THE UNITED STATES' DRONE PROGRAM: LEGAL ARGUMENTS AND FUTURE CONSIDERATIONS

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Abstract

Despite a recent uptick in public scrutiny, little is known about the United States’ use of armed drones to carry out targeted killings in Afghanistan, Somalia, Yemen, and Pakistan. There are many arguments out there arguing for both the legality and illegality of the program. This paper aims to analyze the program by taking into account international and domestic laws regarding sovereignty, targeted killings, and armed conflict. After completing this objective, general analysis, the criteria can be applied to the United States’ use of armed drones. Due to a lack of available information, there are still some questions unanswered, but the general conclusion is that the United States theoretically has the right in certain circumstances to operate armed drones in foreign states to target active members of al-Qaeda and its affiliates. However, the United States goes beyond these constraints in most of its drone strikes. It is concluded that the government should open up the program to more transparency and drastically roll back the number of drone strikes to those that only target operational leaders of al-Qaeda that pose an imminent threat to the American public.
**Introduction**

A signals intelligence officer intercepted and decoded an enemy communiqué detailing the travel plans of a high value, high-level target. The information was immediately passed on up the chain until finally landing on the President’s desk. He gave his authorization for a mission to kill the target, and the next day sixteen fighter planes were scrambled to intercept the enemy leader hundreds of miles behind the combat lines away from the traditional battlefield. This is not a sequence of events taken from the war in Afghanistan or some other modern conflict, but rather it is the story of what many point to as the United States’ first instance of targeted killing seventy years ago.¹

In 1943, the US Navy intercepted and decoded Japanese communications describing Admiral Yamamoto’s travel itinerary. Admiral Yamamoto, Commander-in-Chief of Japanese forces in the Pacific, was credited as one of the main orchestrators of the December 1941 Pearl Harbor attack that officially marked the beginning of hostilities between the United States and Japan. On April 18th, 1943, exactly one year following the famous Doolittle Raid on Tokyo, sixteen P-38 Lightnings took off from one Guadalcanal’s airfields. Two hours later they engaged their target, Admiral Isoroku Yamamoto, killing him after downing his transport plane.

This was a huge morale booster at the time, haled as a great victory. Nearly all still consider this mission fully within the legal frameworks of conflict due to the active state of war between the United States and Japan and Yamamoto’s position in the military, but it does raise some questions. Though the context has changed significantly,

it very closely reflects the current process of targeted killing: signals intelligence gathering and analysis, presidential approval, and an air attack away from an active combat zone.

For as long as wars have been fought, civilizations constantly pursued technological advancements that would provide an upper hand. Often times, that upper hand comes from the ability to strike from afar. This must have become apparent the first time one of our early ancestors picked up a rock to throw at an animal or enemy. From there we developed spears, bows, catapults, cannons, rifles, rockets, machine guns, air planes, missiles, and most recently, unmanned aerial vehicles (UAVs), colloquially known as drones. There is currently no piece of equipment or technology in the United States’ military arsenal more controversial than the drone. Many in the government working on counterterrorism, including former CIA director Leon Panetta, hail the drone programs as integral components to the United States’ so called ‘War on Terror.’² Countless more see the program as a gross overreach by the government and a violation of international law.

One of the main points of contention that comes with discussing these matters is lack of universally agreed upon definitions. It is impossible to judge a program’s legality when each country has its own definition of terrorism, targeted killing, combatant, battlefield, etc. Though some may disagree with this paper’s final interpretations, it is important to outline clear, objective definitions of terms when necessary. There are countless definitions for each term, and this paper will attempt to form definitions that are clear and do not try to serve any particular agenda or bias.

A transnational terror organization is a group that employs terrorism in multiple countries. Similarly, an international terror organization will be defined as an organization that uses terrorism, but on top of that its membership is made up of individuals of varying nationalities. International terror organizations are a relatively modern phenomenon, growing significantly following the dissolution of the Soviet Union. There are plenty of examples of foreign nationals enlisting in foreign militaries in the previous century, however the modern international terror organization, such as al-Qaeda, differs greatly from the international brigades of the 20th century. The line between combatant and civilian is hazy, and it draws attention to the traditional viewpoint of war between two states. Is it possible to have an international conflict between a state and an organization made up of assorted nationals? This question becomes more and more relevant as interstate conflict becomes less frequent, and the focus turns to these transnational groups.³

Drones go by many different names. Unmanned Aerial Vehicles (UAVs) and Remotely Piloted Aircraft (RPA) are formal terms often used by the government or military, however “drones” is a much more popular and widely used term. Drones have technically been around since before the Cold War, but recent technological advancements and an increase in demand led to an extensive increase in usage by the United States and other states over the past decade. Drones are here to stay. They are cheap, effective, increasingly reliable, and multiplying. Nearly one in three aircraft in the United States’ current aircraft inventory is a drone. The military operated upwards of

7,500 drones as of 2012 with the numbers increasing. It should be said that the vast majority of these are small, relatively simple drones used for tactical reconnaissance. Only a small amount of drones—around 250 Predators and Reapers—are armed and used for targeted killings, but it is that small group that garners all the attention and controversy. Though relatively small in number, the fleet of armed drones provides the United States a near permanent ability to strike whomever and wherever it wishes.

When analyzing the debate about drones, it is important to step back and look at the larger picture. Drones are merely the most modern medium for targeted killing. When it comes down to it, there is no real difference between an F-16 dropping a guided bomb and drone firing a Hellfire missile when the end result is the same: the death of a specific individual. The difference is that drones make targeted killing a much more available option due to their loitering ability and low risk nature. Philip Alston, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, defines a targeted killing as the intentional, premeditated and deliberate use of lethal force, by states or their agents acting under color of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator. The same killing of a selected individual outside the time of armed conflict should be regarded as an assassination. This is an important distinction because the Executive officially banned assassinations under President Ford in 1976 following revelation of numerous political assassinations by the CIA.

