

Make No Drones About It: Evaluating the U.S. Drone Program Based On Domestic Policy Standards

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Abstract: *United States policymakers have set strict standards on the parameters of drone use. They have thereby lain out before the public an idealized narrative of the effectiveness of drones, as well as the restraint with which they are used. Beyond this lofty rhetoric, however, the U.S. government has been incredibly reluctant to furnish information on its drone program. To complicate matters further, the rhetoric on the drone program put out by the administration is rarely corroborated by facts on the ground due to frequent civilian deaths, signature strikes, and the targeting of Americans. This piece analyzes the realities of the drone program against the backdrop of the idealized rhetoric laid out by the Obama Administration and finds that the rhetoric is not supported by the facts on the ground. As such, the piece argues for increased transparency and more effective human intelligence to be applied to the drone program.*

Introduction

In January 2015, the United States conducted a drone strike that led to three deaths which had enormous and widespread consequences. A drone strike targeting an Al Qaeda compound on the border between Pakistan and Afghanistan led to the death of Ahmed Farouq, an Al Qaeda leader and American citizen, and two hostages, one an American and the other an Italian.¹ The United States did not know that the hostages were present, and did not specifically target the American Al Qaeda leader.² According to President Obama and the White House Press Secretary, the United States acted on the best intelligence that it had available, which included “hundreds of hours” of surveillance of the site.³ The tragic circumstances surrounding this case led the Obama administration to release an almost unprecedented, yet still relatively scarce, amount of information on a particular drone strike. Even so, the White House still refused to acknowledge on the record that a drone carried out the attack, preferring to call the attack a “counterterrorism operation.”⁴ Unfortunately, according to UN reports, narratives such as these are not isolated incidents; they are often the realities of the U.S. drone program.⁵ In order to

¹ Jeremy Diamond, “U.S. Drone Strike Accidentally Killed 2 Hostages,” *CNN*, April 23, 2015, accessed May 9, 2015, <http://www.cnn.com/2015/04/23/politics/white-house-hostages-killed/>.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ Ben Emmerson, “A/HRC/25/59: Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson,” *United Nations Council on Human Rights*, February 24, 2014, 10-19, accessed March 9, 2015, <http://justsecurity.org/wp-content/uploads/2014/02/Special-Rapporteur-Rapporteur-Emmerson-Drones-2014.pdf>.

mitigate future tragedies and to avoid international scrutiny, U.S. drone policy must be critically examined and evaluated. This piece will attempt to contribute to the aforementioned evaluation. Regardless of the nationalities of the civilians who have died as a result of U.S. drone strikes, anecdotes such as these raise important questions about both the standards that the United States sets for its drone program and the effectiveness of the intelligence behind them. To be sure, drones offer an effective way to kill terrorists with comparatively fewer risks to both U.S. personnel and to civilians than other counter-terrorism methods.⁶ As will be examined throughout this analysis, United States policymakers have been careful to set strict standards on the parameters of drone use. Policymakers have laid out before the public an idealized narrative of the effectiveness of drones, as well as the restraint with which they are used. Beyond this lofty rhetoric, however, the U.S. government has been incredibly reluctant to furnish information on its drone program. To complicate matters further, the rhetoric on the drone program provided by the administration is rarely corroborated by facts on the ground due to frequent civilian deaths, signature strikes, and the targeting of Americans.⁷ Recognizing this, the United States should bolster its human intelligence apparatus and employ other counterterrorism methods such as ground troops in conjunction with drones. Such action would bring the drone program in line with the high standards the administration has placed upon it.

Stated U.S. Drone Policy

In order to make an effective evaluation about the U.S. drone program, it is necessary to have a standard by which to evaluate it. Some scholars have set that standard as international law and others have sought to evaluate drones on their practicality and effectiveness as a counterterrorism mechanism.⁸ These metrics are certainly important, and they will be touched on throughout this analysis, but it is also necessary to evaluate the drone program based on the standards that the U.S. government itself has placed on it. As previously alluded to, the U.S. government very rarely releases substantive information on its drone policy. The closest to definitive comments on policy that has been released to the public come from a 2013 speech that President Obama gave at the National Defense University, and an accompanying fact sheet released by the White House. In his speech, Obama claims that for the

⁶ William Saletan, "In Defense of Drones," *Slate*, March 13, 2013, accessed April 12, 2015. http://www.slate.com/articles/health_and_science/human_nature/2013/02/drones_war_and_civilian_casualties_how_unmanned_aircraft_reduce_collateral.html.

⁷ Cavallaro, James, Stephan Sonnenberg, and Sarah Knuckey, "Living under drones: death, injury, and trauma to civilians from US drone practices in Pakistan: Overview," *NYU School of Law and Stanford Law School*, (2012), accessed March 8, 2015. http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/313671/doc/slpublic/Stanford_NYU_LIVING_UNDER_DRONES.pdf.

⁸ For an international legal perspective, see Mahmood Ahmad, "The Use of Drones in Pakistan: an Inquiry into the Ethical and Legal Issues," *Political Quarterly* 85, no. 1 (January 2014): 65 and 68, accessed March 8, 2015, <http://eds.a.ebscohost.com/eds/pdfviewer/pdfviewer?sid=ef256a5e-2237-40db-ae72-2ba03a162d46%40sessionmgr4002&vid=7&hid=4102>; for a practical perspective, see Daniel Byman, "Why Drones Work: The Case for Washington's Weapon of Choice," *Foreign Affairs* 92, no.4 (2013), accessed March 8, 2015. <http://eds.a.ebscohost.com/eds/detail/detail?sid=ef256a5e-2237-40db-ae72-2ba03a162d46%40sessionmgr4002&vid=18&hid=4102&bdata=JnNpdGU9ZWRzLWxpdmUmc2NvcGU9c2l0ZQ%3d%3d#db=ecn&AN=1380314>.

