless.

To the degree that this is the logic of US drone activity, it more or less eviscerates traditional notions of sovereignty and has the potential to significantly destabilize the already shaky collective security regime created

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<sup>56</sup> Mark V. Vlasic, 'Assassination and Targeted Killing: A Historical and Post-Bin Laden Legal Analysis', *Georgetown Journal of Internal Law* 43 (2012), 318 (citing U.N. Charter art. 2, paras. 1 and 4).

<sup>57</sup> *Ibid.*

<sup>58</sup> U.N. Charter art. 42.

by the U.N. Charter. If the United States declares itself the sole arbiter of whether and when force can lawfully be used inside the borders of another state, why should other strong states not make similar claims?

And, of course, if the US executive branch is the sole arbiter of what constitutes an imminent threat and who constitutes a targetable enemy combatant in an ill-defined war, why shouldn't other states make identical arguments—and use them to justify the killing of dissidents, rivals, or unwanted minorities?

Consider Russia, in which dissidents, investigative journalists, and unwanted political rivals are commonly arrested and jailed and sometimes killed.<sup>59</sup> At the moment, the Russian government disclaims responsibility when a troublesome citizen is conveniently murdered in a foreign country. But with the United States putting forward an infinitely flexible interpretation of the law of war and the scope of self-defense, why should Russia bother to deny targeted killings of its enemies in the future?

Perhaps soon, the Russian government will explain the next dissident's death (whether by drone strike in Belarus or radioactive sushi in London)<sup>60</sup> with a dignified news release. The murdered "dissident"? --A combatant in Russia's war with terrorists, and an imminent threat to Russian national security. The evidence? --Classified, but all actions taken have been lawful and subject to a rigorous internal Kremlin review process. If US officials are skeptical, Russian officials can always approvingly quote President Obama: "There are classified issues, and a lot of what you read in the press ... isn't always accurate.... My most sacred duty ... is to keep the ... people safe."<sup>61</sup>

#### DEALING OPENLY WITH DRONES

We need to stop relying on a questionable, often ad-hoc defense of US drone policy and start talking honestly about the use of these emerging

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<sup>59</sup> 'Russia 2012: Increased Repression, Rampant Corruption, Assisting Rogue Regimes', *Freedom House* (last visited 18 July 2013), <http://www.freedomhouse.org/article/russia-2012-increased-repression-rampant-corruption-assisting-rogue-regimes>.

<sup>60</sup> 'Traces of Radioactive Material Found in Sushi Restaurant, Home of Dead Spy', *Fox News* (25 November 2006), <http://www.foxnews.com/story/2006/11/25/traces-radioactive-material-found-in-sushi-restaurant-home-dead-spy/>.

<sup>61</sup> Chris Woods, 'Obama's Five Rules for Covert Drone Strikes', *Bureau of Investigative Journalism* (6 September 2012), <http://www.thebureauinvestigates.com/2012/09/06/obamas-five-rules-for-covert-drone-strikes/>



technologies, the activities they enable and the strategic and legal frameworks in which these activities take place. Those who criticize the deployment of drones should end their irrational insistence on viewing drones as somehow inherently more “immoral” than other military technologies. But drone strike boosters also need to engage in a more honest conversation, and grapple with the argument that although drone strikes appear to offer cheap and low-risk “quick fix” approach to counterterrorism, they may well be doing the US as much harm as good.

By far the most egregious form of cognitive dissonance afflicts those who deny that the US policy of targeted killings presents rule of law problems. Is it possible to argue that current US drone policy is entirely lawful? Certainly—if you’re willing to take virtually everything about the strikes on faith, and you don’t mind jamming square pegs into round holes. But “legality” is not the same as morality or common sense. Current US drone policy is largely secret, offers no safeguards against abuse or error, and sets a dangerous precedent that other states are sure to exploit.

There’s nothing preordained about how we use new technologies. However, by lowering the perceived costs of using lethal force, drone technologies enable a particularly invidious sort of mission creep. When covert killings are the rare exception, they do not pose a fundamental challenge to the legal, moral, and political framework in which we live. But when covert killings become a routine and ubiquitous tool of US foreign policy, we cannot afford to let them remain in the legal and moral shadows. Our nation, and the world, needs an honest conversation about how to bring targeted killings under a rule of law umbrella, by creating more transparent rules and more robust checks and balances.

“Tell me how this ends,” said General David Petraeus in 2003.<sup>62</sup> He was speaking of the war in Iraq, which was born out of faulty intelligence and faultier strategic logic, leading the mission to spiral rapidly out of control. Today we know the answer to Petraeus’ question: The war ended with tenuous stability for Iraq -- won at the price of some 4,500 dead Americans,<sup>63</sup> hundreds of thousands of dead Iraqis,<sup>64</sup> millions displaced and

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<sup>62</sup> Linda Robinson, *Tell Me How This Ends: General David Petraeus and the Search for a Way Out of Iraq* (New York: PublicAffairs, 2008).

<sup>63</sup> *Iraq Coalition Casualties: Military Fatalities*, *Iraq Coalition Casualty Count* (last updated 11 February 2012), <http://icasualties.org/Iraq/Fatalities.aspx>.

<sup>64</sup> ‘Casualties of the Iraq War’, [http://en.wikipedia.org/wiki/Casualties\\_of\\_the\\_Iraq\\_War](http://en.wikipedia.org/wiki/Casualties_of_the_Iraq_War) (comparing statistics compiled by various reporting organizations).

roughly a trillion dollars in direct costs,<sup>65</sup> as well as incalculable damage to the United States' global reputation. By 2012, two-thirds of Americans were convinced the war in Iraq hadn't been worth it.<sup>66</sup>

Petraeus' famous question about Iraq might equally be asked of America's covert drone war. In this shadowy domain, we know the US government claims the legal right to kill any person, anywhere on earth, at any time, based on secret evidence collected and reviewed by unnamed officials, without any form of prior or subsequent external review or investigation. And though most covert drone strikes are not officially acknowledged, we know from media and NGO reporting that between 3,000 and 5,000 people have been killed by US drone strikes in Pakistan and Yemen.

There is still a great deal that we do not know about US drone policy. We do not know if this shadow war has any limits, what these limits may be or how they are reviewed and enforced. We do not know if there are any meaningful mechanisms to prevent mistakes and abuse, and we do not know how many of the deaths so far were the result of such errors or abuse. We do not know if we will be expanding our shadow war into additional foreign states or what those states might be. We do not know if our government believes there are any limits on whom we can target, when they can be targeted, or where such targeting may occur. We do not know the objectives of this shadowy war. Is the goal to end the operational effectiveness of al Qaeda and its affiliates? To end global terrorism? To reduce anti-American violence? We have no clear idea as to how or when we will know if our policies are effective and enable us to achieve our objectives. Above all, we do not know if our shadow war is making us safer, or simply making our world less stable.

How does this end?

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<sup>65</sup> Danielle Kurtzleben, 'What Did the Iraq War Cost? More Than You Think,' *US News* (15 December 2011), <http://www.usnews.com/news/articles/2011/12/15/what-did-the-iraq-war-cost-more-than-you-think>.

<sup>66</sup> Dina Smeltz, 'Foreign Policy in the New Millennium: Results of the 2012 Chicago Council Survey of American Public Opinion and US Foreign Policy', *The Chicago Council on Foreign Affairs* (2012), [http://www.thechicagocouncil.org/UserFiles/File/Task%20Force%20Reports/2012\\_CCS\\_Report.pdf](http://www.thechicagocouncil.org/UserFiles/File/Task%20Force%20Reports/2012_CCS_Report.pdf).