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4 Ackerman, Spencer. “Almost 1 In 3 U.S. Warplanes is a Robot.” Wired: Danger Room. 9 Jan. 2012.
a conflict zone, opening up the debate of whether to classify the United States’ drone program as assassinations or targeted killings.

The only drone strikes that clearly do not violate another nation’s sovereignty are those that occur in Afghanistan, an active combat zone. The strikes carried out by the CIA in Pakistan, Yemen, and Somalia draw attention to international laws and norms regarding state sovereignty. As is the case with nearly every aspect of the debate over drones, both sides interpret the conflict differently and come to opposite conclusions. The question is not whether the program encroaches on those nations’ sovereignty, but rather if the violation is legally justified in the name of self-defense. The United States government believes so, but many others say no.

As mentioned earlier, the conflict between the United States and al-Qaeda can be murky and complex. It becomes even murkier when you look at the targeted killing program within that context. However, in order to properly judge the program’s legality, the targeted individuals must be distinguished as civilians, combatants, or some hybrid of the two. This is where the rubber meets the road in the legal debate. Civilians are immune from attack, but they lose that protection when engaging in direct participation of hostilities. Combatants and civilians engaging in hostilities are legally targetable within the confines of International Humanitarian Law. However, targeting civilians not engaging in hostilities is a violation of both International Humanitarian Law and International Human Rights Law. One answer points toward legality, the other toward illegality. Many highly educated people have looked at the same data and come to different conclusions.

In February, I had the opportunity to ask a panel of experts a question on an episode of The Diane Rehm Show focusing on drones and their role in counterterrorism.
The question pertained to the complex nature of the current conflict between the United States and al-Qaeda. How is one supposed to decide which law is applicable when members of transnational groups such as al-Qaeda seem to jump between civilian and combatant status? Do current international laws go far enough, or do modern transnational terror organizations expose a blind spot in the current legal framework? Is there a zone between International Human Rights Law and International Humanitarian Law that does not exist yet, but would better apply? One of the panelists, Georgetown law professor Christopher Swift, responded with some general, yet valuable, advice:

“I think, Andrew, you need to go back, you know, I have students at Georgetown, they were also writing on this topic as you might imagine. I think you need to go back to the fundamentals of what law and war are for. The purpose of war, according to Clausewitz, is to achieve terms of peace by degrading your adversary's ability to harm you and his ability to resist your will.

The purpose of law is to order and resolve disputes. These two concepts both serve policy. They both serve the way that we try to build our ideal vision of the future for our societies. And they are in fundamental tension with one another. But this tension between liberty on the one hand and security on the other is not an absolute tension. So when, you know, Dixon and I talk about generations of knowledge that has been passed down to us about the relationship between law and war, this is a flexible relationship. And the thing we really need to be looking at is not what's right or wrong and not what's left or right, not this terrorism
versus human rights but how we balance our interest and our values, how we balance power and principle moving forward when we're making decisions.”

This paper will analyze this modern clash, as manifested by the conflict with al-Qaeda and its affiliates, between law and war mentioned by Swift. The use of armed drones has exploded since its introduction just over a decade ago. Arguments exist on both sides of whether the program complies with international and the United States’ domestic laws. The executive was authorized in 2001 to broadly and aggressively pursue al-Qaeda and its affiliates around the globe through the Authorization for Use of Military Force. The program appears to toe the line of compliance with the United States’ domestic laws, however aspects of it point toward violation of international laws. The main points of contention revolve around whether to apply International Humanitarian Law or International Human Rights Law to the United States’ ‘War on Terror.’ Regardless of the program’s illegality or legality, it represents a dangerous trend that should be codified or scaled back before dangerous precedents are set and new, loose norms regarding targeted killings are established for other nations to cite. In order to discuss possible policy changes, one must first analyze questions revolving around national sovereignty, targeted killings, the history of the drone program and relevant legal arguments.

**Sovereignty**

The modern system of sovereign states has its origin in the seventeenth century’s Peace of Westphalia that ended the Thirty Years War in Europe. The treaty outlined many concepts that may seem commonplace today, but were very new at the time. At

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the most basic level, all sovereign states have territory, people, and a government.\textsuperscript{9} The concept of sovereignty has evolved over the centuries, taking into account advances and changes in the global community. The two subsections of sovereignty relevant to the question at hand are domestic and international sovereignty.\textsuperscript{10} Domestic sovereignty concerns the ability of a government to control its territory and people. In order to maintain domestic sovereignty, the government must have the monopoly on authority within its borders. When other entities or organizations are able to challenge that monopoly, the domestic sovereignty of a nation is called into question. International sovereignty implies a level playing field of equality on the world stage. In the modern system, both China and the Maldives enjoy equal rights of autonomy and self-determination.

Sovereignty, however, is not necessarily an inherent right guaranteed to states, but rather there are certain requirements that must be satisfied. Sovereignty is a declaration of political responsibility for governing, defending, and promoting the welfare of a human community.\textsuperscript{11} That extends to providing certain responsibilities for a domestic population, such as basic infrastructure, law enforcement, judicial systems, and other government provided services. There are also responsibilities owed to other states. Sovereign states are legally obligated to prevent their territory from being used by terrorists intent on attacking other states or peoples.\textsuperscript{12}

\textsuperscript{12}Ibid
The most relevant question to ask in regards to the drone program is, when is it permissible to violate the sovereignty of another state? Following the September 11th attacks in 2001, the United States responded militarily in the name of self-defense. The Authorization for Use of Military Force from September 18th, 2001 allowed the Executive to take all necessary military action against al-Qaeda, its affiliates, and those that aid or protect them for the purpose of preventing future attacks.\textsuperscript{13} The authorization is vague and grants a wide spectrum for the Executive to act within against al-Qaeda. It will be analyzed much more thoroughly later on, but it appears to allow for retaliation wherever al-Qaeda may be operating.