U.S. to carry out a drone strike, “there must be near-certainty that no civilians will be killed or injured.”⁹ Obama goes on to refer to this as “the highest standard we can set.”¹⁰ President Obama surely knows that civilian deaths are one of the most potent arguments against drone warfare and by setting this standard he attempts to address the doubts of all but the most stalwart humanitarians.

Released the same day as the president’s speech, the fact sheet, summarizing a classified Presidential Policy Guidance on targeted killings, echoes and corroborates the information presented in Obama’s speech. For instance, the document clearly states that it is the policy of the United States “not to use lethal force when it is feasible to capture a terrorist suspect, because capturing a terrorist offers the best opportunity to gather meaningful intelligence and to mitigate and disrupt terrorist plots.”¹¹ This policy furthers the high standard placed on the drone program as it indicates that drone strikes are not the first option on the table and the ability to capture terrorists will be examined before drones or other lethal methods are considered. In addition, the document explains that force will only be used against “a target that poses a continuing, imminent threat to U.S. persons.”¹² The document makes this requirement even more stringent by immediately qualifying that being a terrorist does not by definition mean that one is necessarily posing a continuing and immediate threat and that only those who are can have lethal force used against them.¹³ The fact sheet also goes on to address concerns of international law and sovereignty claiming that the United States respects both and that its policy adheres to both.¹⁴

In short, this document answers nearly every criticism of U.S. drone policy. As such, if the United States adheres to its presented policy, then there is little argument that can be made against the administration’s use of drones. Nevertheless, to determine if the government is adhering to its policy, one must analyze the decisions made and the actions taken on individual drone strikes. Unfortunately, except in extreme cases such as the aforementioned drone strike which killed Western hostages, the U.S. government does not release information about the circumstances of individual strikes.¹⁵ Perhaps the most telling evidence of the zealotry of the administration’s protection of any information relating to the drone program comes from an interview with Obama’s first press secretary, Robert Gibbs. In the interview, Gibbs states that “one of the first things they told me was, you’re not even to acknowledge the drone program. You’re not even to discuss that it exists.”¹⁶ While this narrative has become slightly more open

⁹ Barack Obama, “Remarks by the President at the National Defense University,” *The White House*, May 23, 2013, accessed March 8, 2015, <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

¹⁰ Ibid.

¹¹ The White House, “Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities,” *The White House*, May 23, 2013, accessed March 8, 2015, <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Milena Sterio, “The Covert Use of Drones: How Secrecy Undermines Oversight and Accountability,” *Albany Government Law Review* 8 no. 1, (2015): 164-5.

http://www.albanygovernmentlawreview.org/Articles/Vol08_1/8.1.129-Sterio.pdf

¹⁶ Lloyd C. Gardner, *Killing Machine: the American Presidency in the Age of Drone Warfare*, (New York: The New Press, 2013), vii.

(the Obama administration is now willing to acknowledge the program's existence) little else has substantively changed.¹⁷

A more recent example of the administration's desire to maintain an aura of secrecy around the drone program comes from a lawsuit between the American Civil Liberties Union (ACLU) and the Central Intelligence Agency (CIA). In 2010, ACLU filed a Freedom of Information Act (FOIA) request to the Departments of State, Defense and Justice, as well as to the CIA. According to the ACLU, the request sought documents pertaining to "when, where, and against whom drone strikes can be authorized, and how the United States ensures compliance with international laws relating to extrajudicial killings."¹⁸ While the three departments agreed to furnish some, but not all information, the CIA denied the request outright.¹⁹ The CIA issued, and a D.C. District Court originally upheld, what is known as a "Glomar response," wherein it refused to either confirm or deny even the existence of any documents acknowledging the drone program.²⁰ This response was given with the justification that "whether such [documents] even exist is a properly classified fact."²¹

The ACLU filed suit against the CIA, disputing the "Glomar response." Recently, a D.C. Circuit Court ruled that even though the government had not admitted to the existence of the CIA drone program in an official capacity, the overwhelming acknowledgement of the program by "anonymous" government officials meant that the program itself could not reasonably be considered classified.²² The Circuit court therefore ruled that the CIA's original response was inadequate and required the agency to begin the FOIA process anew.²³ As a result, the CIA "searched for and acknowledged the existence of twelve legal memoranda and thousands of classified intelligence products."²⁴ The agency then released a redacted white paper from the Department of Justice, but withheld the other 11 memoranda and all of the intelligence reports.²⁵ This slight victory for the ACLU was short-lived. In June of 2015, the same D.C. District Court that upheld the CIA's original Glomar response ruled that because of potentially sensitive national security information contained in the CIA's documents, the agency was not mandated to furnish any documents, even redacted ones, to the ACLU, effectively ending the FOIA request.²⁶ While national security concerns are undeniably legitimate, applying such a broad ruling to all CIA documents containing information on drone strikes ensures that scholars, journalists, and the public at large will remain woefully uninformed of the government's official decisions made and actions taken on drone strikes.

With the government's unwillingness to divulge information on the drone program, the only way to adequately analyze whether the realities of the U.S. drone program are adhering to government standards is to rely on the facts gathered after the strikes by third party

¹⁷ Sterio, "The Covert Use of Drones," 134.

¹⁸ "ACLU v. CIA - FOIA Case for Records Relating to Drone Killings," last modified July 24, 2014, accessed May 9, 2015. <https://www.aclu.org/cases/aclu-v-cia-foia-case-records-relating-drone-killings?redirect=cases/predator-drones-foia>.