The United Nations Charter does allow for a state to respond in self-defense following an armed attack. However, in the case of international terror groups, attacks are not between two sovereign states. This is where questions regarding sovereign rights arise. Does an attack from a non-state actor acting within the borders of another state allow the United States to retaliate militarily, thereby violating the sovereignty of that state? The answer is not so clear, and it depends on two conditions. Is the host country unwilling to act against the non-state actor, or, is the host country incapable of acting against the group? As mentioned before, one of the responsibilities of a sovereign state is to prevent its territory from being used as a base of operations by terrorist groups.

The vast majority of strikes come from the Air Force in Afghanistan and are generally accepted as legal. Various agreements between the governments of the United States and Afghanistan combined with Afghanistan being designated a combat zone discounts any claims of sovereignty violations. The strikes clearly fall within the scope of

armed conflict and will not be addressed in this paper. The issue arises for strikes occurring outside of the clear combat zone in Afghanistan.

It can be difficult to properly judge the legality of United States operations in Somalia, Pakistan, and Yemen. Many of the agreements between the governments are secretive, as acknowledgement of their collaboration would most likely trigger intense public backlash. Pakistan continues to publicly condemn the drone program as unlawful, but it is difficult to know what sort of approval is given behind closed doors. In regards to Yemen, the government is so fearful that it will often jump to the occasion to claim responsibility for errant United States strikes that cause civilian deaths.\textsuperscript{14} It is nearly impossible to judge each case for sure, but one can make an attempt. However, it is important to note that the United States is often making these claims unilaterally. That is not enough to justify military intervention within the borders of a non-consenting state in the pursuit of non-state actors such as al-Qaeda. The responsibility still lies with the United Nations Security Council to maintain international peace and security.

Somalia is the country experiencing the fewest and least frequent number of drone strikes. Somalia plunged into chaos in 1991 when the country’s government was ousted, resulting in a bloody civil war between countless warlords. The civil war is technically still ongoing, and the nation finds itself at the top of annual lists highlighting failed states. One of the many groups still vying for power is an Islamist militant group known as al-Shabaab officially acting under al-Qaeda.\textsuperscript{15} According to the United States government, that connection would make al-Shabaab an approved target under the

Authorization for Use of Military force passed by Congress. In addition, what remains of a central government has proved incapable of acting definitively against al-Shabaab. Their incapacity would mean that the United States has the right to deal with al-Shabaab unilaterally. This is not enough, however, for the United States to act militarily. It must go in front of the international community and present its case for approval.

Yemen may have fewer drone strikes than Pakistan, but it was the site of the first recorded instance of an air strike from a UAV. On November 3rd, 2002 an armed Predator drone operated by the CIA fired upon a car killing six suspected al-Qaeda militants.\textsuperscript{16} A leaked diplomatic cable revealed that the United States had full approval from the Yemeni government to conduct the strike. As recent as December 2012, the Yemeni government attempted to take credit for the bombardment let loose from a United States UAV.\textsuperscript{17} The lack of public denunciation from the Yemeni government and revelation of explicit approval in diplomatic cables would point toward a degree of legality for the United States’ operations.

Pakistan has witnessed the majority of drone strikes over the years and is the center of much of the controversy revolving around the program. It is important to look at Pakistan through two different lenses. One lens judges strikes against al-Qaeda, and the other looks at strikes against the Taliban. The strikes on al-Qaeda targets are no different than those taking place in Somalia or Yemen. Here, however, the Pakistani government claims publicly that it has not granted approval to the United States to act within its borders. The attacks against Taliban fighters are closely tied to the war in Afghanistan. It is possible to connect the Taliban to al-Qaeda, but for the most part


Taliban militants are only concerned with attacks against United States forces in Afghanistan. Many militants base their operations in the ungoverned tribal areas in Pakistan and then cross into Afghanistan to execute operations. Where Somalia is incapable of dealing with al-Shabaab, Pakistan appears to be unwilling to definitively deal with al-Qaeda or the Taliban. Pakistan has launched many attacks against al-Qaeda and Taliban fighters, but the United States has accused Pakistan of only targeting those they deem “bad.” The relationship between these two countries often experiences intense fluctuations, and it is impossible to know for sure the degree to which the Pakistani government consents to strikes behind closed doors away from public scrutiny.

The requirements of distinction and proportionality are not addressed here, but rather only whether or not the United States has a right to violate the sovereignty of certain states. The cases of Afghanistan and Yemen are somewhat clear due to the presence of agreements between their governments and the government of the United States. Pakistan is much more complicated. If it were true that those targeted by the United States are al-Qaeda members and the Pakistani government is unwilling to perform its responsibility to pursue them, then the United States would have the right to act in the name of self-defense. The problem is that it is impossible to know the extent of agreements between the United States and these countries. In addition, the United States is too quick to act without first obtaining the approval of the international community. Just because the United States government claims certain individuals are members of al-Qaeda or the Taliban and are actively participating in hostilities may not be enough for it to launch attacks without the consent of either the host government or the international community.
Targeted Killings

Targeted killing is not a tactic unique to the United States’ drone program. When it comes down to it, there is no real difference between a Hellfire missile dropping from the wing of an F-16 or a drone if the end result is the same. Is it fundamentally or legally important whether a team of Special Forces, a missile from above, or a poison causes the death of a particular individual? The real debate revolves around whether it is permissible or not to fatally target an individual within the confines of armed conflict. The debate has grown murkier as the prevalence of such targeted killings away from defined battlefields and within foreign sovereign territory has risen.

As was mentioned at the beginning of this essay with the Yamamoto case, the targeting of particular individuals in wartime is nothing new. However, the large globe encompassing wars of the early twentieth-century are no more. Nations do not declare war on one another as they once did, and their enemies are not always as clearly defined. Terrorism as a crime and terrorism as an act of war appear to have converged to form a hazy hybrid over the decades culminating in the “War on Terror” that we know today. With non-state actors engaging in military style conflict with more frequency, governments must ask themselves, “Can we fight a war against a group not affiliated with a particular state? At what point do these ‘acts of terror’ cross from crime to conflict? When is a response attack considered an extrajudicial execution and when is it a targeted killing?” There are no simple or easy answers to these questions, but one can begin to clarify the issues surrounding targeted killings.

Targeted killings as the world knows them today—covert attacks against particular individuals accused of terrorism or conspiring to commit terrorist acts—began with the Israelis during the First Intifada. Israeli security forces began targeting
particular people in the Palestinian territories they deemed were connected to attacks on
Israeli civilians and soldiers. One of the most notable cases was in 1996 with the killing
of Yahya Ayyash, a notorious bomb maker, by Israel’s Shin Bet. The secretive
organization booby trapped a cell phone with explosives and killed Ayyash in the Gaza
Strip.\textsuperscript{18} In the case that eventually officially legalized the practice domestically, the
Israeli Supreme Court described the targeted killing program as such:

“As part of the security activity intended to confront the terrorist attacks, the
State employs what it calls ‘the policy of targeted frustration’ of terrorism. Under
this policy, the security forces act in order to kill members of terrorist
organizations involved in the planning, launching, or execution of terrorist
attacks against Israel.”\textsuperscript{19}

While the court refers to “killing” as “frustration,” they do outline who is a valid target
for the Israeli program. It is legally permissible in Israel, though not within the confines
of international law, to target and kill anyone who partakes in the planning, launching,
or execution of an attack against the state. The United States most likely holds a very
similar general guideline for selecting targets for killing. At its core, targeted killing,
sometimes referred to as “preventative killing,” is a defensive measure with an offensive
nature.\textsuperscript{20} They are to be employed only as a last resort in the presence of armed conflict
to prevent violence

Though some may argue about how to categorize US drone strikes, it is important
to note the term “targeted killing” has a very specific definition. One cannot use

\textsuperscript{19} The Public Committee against Torture in Israel v. The Government of Israel. The Supreme Court Sitting as
the High Court of Justice. 11 Dec. 2005.
\textsuperscript{20} Kremnitzer, Mordechai. “Are All Actions Acceptable in the Face of Terror?
assassination, extrajudicial execution, summary execution, or targeted killing interchangeably. This is because assassinations, extrajudicial executions, and summary executions are nearly universally considered to be illegal, while the legality of targeted killings is more accepted. Philip Alston, the United Nations’ Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, defines targeted killings as follows, “A targeted killing is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under color of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.”

Discussing the difference between assassinations and targeted killings, former federal judge Abraham Sofaer wrote,

“When people call a targeted killing an ‘assassination,’ they are attempting to preclude debate on the merits of the action. Assassination is widely defined as murder, and is for that reason prohibited in the United States.... U.S. officials may not kill people merely because their policies are seen as detrimental to our interests.... But killings in self-defense are no more ‘assassinations’ in international affairs than they are murders when undertaken by our police forces against domestic killers. Targeted killings in self-defense have been authoritatively determined by the federal government to fall outside the assassination prohibition.”

Sofaer points out that assassinations are often equated to murder while targeted killings are just another form of warfare. Both policies, however, are quite similar. An assassination and a targeted killing result in the death of a particular individual.

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22 Sofaer, Abraham D. “Responses to Terrorism/Targeted killing is a necessary option.” San Francisco Chronicle. 26 March 2004.
However, Georgetown professor Dr. Gary Solis suggests that a targeted killing relies upon five requirements being satisfied.23

First, an international or non-international armed conflict must be going on. This is what separates a targeted killing from an assassination. Outside of an armed conflict or combat zone, targeted killings are merely extrajudicial executions. In the absence of International Humanitarian Law, security personnel are only allowed to use lethal force in very specific instances when lives are in imminent danger. Most targeted killings occur while the target is unsuspecting and no one’s life is immediately at risk.

Second, the target of the attack must be a specific individual or group of individuals, and that individual or group must be targeted as a result of actions taken during a conflict. Because targeted killings are a tactic only to be employed in times of conflict, the targets may only be selected for acts committed during that conflict. Any acts committed outside of conflict are criminal in nature and fall under the umbrella of International Human Rights law.

The third, and possibly most critical, requirement is that the target or targets are beyond the reach of reasonable arrest or detention. Arrest or capture is more often associated with criminal activity and International Human Rights law. However, lethal force is, and always should be, the absolute last resort. If security personnel can feasibly arrest or capture a target without significant risk, that option must be taken.

Fourth, only a senior leader in the military or government may authorize a targeted killing. This leader could be the president, prime minister, or chief military leader. Targeted killings are not just another battlefield tactic. They are a serious

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military action carried out in time of war that requires careful consideration of factors such as distinction, military necessity, and proportionality by an official in a position of authority. Only these top military leaders have the strategic knowledge needed to fully judge all aspects of a proposed targeted killing.

Fifth, and finally, the target must be actively participating in hostilities. This can be a uniformed soldier on the battlefield, a military leader such as Yamamoto, or even a child conscripted to carry ammunition. All non-lawful targets, including women and children, lose their immunity from attack when they participate directly in hostilities. This question of “direct participation in hostilities” is the center of the targeted killing debate. As will be seen later, many people interpret “direct participation” in different ways. Imagine a bomb maker, for example. Some argue that he or she is only participating in hostilities while making the bomb. Others say that his or her activities completely clear him or her of all immunity, and that individual is a legal target at all times. A growing group sees a middle ground where there is a kind of “stickiness” to the combatant status that comes as a result of participation. That bomb maker cannot always be targeted as a combatant, but he or she is not only a legitimate target while in the midst of constructing a bomb.

The most widely know, and possibly most widely supported, targeted killing came in May 2011 when a group of Navy SEALs entered Pakistan and killed Osama bin Laden. Other notable targeted killings came at the hands of the Israelis and Russians. In 2002, the Israelis dropped a two thousand pound bomb on Salah Shehade, the head of the military wing of Hamas, while he slept in an apartment. Shehade died instantly, but he was accompanied by hundreds of innocent casualties, including fourteen other
fatalities. In 2006, Russian agents supposedly killed Shamil Basayev, the man that claimed responsibility for the 2004 Beslan school attack that killed hundreds of Russian citizens. According to Russian officials, Basayev was killed by a truck bomb while inspecting an arms shipment. These three represent some of the most high profile targeted killings from around the world over the last decade. The vast majority of targeted killings are carried out against lesser-known individuals. The next chapter will examine the United States’ targeted killing program specifically and try to shed light upon what the “average” targeted killing looks like.