¹⁹ Ibid.

²⁰ Andrew Christy, "The ACLU's Hollow FOIA Victory over Drone Strikes." *George Mason Law Review* 21 no.1 (2013): 2-3.

²¹ Ibid.

²² Ibid., 2.

²³ *American Civil Liberties Union v. Central Intelligence Agency*, 10-436 F. Supp. 2d 74, 1 (D.D.C. 2015) https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2010cv0436-74.

²⁴ Ibid.

²⁵ Ibid., 1-2.

²⁶ Ibid., 34.

organizations. Several organizations have collected data on drone strikes and their consequences, but three of them, the Long War Journal, the New America Foundation, and the UK-based Bureau of Investigative Journalism, stand out as having the most reliable information.²⁷ Several journalists as well as academics use the data from one or all of these organizations when conducting research on drone strikes.²⁸ Highlighting their authority on drone strikes, the Human Rights Clinic at Columbia Law School chose to audit these three organizations because they were deemed to be the most influential organizations devoted to tracking drone strikes.²⁹ Unfortunately, the facts on the ground gathered by these groups often tell of frequent civilian deaths, signature strikes, and American targets. Such realities cannot logically align with an adherence to the lofty policies laid out by the Obama administration.

The Realities of the Drone Program

Civilian Deaths

Having laid the backdrop of the stringent U.S. policy on drone strikes, it is now appropriate to examine the data available on the realities of the program itself. One of the most strident arguments against the U.S. drone policy is that civilians, including women and children, are inevitably killed by drone strikes. Scholars have used this claim to make moral, practical, and international legal arguments for why the drone program should be reevaluated. The civilian casualties surrounding drone strikes are therefore one of the most important metrics by which to evaluate the drone policy and determine if it is adhering to the strict guidelines purportedly adopted by the government.

The U.S. government has not publicly released an official tally of the number of civilian deaths caused by its drone program. Occasionally, the administration will acknowledge civilian deaths that result from high-profile strikes, but these instances are rare.³⁰ Demonstrating the administration's unwillingness to acknowledge civilian deaths is the fact that in June of 2011, Obama's top counterterrorism advisor, John O. Brennan, claimed that U.S. drones had not killed a single civilian since August 23, 2010.³¹ This estimation was contradicted by "even the most conservative nongovernmental civilian casualty estimates"³² Because the government's scarce acknowledgements are so widely recognized as inaccurate, it has fallen to independent organizations to attempt to tally civilian casualties. The Long War Journal estimates that 150 civilians had been killed in drone strikes between 2006 and 2012; the New America Foundation estimates that 305 had been killed in that time; and, the Bureau of Investigative Journalism

²⁷ Saletan, "In Defense of Drones."

²⁸ Ibid.; Chantal Grut, "Counting Drone Strike Deaths," *Columbia Law School Human Rights Clinic*, (2012): 4, <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/COLUMBIACountingDronesFinal.pdf>.

²⁹ Grut, "Counting Drone Strike Deaths," 4.

³⁰ "Acknowledge All Civilian Drone Strike Deaths, Human Rights Groups Urge President Obama." May, 13 2015, accessed 9/22/15, <http://www.reprive.org/acknowledge-all-civilian-drone-strike-deaths-human-rights-groups-urge-obama.html>; Grut, "Counting Drone Strike Deaths," 9.

³¹ Cavallaro, Sonnenberg, and Knuckey, "Living Under Drones," 32; Tom McCarthy, "John Brennan: CIA Veteran who Became Obama's Drone Champion," *Guardian*, January 13, 2013, accessed September 26, 2015, <http://www.theguardian.com/world/2013/jan/07/john-brennan-cia-drones-obama>.

³² Cavallaro, Sonnenberg, and Knuckey, "Living Under Drones," 32.

estimates that between 2004 and today there have been between 423 and 962 civilian deaths attributable to drones.³³ Because of its extensive and well-documented use of credible sources and its propensity to send its own independent researchers to the areas where drone strikes have occurred, the Bureau of Investigative Journalism provides what appears to be the most accurate numbers on civilian casualties from drone strikes.³⁴ Indeed, the aforementioned audit of the three organizations found the Bureau to have a “more methodologically sound count of civilian casualties” than the other two.³⁵

It is doubtful, based on the sheer volume of civilian deaths, that the government is going to great lengths to have “near certainty” that no civilians will be harmed in the individual strikes that it carries out. It must be made clear, of course, that civilian casualties will inevitably occur in any counterterrorism strategy and drones are no different. The battlefield where civilians cannot be harmed has not been shown to exist in the modern era. It is true that drones offer the best, or, as one scholar put it, the “least worst” counterterrorism strategy in terms of civilian casualties.³⁶ The ratios of civilian casualties associated with conventional air strikes and ground troops are much higher than that of drone strikes.³⁷ Even so, the simple fact that drones kill fewer civilians than other counterterrorism strategies does not necessarily mean that the methods in which they are used cannot or should not be improved upon. A scalpel is a far better tool for conducting surgery than is a hatchet. To ensure its effectiveness, however, one must ensure that the scalpel is sharp and is being wielded by someone with the proper intelligence and skill set. The same is true of drones. If the administration purports that it adheres to the “highest standard” of mitigating civilian casualties, then the drone program must be evaluated by those standards. Presently, the relatively high number of civilian casualties belies the government’s position.

Moreover, it is likely that the government’s numbers for civilian casualties are so low because the government rarely investigates whom it actually kills. There are, of course, some practical reasons for this as some individuals are burned or dismembered beyond recognition and the areas where these strikes are conducted are hard to access.³⁸ Nevertheless, researchers at New York University (NYU) and Stanford claim that there is “little evidence that US authorities have engaged in any effort to visit drone strike sites or to investigate the backgrounds of those killed. Indeed, there is little to suggest that the US regularly takes steps even to identify all of those killed or wounded.”³⁹ This raises distinct questions of how the administration can make definitive claims about the accuracy of drone strikes and the low risk of civilian casualties. Even if the government did conduct internal investigations into those killed by drone strikes, as some unofficial government sources have claimed,⁴⁰ it is unlikely that the results of such investigations would be released for public scrutiny. As such, it becomes nearly impossible to

³³ Saletan, “In Defense of Drones”; The Bureau of Investigative Journalism, “Get the Data: Drone Wars,” *The Bureau of Investigative Journalism*, May 7, 2015, accessed May 10, 2015, <http://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/>.

³⁴ The Bureau of Investigative Journalism, “Get the Data: Drone Wars.”

³⁵ Grut, “Counting Drone Strike Deaths,” 5.

³⁶ Saletan, “In Defense of Drones.”

³⁷ *Ibid.*; Obama, “Remarks by the President.”

³⁸ Cavallaro, Sonnenberg, and Knuckey, “Living Under Drones,” 33.

³⁹ *Ibid.*

⁴⁰ Letta Tayler, “A Wedding that Became a Funeral: US Drone Attack on Wedding Procession in Yemen,” *Human Rights Watch* (2014): 12, accessed March 9, 2015, http://www.hrw.org/sites/default/files/reports/yemen0214_ForUpload_0.pdf.

independently confirm that the U.S. is adhering to the standard that for a strike to occur there must be near certain intelligence indicating that civilians will not be harmed.

Signature Strikes

Another reality of the U.S. drone program that contradicts the narrative of rigorous standards put forth by the administration is the use of so-called “signature strikes.” Scholars define signature strikes as “a drone strike on suspected terrorists or militants whose identities are not known, but whose ‘pattern of life activity’ would seem to indicate that they are involved in some militant/terrorist activity.”⁴¹ These strikes bear a stark contrast to “personality strikes,” which identify and target specific terrorists who are high-ranking members of Al Qaeda or other dangerous terrorist organizations.⁴² The January 2015 strike which killed the American and Italian hostages reportedly did not target a specific individual, but rather the Al Qaeda compound itself, therefore classifiable as a signature strike.⁴³ Beyond the general definition of signature strikes, the government provides scant information on these strikes. More importantly, the government provides no indication as to the criteria that must be met before a signature strike can be launched.⁴⁴

Signature strikes, by their definition, contradict the stated policy of the United States. The aforementioned fact sheet demands that for lethal force to be used, it must target an individual or individuals who pose a continuous and imminent threat. It is certainly arguable that anyone who associates with Al Qaeda or any other such terrorist groups is an enemy of the United States. It is significantly less certain, though, that anyone who associates with those groups necessarily poses an “imminent threat,” a term that also remains publicly undefined by the U.S. government. It is unreasonable to think that the government could make such a definitive claim about the threat an individual poses without knowing the identity of that individual. The argument could of course be levied that the United States should be able to conduct signature strikes. This argument is advanced on the basis that it is likely that the people associating themselves with terrorist organizations would like to harm the U.S. and its interests.⁴⁵ While this argument has merit, if the U.S. asserts highly stringent standards in its official policy, then the drone policy must be evaluated on those standards. A logical examination of the definition of signature strikes yields the conclusion that they do not adhere to the idealized policies laid out in the White House fact sheet. This evaluation is likely to remain in place unless the administration releases further information on the specifics of how intelligence is analyzed and what criteria must be met before an individual can be determined to pose an imminent threat.

Targeting Americans

While signature strikes raise important concerns about using force when the United States does not have a specific, identified target, there are also concerns when the U.S. targets an American citizen. Targeting an American raises questions about the U.S. Constitution and the right to due process, questions that are simply not raised when terrorists without American citizenship are killed. As such, this topic must be addressed in any analysis that seeks to evaluate

⁴¹ Sterio, “The Covert Use of Drones,” 163.

⁴² Cavallaro, Sonnenberg, and Knuckey, “Living under drones,” 12.

⁴³ Diamond, “U.S. Drone Strike Accidentally Killed 2 Hostages.”

⁴⁴ Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” *New York Times*, May 29, 2012, accessed May 10, 2015, <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html>.

⁴⁵ Byman, “Why Drones Work”; Anderson, “The Case for Drones,” 17.

the standards of the U.S. drone policy. The most well-known case of drones targeting an American is the strike that targeted and killed Anwar Al-Awlaki, a leader of Al Qaeda in the Arabian Peninsula who, allegedly, was involved in the plotting of the attempted Christmas Day underwear bombing. President Obama maintained in his speech to the National Defense University that it was completely legal under domestic law to target and kill Awlaki and that because Awlaki was actively plotting to attack the U.S., his citizenship did not shield him from lethal action.⁴⁶

To further justify his point, Obama also made the analogy that a SWAT team would not be questioned if it used lethal force against an American sniper firing into a crowd of innocents. Obama's implication was clear that the same lethal force could be justified against an American terrorist.⁴⁷ This very analogy was echoed recently by Tom Donilon, former national security advisor to President Obama, on Meet the Press.⁴⁸ This logic fails when considering the fact that the sniper would be presenting a clear and present danger when firing into a crowd; in this instance, lethal force is undeniably justified. It would not be justified, however, if a SWAT team came to the would-be sniper's home the day before his planned attack and shot him. While analogies are generally meant only to be illustrative, the fact that both the president and his senior advisors rely on this logic and do not see the flaws within it is disconcerting. Obama's remarks are bolstered by a Department of Justice memo, which describes in detail the legal justification for targeting and killing Awlaki. The memo discusses several possible statutes that justify the use of force against terrorists, even with U.S. citizenship. The document also examines statutes that could potentially prohibit the CIA or Department of Defense (DoD) from carrying out such an attack and then proceeds to explain why those prohibitions do not apply to the Awlaki case.⁴⁹