**Drones and the Program**

Unmanned aerial vehicles are not entirely a modern technological phenomenon. The now famous MQ-1 Predator first entered service as the RQ-1 Predator in 1996, nearly twenty years ago. However, one must go back nearly a century to find the first unmanned fixed-wing aerial vehicle. The Hewitt-Sperry Automatic Airplane was a pilotless experimental aircraft guided by primitive gyroscopes experimented with throughout World War One. The program experienced a few successful test flights, but was cancelled in 1918 following the end of the war. The following decades saw a variety of remotely piloted aircraft, some armed and some not, however what the public thinks of today as a drone did not arrive until the close of the twentieth century.

There are generally two classifications for drones by the Department of Defense. Unmanned aerial vehicles, designated with a “Q,” are either considered Reconnaissance or Multiuse, carrying an “R” or “M” respectively. In the name MQ-1 Predator, the “Q” designates the vehicle as unmanned, and, in this case, the “M” indicates the drone as

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26 Pearson, Lee. “Developing the Flying Bomb”
being armed. The MQ-1/RQ-1 Predator, MQ-9 Reaper, RQ-170 Sentinel, RQ-4 Global Hawk, and RQ-11 Raven are the most common drones in the military’s inventory. However, only two of these, the Predator and the Reaper, carry the “M” designation signifying that they are weaponized. These two, representing only a tiny fraction of all active drones, are responsible for each targeted killing carried out by a drone in the past decade.

Technically speaking, drones are very different from conventional aircraft. For example, the popular Predator drone is nearly equal in weight to just ejection seat and pilot safety equipment inside an F-16. Combine their ultra light airframes with a one hundred horsepower engine, and the result is an aircraft that hums along for twenty-four hour stints watching, and sometimes firing upon, the scene below. Their hovering ability concentrates the reconnaissance, intelligence, and strike aspects of an attack into only one aircraft. The streamlining of these subsets created an extremely efficient mechanism for carrying out targeted killings. One Predator can track a target, send information back for dissemination, and then destroy the target. Missions that were once out of reach due to high risk or impracticability are now available because of this “one stop shop” capability.

While the propeller powered Predators and Reapers have been called upon and relied upon heavily by the CIA and military in the past decade, billions of dollars per year are going into expanding the US fleet. Each military service is designing, testing, and acquiring sophisticated drones to fit their needs. For example, the Navy is in the final stages of testing of a jet powered stealth drone, known as the X-47B, capable of

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27 Organization of the United States Air Force. Factsheets. 2013
taking off from and landing on an aircraft carrier. The Navy is at the forefront of development of what are known as Unmanned Combat Aerial Vehicles (UCAVs). They are the faster, stealthier, and deadlier drones of the future that will more closely resemble a hybrid of traditional fighter aircraft and present-day drones.

The United States currently maintains, though with diminishing certainty, a monopoly on armed drones. That being mentioned, drones are proliferating at exceptional rates around the world and are becoming mainstays of many foreign aircraft inventories. In February 2013, China revealed that it considered using an armed drone to kill a wanted Burmese drug lord in Myanmar’s territory. The government eventually decided upon an alternative plan, but the revelation of their alternative solution sounded an alarm. There are questions about whether the alternative plan was chosen political reasons or due doubts regarding the armed drones capabilities. Regardless, the mere fact that it was an option indicates that other nations are investing resources into their own lethal drone programs. China may be on the brink of joining the small collection of nations operating lethal drones, but more than seventy other states already operate surveillance drones in one form or another. They may not be as sophisticated as their American counterparts, but it shows that the United States is losing its definitive hold on drones.

The covert nature of the United States’ targeted killing program makes it difficult to fully gauge the extent of its history, however through independent news sources and foreign government reports it is possible to piece together the strikes. Targeted killings

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30 Ibid.
began for the United States in Afghanistan following the invasion. Particular individuals were sought out and most often captured but sometimes killed. The program expanded from the military to the CIA when it officially left the confines of Afghanistan on November 3rd, 2002 when a Predator drone fired a missile upon a pickup truck in Yemen carrying Qaed Salim Sinan al-Harethi, one of the primary planners of the USS Cole bombing two years prior. Five additional militants were killed in the truck, including a US citizen. The program again expanded in June 2004 when a drone strike killed multiple suspected militants in the Federally Administered Tribal Areas (FATA) of Pakistan along the Afghan border.

Hundreds of strikes have occurred in Pakistan and Yemen since the initial attacks in 2002 and 2004. Attacks in Pakistan did not pick up steam until the end of the Bush presidency in 2008, however they rapidly increased under the Obama administration, hitting a high in 2010 at an average of a strike every three days. The frequency of strikes declined, and, as of April, strikes have occurred on average once every seventeen days in 2013. It took seven years for another drone to strike in Yemen to occur, but since 2009 there has been a steady flow of strikes. They hit a high in 2012, averaging a strike every eight days, but are down sharply in 2013, averaging only one every twenty-one days as of April. With only between three and nine total strikes in Somalia over the past six years, there is not enough data to draw any substantive conclusions. Images 1 and 2 show the location of every recorded attack in Yemen and Pakistan according to the New America Foundation’s database.

The first map details each recorded strike in Yemen. While some pepper the countryside, the majority is concentrated along the central southern coast. The second map shows the over three hundred strikes in Pakistan. All of the attacks have taken place in the semi-autonomous, semi-lawless FATA along the Afghan border. Within the FATA, strikes are concentrated in North and South Waziristan, both of which are Pakistani Taliban strongholds.