While the justification of Awlaki's death is relatively straightforward from the administration's perspective, several scholars and analysts disagree.⁵⁰ One of the most potent critiques comes from constitutional law expert Steve Vladeck, who articulates that, regardless of the memo's explanation of due process, it does not, and cannot, satisfy other important constitutional questions. For instance, he argues that the memo is very specific to the circumstances surrounding Awlaki at the time that the memo was written.⁵¹ At that time, it was concluded by intelligence analysis that Awlaki posed a continuing and imminent threat, and that his capture would be unfeasible.⁵² This justification notwithstanding, Awlaki was killed 14 months after the writing of the memo and, while the memo does allow for the CIA and DoD to "monitor whether changed circumstances" would permit the capture of Awlaki, it is not clear

⁴⁶ Obama, "Remarks By the President."

⁴⁷ Ibid.

⁴⁸ "Meet the Press Transcript - April 26, 2015" *NBC*, April 26, 2015, accessed May 11, 2015.

<http://www.nbcnews.com/meet-the-press/meet-press-transcript-april-26-2015-n350661>.

⁴⁹ Office of the Assistant Attorney General, "Memorandum for the Attorney General RE: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al- Aulaqi" *U.S. Department of Justice*, July 16, 2010, accessed May 10, 2015, <http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/06/23/National-Security/Graphics/memodrones.pdf>.

⁵⁰ Alice K. Ross, "Legal Experts Dissect the US Government's Secret Drone Memo: A Round-Up," *The Bureau of Investigative Journalism*, June 25, 2014, accessed May 10, 2015, <http://www.thebureauinvestigates.com/2014/06/25/legal-experts-dissect-the-us-governments-secret-drone-memo-a-round-up/>.

⁵¹ Steve Vladeck, "The Constitutional Question the Drone Memo Didn't—and Couldn't—Answer," *Just Security*, June 24, 2014, accessed May 10, 2015, <http://justsecurity.org/12086/drone-memo-constitution/>.

⁵² Office of the Assistant Attorney General, "Memorandum for the Attorney General," 40.

that those reevaluations ever took place.⁵³ Furthermore, Vladeck raises the point that the memo only provides an executive review of due process, not a judicial one. Vladeck succinctly articulates the problem with a purely executive review as he notes that “[t]he Supreme Court has *never* identified a situation in which whether the government provided due process can be confirmed without at least some judicial assessment, at some point, of the government’s conduct” (author’s emphasis).⁵⁴ Therefore, the memo, because it is a wholly executive document, cannot adequately confirm the constitutionality of Awlaki’s killing.

Moreover, other scholars point out that the memo spends the majority of its time justifying lethal action for the DoD and comparatively little time discussing the legality of the CIA, a civilian agency, taking lethal action against an American citizen.⁵⁵ Ultimately, it was the CIA that conducted the drone strike that killed Awlaki and therefore the legal justification has fewer legs to stand on than if the DoD had taken the action. In addition, the circumstance of the Awlaki case that is by far the most concerning is that the memo was drafted on July 16, 2010, but the first known U.S. attempt to kill Anwar Al-Awlaki was on December 24, 2009, over six months prior to the official justification from the Department of Justice.⁵⁶ Though a traditional aircraft, not a drone, conducted this first strike, it bears extreme significance to this case. Had the strike been successful, the U.S. would have targeted and killed a U.S. citizen overseas without official Department of Justice justification.

The above analysis indicates that neither the position of the government nor that of the critics is wholly unassailable. Therefore, the legality of the CIA’s targeting and killing of Anwar Al Awlaki is at best questionable. The memo also raises further concerns about how closely the United States adheres to the policies laid out by the administration. While the memo uses the language of the fact sheet in claiming that Awlaki presented an imminent threat and his capture was unfeasible, it still leaves vague terms such “imminent” woefully undefined and presumably up to the sole interpretation of officials in the executive branch.⁵⁷ Moreover, because the memo is so specific to Awlaki’s case, it cannot be generalized to legally justify the killing of future American citizens who join terrorist organizations overseas.⁵⁸

Moving Forward: Improvements to the Drone Program

Why Improvements are Needed

It is imperative to emphasize that the criticisms laid out above should not be taken as a call to end the drone program altogether. Such an argument would be shortsighted and ignore the myriad advantages that drones have over other mechanisms of war. Compared to other counterterrorism strategies, drones kill a fewer percentage of civilians.⁵⁹ Likewise, drones significantly, if not completely, reduce the risk to American servicemen and women by removing a human presence from the battlefield. Furthermore, drones display the United States’ military

⁵³ Ibid.; Vladeck, “The Constitutional Question”

⁵⁴ Ibid.

⁵⁵ Ross, “Legal Experts Dissect.”

⁵⁶ The Bureau of Investigative Journalism, “Get the Data: Drone Wars Yemen: Reported U.S. Covert Actions 2001-2011,” *The Bureau of Investigative Journalism*, March 29, 2012, accessed May 13, 2015, <http://www.thebureauinvestigates.com/2012/03/29/yemen-reported-us-covert-actions-since-2001/>.