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It is usually easier to determine that an attack is the result of a drone, but it can be difficult to identify exactly who—militants or civilians—were killed. Because of this, there is much debate and controversy surrounding the numbers of civilian and combatant casualties from drone strikes. The three main databases maintained by the Long War Journal, the New America Foundation, and the Bureau for Investigative Journalism each come to different conclusions on who exactly is being killed in drone strikes. Below Table 1 shows each database’s numbers for the total, militant, unknown, and civilian death counts. Only the New America Foundation provides figures for unknown deaths. The Bureau of Investigative Journalism only provides numbers for total deaths and civilian deaths, so in order to determine militant deaths the maximum civilian number was subtracted from the minimum total number, and the minimum civilian number was subtracted from the maximum total number.

**Table 1**

<table>
<thead>
<tr>
<th></th>
<th>NAF$^{38}$</th>
<th>LWJ$^{39}$</th>
<th>BIJ$^{40}$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civilian</td>
<td>276-338</td>
<td>235</td>
<td>446-993</td>
</tr>
<tr>
<td>Militant</td>
<td>1,969-3,238</td>
<td>2,826</td>
<td>2,071-3,933</td>
</tr>
<tr>
<td>Unknown</td>
<td>200-330</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>2,426-3,969</td>
<td>3,061</td>
<td>3,049-4,379</td>
</tr>
</tbody>
</table>

The mystery surrounding the drone program manifests itself in these numbers. Excluding the Long War Journal, all the data comes in huge ranges. Each database compiles their numbers using the same publicly available news reports and witness

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$^{40}$ Drones team. "Covert War on Terror—The Datasets." *Covert Drone War*. The Bureau of Investigative Journalism.
testimonies, but they come to conclusions with numbers that vary by as much as sixty-three percent. Even taking the lowest estimates, the data shows that nearly 2,500 total people have died with at least 235 of those being civilians. Senator Lindsey Graham provided a rare glimpse into the government’s numbers when he told reporters in February, “We’ve killed 4,700. Sometimes you hit innocent people, and I hate that, but we’re at war, and we’ve taken out some very senior members of Al-Qaeda.”41 That is an alarming figure, as the maximum number of deaths of any database is only 4,379. Senator Graham did not provide any clarification regarding the number, and it is unclear whether his 4,700 includes fatalities in Afghanistan and Iraq where strikes are carried out by the military. Regardless, Senator Graham’s candid comment revealed that the government has a figure, and that figure is closer to high estimates than low estimates.

There are generally two types of drone strikes: signature strikes and personality strikes.42 Personality strikes are the strikes one generally thinks of when discussing targeted killing. These strikes target a particular individual that is an important member of al-Qaeda or the Taliban and has usually been monitored for an extended period of time. Signature strikes, on the other hand, target groups of men based on their behavior, not their identities. Signature attacks often are also accompanied by extended periods of observation, but the target’s identity is never known. A number of activities can cause a person’s addition to a signature list such as gathering near militant training compounds, entering known bomb making facilities, traveling with a group of armed men, or entering a pickup truck with other men bound for the Afghan border. All of these are

plausible activities for al-Qaeda or Taliban members to be carrying out, but, as has been seen, innocent people performing similar actions are sometimes mistakenly targeted and killed.43

Signature strikes are particularly controversial, but the targeted killing program crossed an important threshold in September 2011 when it was used to bring about the death of Anwar al-Awlaki, an American citizen. This was not the first time an American had been killed by a drone. An American man with duel citizenship was one of five additional men killed during the first drone strike in November 2002, but the CIA operatives did not know at the time an American would be in the vehicle. The Awlaki case, however, marks the first time an American citizen was the primary target and not just collateral damage.44 The following month, Anwar al-Awlaki’s sixteen-year-old son, Abdulrahman al-Awlaki, in addition to eight other suspected militants were killed in a drone strike.45

With attacks against American citizens and groups of main based solely on behavior, many have raised questions regarding the selection process and how exactly targets are chosen by the United States government. The details behind the process are closely guarded by the administration and have not yet been revealed, however several leaked documents, official speeches, and news pieces have helped to shed some light on how officials decide who may and may not be killed. John Brennan, the current CIA director and former Counterterrorism chief, was the chief architect of the framework used to select targets. He helped create a selection mechanism that is known as the

45 Ibid.
“disposition matrix.” This “matrix” details the identities, tracking information, and strategies for killing or capturing suspected terrorists or militants. It streamlined the selection process by increasing the role played by the National Counterterrorism Center. The process also accepts input from the Pentagon, the National Security Council, the State Department, and the US Joint Special Operations Command (JSOC).

An important takeaway from the creation of such an extensive framework is that the targeted killing program is here to stay. For example, JSOC “created a ‘national capital region’ task force that is a 15-minute commute from the White House so it could be more directly involved in deliberations about al-Qaeda lists.” Not only does this illustrate how far across government the targeting process extends, but it also indicates JSOC is preparing for the long hall. It does not make much sense to physically sets up an office if JSOC does not believe drone strikes, and their selection process, are going to continue. That does not hold true only for JSOC. The groundwork, both tangible and intangible, is being laid for a covert war that will continue for years to come following the exit from America’s conventional conflicts in the Middle East and Afghanistan.

**Legal Considerations**

So far this paper has addressed many of the issues involved in the United States’ targeted killing program. Having outlined sovereignty considerations, targeted killing doctrine, and the details of the United States’ drone program, one can now begin examining the legal arguments surrounding drone strikes as a means of targeted killing.

A variety of top government lawyers and officials have come out to defend the program’s

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48 Ibid.
legality. On the other side, many human rights activists, academics, and commentators criticize the program claiming it violates domestic and international laws. Much of the debate seems to be based in subjective interpretations, but one can begin to sift through the speeches, reports, articles, documents, and data to perform some sort of objective analysis.