⁵⁷ Office of the Assistant Attorney General, “Memorandum for the Attorney General.”

⁵⁸ Vladeck, “The Constitutional Question.”

⁵⁹ Saletan, “In Defense of Drones.”

and technological prowess to the enemy. In this way, drones are not unlike the Great White Fleet sent on tour by Theodore Roosevelt to remind the world that America had the military might necessary to achieve its foreign policy goals.⁶⁰ However, these strategic advantages can only be maximized if drones are made more effective by further reducing the number of civilian deaths and allowing more public scrutiny of the program, such as that advocated by the ACLU. These recommended measures ensure that the United States is following the legal and moral imperatives that the administration insists that it is.

Before delving into the specific policy changes that the U.S. should adopt to add transparency and accuracy to its drone program, it is important to understand the factors demanding these policy changes and why such factors matter. There are several practical reasons for why the United States should bring its drone program up to the rigid standards that it has set for itself. These practical reasons extend far beyond the naïve normative argument that a government should be honest with its citizens. One such factor is that, by adhering to the strict standard of “near certainty” that no civilians will be harmed, the U.S. will reduce the potential for civilian casualties even further. In so doing, the United States will mitigate the risk of blowback, or creating more radicalization by killing civilians. Blowback has been referred to by scholars as “the most prominent critique” of the drone program because, if it exists, it has the potential to undermine the effectiveness of the entire program.⁶¹ By killing fewer civilians, terrorists will have less potent propaganda from which to draw upon to radicalize the general population.⁶² Another factor that should lead the United States to improve the transparency and accuracy of the drone program is the fact that the current use of drones is eroding the U.S.’s international credibility and alienating its allies. The most venerable international institution, the United Nations, has on multiple occasions called for the U.S. to be more judicious and transparent in its use of drones. For example, in 2010, Philip Alston, the UN Special Rapporteur on Extrajudicial Executions, issued a report on drone strikes, particularly those used by the United States. In his report, Alston claimed that the “strongly asserted but ill-defined license to kill without accountability is not an entitlement which the United States or any other states can have without doing grave damage to the rules designed to protect the right to life and prevent extrajudicial executions.”⁶³ Alston goes on throughout the report to call into question the international legal premises on which the United States has built its policy on targeted killings through drone strikes.⁶⁴ This report from the UN indicates the international unease relating to the U.S.’s liberal use of drone strikes to conduct targeting killings.

What is more, the Alston report was not an isolated occurrence but rather was one in a string of other such reports. A more recent report by Benjamin Emmerson, the UN Special

⁶⁰ George C. Herring, *From Colony to Superpower: U.S. Foreign Relations Since 1776* (New York: Oxford University Press, 2008): 349.

⁶¹ Kenneth Anderson, “The Case for Drones,” *Commentary* 135, no. 6 (June 1, 2013): 14, accessed May 10, 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2047537.

⁶² Audrey Cronin, “Why Drones Fail,” *Foreign Affairs* 92, no. 4 (2013), accessed March 8, 2015, <http://eds.a.ebscohost.com/eds/detail/detail?sid=ef256a5e-2237-40db-ae72-2ba03a162d46%40sessionmgr4002&vid=14&hid=4102&bdata=JnNpdGU9ZWRzLWxpdmUmc2NvcGU9c2l0ZQ%3d%3d#db=ecn&AN=1380315>.

⁶³ Office of the High Commissioner for Human Rights, “Un Expert Criticizes ‘Illegal’ Targeted Killing Policies and Calls on the US to Halt CIA Drone Killings,” *United Nations* (June 2, 2010), accessed March 8, 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10094&LangID=E>.

⁶⁴ Philip Alston, “A/HRC/14/24/Add.6: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston,” *United Nations Council on Human Rights*, (May 28, 2010), accessed March 8, 2015, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, similarly calls into question the lack of transparency in the United States' drone program. In his report, Emmerson calls on the U.S. to release detailed information on 30 cases where drone strikes have allegedly killed a significant number of civilians, especially children.⁶⁵ The significance of these reports is unlikely to be lost on the Obama administration. Throughout his presidency, Barack Obama has tried, where it has been realistic, to rebuild relations between the U.S. and the UN. In 2009 for example, the U.S. ran for and was elected to serve on the Human Rights Council.⁶⁶ While the use of drones is far from the only policy that calls the United States' human rights record into question, these reports by the UN Special Rapporteurs undoubtedly add to the negative light in which other countries view the United States.

Arguably more important than UN criticisms are the criticisms of the drone program made by key U.S. allies. While the drone program has relatively widespread support domestically, with nearly two-thirds of Americans approving of killing terrorists overseas with drones,⁶⁷ the international opinion of the program is starkly different. The international community, removed from the idealized rhetoric advanced by the Obama administration, is, by majority, opposed to the U.S. drone program. This is evidenced by a Pew Research poll which indicates that majorities in many of our regional allies and even our strongest Western European allies are opposed to drone strikes. This is true in the Middle East where 90% of Jordanians oppose U.S. drone strikes along with 83% of Turks.⁶⁸ Opposition extends to Western Europe where 72% of French citizens and 59% of UK citizens oppose the United States' zealous use of drone strikes.⁶⁹ Most importantly, over two-thirds of German citizens oppose U.S. drone strikes.⁷⁰ This is incredibly important because German airbases play an essential role in the U.S. drone program. Though Germany prefers to downplay the relationship between German airbases and the U.S. drone program, recent evidence has surfaced alleging that drones rely on the Ramstein airbase in Germany to launch lethal attacks.⁷¹ The negative German public opinion of U.S. drone strikes is embodied by a recent protest against the base.⁷² In order to ensure that Germany continues to allow its airbases to be a hub for U.S. drone activity, the U.S. must assuage the German public's discontent. The United States should therefore increase the transparency of its drone program and maintain the high standards it has set for itself.