The root of the debate comes from whether to apply International Humanitarian Law (IHL) or International Human Rights Law (IHRL) when determining legality. Part of this dilemma comes as the result of a difficult philosophical question: Should we treat international terrorism as a crime or an act of war? If it is a crime, then those individuals performing acts of terror are non-combatants, and the targeted killing program would represent a gross violation of IHRL. If it is considered an act of war, then those involved can be considered combatants, and the targeted killing program could fall within the confines of IHL. “Terrorist attacks, if the terrorists have a sufficient organization and if the attacks are sufficiently violent and protracted, may be instances of non-international common Article 3 conflicts. If not sufficiently organized, and if the attacks are not lengthy in nature, they are simply criminal events.” The problem here lies with the subjective vocabulary. Quantifiable means of testing sufficient organization, violence, or length do not exist.

Since 2001, the United States has claimed to be in the midst of armed conflict with al-Qaeda and its affiliates around the globe. The foundation for this argument comes from the Authorization for Use of Military Force (AUMF), a joint resolution signed into law a week after the September 11th attacks. The piece of legislation grants

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broad powers to the President in order to use military force against all those responsible or connected to the September 11th attacks. The key clause in Section Two reads,

“The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

There seems to be two components to this authorization. The first portion declares that the President is legally entitled to use force against any state, group, or individual at all connected to the attacks. The second portion clarifies that the aforementioned use of military force is for the purpose of preventing future attacks by those states, groups, or individuals. The first portion appears to constrain the response to those originally connected to the September 11th attacks, but the second portion leaves it open to continuity if the purpose is to prevent future attacks. Regardless of its original intent, top cabinet officials have cited the AUMF as legal justification for drone strikes as recently as last year.

Being in a state of armed conflict is a necessary, but not sufficient, condition for classifying the drone program as legal. An equally important requirement is that those being targeted for drone strikes—al Qaeda and Taliban members—are legally eligible for lethal selection. However, neither al Qaeda fighters nor Taliban insurgents can be classified as lawful enemy combatants. At the outset of the US invasion of Afghanistan

in 2001 when the Taliban had a legitimate claim of representing the government, the
Taliban fighters could have qualified as lawful combatants assuming they satisfied other
requirements such as wearing a uniform. At the present, the Taliban fighters no longer
represent the “military” of the Afghan government and should now be considered
unlawful combatants directly participating in hostilities. Al Qaeda fighters have never
enjoyed the status of lawful combatants because al Qaeda has never represented a state
on top of failing to fulfill the requirement of wearing uniforms. They, too, would be
classified as unlawful combatants directly participating in hostilities.

The question that then arises is what exactly constitutes direct participation in
hostilities and for how long does that participation last. In 2009, the International
Committee for the Red Cross (ICRC) released a multiyear research report offering
guidance on determining direct participation in hostilities. According to the report,
there are three main criteria that must be met in order to categorize a civilian as directly
participating in hostilities:

“1. The act must be likely to adversely affect the military operations or military
capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or
destruction on persons or objects protected against direct attack (threshold of
harm), and

2. There must be a direct causal link between the act and the harm likely to result
either from that act, or from a coordinated military operation of which that act
constitutes an integral part (direct causation), and

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3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).”

In short, there must be a violent act or intent of violence, there must be a link between that act and a greater conflict, and the act must be in support of a specific party to the conflict. The report goes onto discuss those that directly participate in hostilities as members of organized groups such as the Taliban or al-Qaeda. Those civilians that choose to join armed organizations for the purpose of participating in hostilities shall remain legal targets for as long as they remain members of those organizations and maintain a continuous combat function. Though it can be difficult to fully judge, a continuous combat function “may be... for example, where a person has repeatedly directly participated in hostilities in support of an organized armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role...”

Dr. Solis from Georgetown University interprets the report’s findings as such,

“The report’s description clarifies that an al Qaeda leader does not regain civilian protection against direct attack merely because he temporarily stores his weapon to visit his family in government-controlled territory. A Taliban fighter who plants improvised antipersonnel mines remains a lawful target when he puts down his tools and walks home for lunch with his family. A senior terrorist insurgent may be targeted when he is asleep. An insurgent commander remains a lawful target whenever he may be located and whatever he may be doing.

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54 Ibid.
Proportionality always remains an issue, but his targeting is not precluded because the organized armed group member who has a continuous combat function is not actually fighting at the moment of his targeting.\textsuperscript{55}

It would appear that the bomb maker who returns to his family and home with the intention of building another bomb the following week is still directly participating in hostilities, while the bomb maker who returns home having built his or her last bomb is no longer directly participating in hostilities. As long as the intent to participate remains, the individual is stripped of his or her immunity from attack.

Though withholding important details, high-ranking officials such as John Brennan, Eric Holder and Jeh Johnson have given speeches in the past year attempting to highlight the legal justifications for America’s targeted killing program. According to them, the United States government claims, citing the AUMF, to be in a state of armed conflict with al-Qaeda and its affiliates around the globe. It claims that the targets in Pakistan, Afghanistan, Somalia and Yemen are either enemy combatants or civilians directly participating in hostilities. The attacks are done in the name of self-defense and are countering imminent threats posed toward the American people.\textsuperscript{56,57,58,59} Article 51 from the United Nations’ Charter clearly states that nations have the right to defend themselves militarily.\textsuperscript{60} They admit it is an unconventional conflict, but, in their eyes, it is a conflict nonetheless. As a conflict, IHL is the relevant legal apparatus that applies, and those targeted are legally targetable.