Improving the Drone Program

To achieve the Obama administration's high standards of "near certainty" that civilians will not be harmed in a strike and that targets will pose an "imminent threat" to the United States, the U.S. must improve its mechanisms for gathering intelligence, particularly human intelligence (HUMINT). The Al Qaeda compound that was targeted in the drone strike that killed

⁶⁵ Emmerson, "A/HRC/25/59"

⁶⁶ Thomas Weiss, David Forsythe, Roger Coate, and Kelly-Kate Pease, *The United Nations and Changing World Politics*, (Boulder, CO: Westview Press, 2008), 213.

⁶⁷ Alyssa Brown and Frank Newport, "In U.S., 65% Support Drone Attacks on Terrorists Abroad," *Gallup*, March 25, 2013, accessed March 8, 2015, <http://www.gallup.com/poll/161474/support-drone-attacks-terrorists-abroad.aspx>.

⁶⁸ Pew Research Center, "Global Indicators Database: Drone Strikes," *Pew Research Center*, September 2014, accessed May 11, 2015, <http://www.pewglobal.org/database/indicator/52/survey/16/response/Disapprove/>.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ Jeremy Scahill, "Germany Is the Tell-Tale Heart of America's Drone War," *The Intercept*, April 17, 2015, accessed May 10, 2015. <https://firstlook.org/theintercept/2015/04/17/ramstein/>.

⁷² "Hundreds Gather at Ramstein to Protest US Drone Strikes," *Stars and Stripes*, September 26, 2015, accessed September 28, 2015, <http://www.stripes.com/hundreds-gather-at-ramstein-to-protest-us-drone-strikes-1.370552>.

the 2 hostages was under “constant surveillance” in the days leading up to the drone strike, and indeed the intelligence was able to correctly identify the building as an Al Qaeda compound.⁷³ Despite its success, the surveillance obviously and unfortunately failed to determine the presence of the hostages. While there is no guarantee that HUMINT would have discovered the hostages, it would have provided a better opportunity to make that discovery than an aerial, top-down view of the compound.

Beyond this hypothetical, there are scholars who agree that, despite the technical advances of the 21st century, the value of human intelligence cannot be overstated. The geospatial intelligence (GEOINT) provided by drones and satellites is highly important but it fails to capture the nuances that can be captured by HUMINT. For example, Gabriel Margolis notes that the increased emphasis on the technical side of intelligence gathering, including geospatial and signals intelligence, has left HUMINT either lacking, absent, or susceptible to counterintelligence.⁷⁴ As a result, Margolis argues, some of the worst intelligence failures in recent memory can be attributed to a lack of adequate HUMINT.⁷⁵ Furthermore, the more autonomous drones become, the more removed from human “ethical thinking, adaptability, and critical reasoning,” they become.⁷⁶ It is undoubtedly necessary to keep and to expand this link between human thought processes and drones to better ensure that strikes are targeting legitimate targets and that risk to civilians is minimized to the greatest extent possible.

One of the best ways to achieve increased human intelligence, and with it more accurate targeting information for drones, is to combine drone strategy with a more conventional strategy of ground troops.⁷⁷ Though the term “boots on the ground” has become politically toxic following the quagmires of Iraq and Afghanistan, it is important to note that the deployment of ground troops does not necessarily mean a full scale invasion or occupying force, but rather can include strategically implanted elite teams such as the Navy SEALs. In 2004, the United States implemented an effective policy of using SEALs and other Special Forces for gathering human intelligence. These elite units proved “highly adept” at gathering intelligence.⁷⁸ Furthermore, there are reports that the army developed and maintained effective intelligence networks while deployed in Iraq and Afghanistan.⁷⁹

HUMINT provides another more nuanced and complete layer of intelligence which would allow the United States to make more informed decisions regarding the immediacy of the threat posed by certain targets and the likelihood of civilian casualties. Moreover, having boots on the ground would allow for more opportunities to conduct capture missions rather than use lethal force, which would achieve the dual purposes of eliminating the terrorist threat as well as

⁷³ Diamond, “U.S. Drone Strike Accidentally Killed 2 Hostages.”

⁷⁴ Gabriel Margolis, “The Lack of HUMINT: A Recurring Intelligence Problem,” *Global Security Studies* 4 no.2 (2013): 43, <http://globalsecuritystudies.com/Margolis%20Intelligence%20%28ag%20edits%29.pdf>.

⁷⁵ *Ibid.*, 50.

⁷⁶ Christian Science Monitor Editorial Board, “Drone Strikes that Hit Civilians: Time to Rethink Intelligence,” *Christian Science Monitor*, October 22, 2013, accessed May 10, 2015, <http://www.csmonitor.com/Commentary/the-monitors-view/2013/1022/Drone-strikes-that-hit-civilians-Time-to-rethink-intelligence>.

⁷⁷ Douglas C. Lovelace, forward to *The Effectiveness of Drone Strikes in Counterinsurgency and Counterterrorism Campaigns*, by James Igoe Walsh, (Carlisle, PA: U.S. Army War College Press, 2013), vii.

⁷⁸ Ann Scott Tyson, “Boots on Ground, Now Also the Eyes: Special Operations Forces are Doing more Intelligence Gathering in Terror War.” *Christian Science Monitor*, March 11, 2004, accessed May 10, 2015, <http://www.csmonitor.com/2004/0311/p01s02-usmi.html>.

⁷⁹ *Ibid.*

potentially gleaning more intelligence through interrogation.⁸⁰ If no boots are on the ground, capture will rarely if ever be a feasible option.

While it is true that America's war weariness may have made the option of boots on the ground inviable, there is increasing evidence to suggest that deploying U.S. troops may not remain a politically toxic counterterrorism strategy for long. In a Quinnipiac University poll, for example, nearly two thirds of American voters support sending ground troops to Iraq and Syria to combat the Islamic State of Iraq and Syria (ISIS).⁸¹ Across all categories, including party identification, gender, and age, there are majorities that support sending in ground troops.⁸² Further bolstering the suggestion that Americans are moving beyond the hesitancy imposed by the Iraq war is the finding that only 39% of voters are concerned that the U.S. will get too involved militarily against ISIS, while 53% are concerned that the U.S. will not go far enough.⁸³ Of course, one poll does not and should not signal a sea change in American foreign policy, but it does indicate that as the threat of terrorism continues to rise and as time continues to put distance between the public and the wars, Americans may be more willing to support ground troops as a viable counterterrorism strategy.

Further corroborating the poll data is the fact that several high-ranking U.S. Generals and military strategy experts have recently stated that ground troops may be necessary to achieve our counterterrorism goals, particularly with regard to ISIS. President Obama has repeatedly stated that his goal is to "degrade and destroy [ISIS]."⁸⁴ While these terms are alliterative and attention grabbing, Marine General James Mattis argues that in terms of substance, they would require two different strategies. To "destroy" ISIS would require more than airstrikes and advisors.⁸⁵ Mattis does not advocate for a full-scale invasion akin to Iraq or Afghanistan, but he notes that sending a limited number of U.S. combat troops might spur our regional allies to do the same.⁸⁶

Mattis's criticism of Obama's flat out rejection of ground troops does not occur in isolation. Others, such as General Lloyd Austin, "the top commander of U.S. forces in the Middle East," have also advocated for the insertion of a limited number of Special Forces to more effectively combat ISIS.⁸⁷ Arguments such as these have led Martin Dempsey, the Chairman of the Joint Chiefs of Staff and by extension Obama's top general, to state that he would not rule out the eventual return of ground troops to the Middle East.⁸⁸ While president Obama must account for the political consequences of deploying ground troops when making his

⁸⁰ The White House, "Fact Sheet."

⁸¹ Tim Malloy, "U.S. Voters Back 2-1 Sending Troops to Fight ISIS, Quinnipiac University National Poll Finds," Quinnipiac University Poll, March 4, 2015, accessed April 4, 2015, http://www.quinnipiac.edu/images/polling/us/us03042015_Uic472gg.pdf.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Barack Obama, "Statement by the President on ISIL," *The White House*, September 10, 2014, accessed May 11, 2015, <https://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1>.

⁸⁵ Paul Szoldra, "Legendary Marine General James Mattis: To Fight ISIS, 'Boots On The Ground' Needs To Be An Option," *Business Insider*, September 18, 2014, accessed May 11, 2015, <http://www.businessinsider.com/mattis-testimony-isis-2014-9>.

⁸⁶ Ibid.

⁸⁷ Rajiv Chandrasekaran, "Countering Islamic State will be Hard in Iraq and Harder in Syria, Officials Say," *Washington Post*, September 10, 2014, accessed May 11, 2015, http://www.washingtonpost.com/world/national-security/countering-islamic-state-will-be-hard-in-iraq-and-harder-in-syria-officials-say/2014/09/10/de74d448-3943-11e4-9c9f-ebb47272e40e_story.html.

⁸⁸ Szoldra, "Legendary Marine General."

decisions, these generals are able to make recommendations based on their strategic assessment of the situation, adding significantly to the weight of their recommendations.

Conclusion

The United States government has provided disturbingly little substantive information on the drone program to its citizens. Of course, some of this secrecy is legitimated by the need to protect national security, sources and methods. Nevertheless, this analysis has shown that the government has undoubtedly been overzealous in its lack of transparency. Compounding this problem is the fact that the idealized rhetoric on drone policy that the Obama administration has released has contradicted the realities of the program that exist on the ground. If the drone program actually adhered to the strict standards laid out by the administration, there could be almost no logical challenge to the program both in terms of moral standards as well as international and domestic legal standards. As such, the U.S. has a strong incentive to improve its drone program to bring it within the standards that the administration itself has placed.

While tragic, the deaths of the American and Italian hostages referenced throughout this work have provided the United States with an important impetus to become more transparent and peel back the veil of its drone program. This opportunity for the government to take stock of its drone program should not be squandered. It is also imperative that this review does not become lost in the bureaucracy of the Executive Branch. The government must be more willing to release information to the public on the U.S. drone program, provided that it does not hinder national security. This will allow for scholars and experts not caught in the bureaucratic inertia of Washington to objectively analyze the drone program that is quickly becoming our most prominent counterterrorism strategy. Analysis is needed not only on the criteria that are actually being used to determine the legitimacy of lethal force, but also on the intelligence itself, to ensure that it is the most complete and accurate possible.

The United States counterterrorism strategy cannot afford to be one-dimensional. The terrorist threats that face the U.S. require a multi-pronged approach. While drones are an effective means of countering the terrorist threat, they will become infinitely more effective if they are paired with other counterterrorism strategies such as ground troops. The decision to deploy Americans to a theater of war must always be made with prudence and caution. It must also be made, however, on the basis of strategic assessments rather than solely on political expediency. For the United States to have an effective and comprehensive counterterrorism strategy, drones must work in tandem with other strategies. The drone program must also be bolstered by more effective intelligence to ensure that it can meet the worthy ideal that the Obama administration has set.

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