\textsuperscript{55} Ibid.
The opponents of the drone program may agree with some of the above arguments. The United States has the right to defend itself, and in theory drone strikes are a viable medium through so to do. However, the program has gone too far. Civilians that choose to participate in hostilities indeed lose their immunity and become lawful targets for lethal force. However, many would argue that, outside clear combat zones such as Afghanistan, no such armed conflict exists. In a recent interview, the chief of the ICRC, Peter Maurer, said, “A drone used in Afghanistan or Yemen is a drone used within the context of an armed conflict, and is thereby used legitimately,” but those in Pakistan, he continued, are “more problematic.”61 This is because in Afghanistan, and reportedly Yemen62, the home governments give permission to the United States to conduct drone strikes. In Pakistan, however, there is officially no such agreement between the two governments, and the Pakistani government publicly condemns the strikes as violations of its sovereignty.63 In addition, opponents point out that regardless of the application of IHRL or IHL, it is illegal to knowingly target civilians. They are immune from attack, and to target them could constitute war crimes. With hundreds of civilians dead and more injured, they say it is impossible to have resulted unknowingly. Some of those deaths must be the result of calculations or negligence. This is especially true in the case of “signature strikes” where the identity of the men on the ground is unknown prior to the strike. In addition, some argue that a civilian, regardless of membership to an organization such as al-Qaeda or the Taliban, only loses his or her immunity from attack

61 AFP. “Red Cross chief criticizes US’ drone use in Pakistan.” The Express Tribune News Network. 16 April 2013.
63 “Pakistan’s next govt to seek end to US drone attacks: Inderfurth.” The Nation. 5 April 2013.
in the midst of directly participating in hostilities.\textsuperscript{64} It is not sticky like Dr. Solis suggested.

Taking both sides’ arguments into account, one can attempt to objectively analyze the targeted killing program. Remembering back to the previous chapter, there are five requirements that must be satisfied for a targeted killing to be legal. It must be in the presence of an armed conflict, it must target a specific individual or group, the individual must be out of the reach of arrest or capture, a senior leader must authorize the strike, and the target must be actively participating in hostilities. One can apply these five criteria to the United States’ targeted killing program in an attempt to determine its legality.

The famous targeted killing of Osama bin Laden satisfies all five requirements. Assuming a state can legally be in armed conflict with a non-state actor and citing the AUMF, there was the presence of armed conflict between the United States and al-Qaeda on May 1\textsuperscript{st}, 2011. The target of the raid was Osama bin Laden, and the government had identified him with a relatively high degree of certainty. The third requirement is somewhat debatable, but it is entirely reasonable to assume bin Laden was outside the reasonable reach of arrest or capture. Such a prolific member of al Qaeda might resist capture, and it is true that the first individual encountered at bin Laden’s compound opened fire on the Navy SEALs with an AK-47 assault rifle.\textsuperscript{65} Barack Obama, the Commander-in-Chief, gave the final order to launch the targeted killing. Lastly, bin Laden had been in contact with other al-Qaeda members and been forming strategies for the militant organization moving forward, granting him unlawful

\textsuperscript{64} International Human Rights and Conflict Resolution Clinic (Stanford Law School) and Global Justice Clinic (NYU School of Law), “Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan” (September, 2012)

\textsuperscript{65} Sherwell, Philip. “Osama bin Laden killed: Behind the scenes of the deadly raid.” The Telegraph. 7 May 2011.
combatant status. Some object to its legality pointing toward the violation of Pakistan’s sovereignty. The United States claimed to have evidence that the Pakistani government had been unwilling to pursue, or even supported, groups within its borders that had repeatedly killed Americans in Afghanistan. The United States should have pursued diplomatic means prior executing the attack, however it is not unreasonable for the American government to believe that involving the Pakistani government in the raid would jeopardize it. The United States was in a difficult position regarding taking out the number one man covered by the original AUMF. Relying on a few assumptions, the bin Laden killing can be considered a legal targeted killing.

However, the bin Laden killing is likely the most high profile targeted killing ever carried out and does not reflect the average targeted killing by drone. First off, are the drone strikes being carried out in the presence of an armed conflict? This is obviously a highly debated question, and the answer depends on who is asked. Many will agree that Afghanistan and Yemen are in the midst of an armed conflict and that the host governments condone American strikes. In addition, Somalia, the perennial winner of the failed state index, is in the midst of a decades long civil war. The real argument arises with Pakistan where the majority of strikes take place. It is true that Taliban and al-Qaeda militants take refuge in the FATA along the Afghan border. The United States government claims Pakistan is incapable or unwilling to deal with all of these militants, and therefore, citing the AUMF, has the right to attack these militants with

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69 Roggio, Bill. “Al Qaeda intelligence chief reported killed in drone strike.” The Long War Journal. 22 April 2013.
whom it is in armed conflict. However, the United States is making dangerous assumptions in continuing to apply the AUMF nearly twelve years after its adoption. It is reasonable to assume the Congress of 2001 did not intend to pass an authorization for perpetual use of military force against any group the United States deems a terrorist organization.

Second, do drone strikes target specific individuals or groups of individuals? The answer to this question is both yes and no. So called “personality strikes” do target specific people whose identities are known prior to the attack.\textsuperscript{70} According to the government, the selection process is lengthy and prospective targets are thoroughly vetted.\textsuperscript{71} However, “signature strikes” target individuals who have not been identified. They are targeted and killed solely based on their behavior. This is a direct violation of the second requirement and indicates “signature strikes” do not follow the legal requisite of a targeted killing. In addition, depending on the database and range, civilian casualties represent between 7\% and 32\% of total dead in drone strikes since 2002.\textsuperscript{72,73}

Third, are the targets outside the reach of reasonable arrest or capture? This answer is almost impossible to know without looking at the government’s intelligence reports that go into a drone strike, all of which are classified. That being said, it is not unreasonable to assume there is a high level of difficulty and risk associated with sending American soldiers into the FATA to capture a potential drone strike target. It is

\textsuperscript{70} Currier, Cora. “Everything We Know So Far About Drone Strikes.” ProPublica. 5 Feb. 2013.
\textsuperscript{73} Drones team. "Covert War on Terror—The Datasets." Covert Drone War. The Bureau of Investigative Journalism.
impossible to know how common such scenarios arise, but it is reasonable to assume there are many such cases where arrest or capture would not be possible.

Fourth, is a senior official authorizing the drone strikes? The answer to this question is yes. President Obama is said to personally approve names to be added to the targeting lists. There is no official more senior in the United States government to approve these drone strikes.

Fifth and finally, is the target directly participating in hostilities? Again, the answer to this question is difficult to uncover without the ability to look into the government’s intelligence reports. Citing the various databases tracking drone strikes, thousands of individuals classified as combatants have died in attacks. However, even the lowest estimate lists over two hundred civilian dead. It would be unreasonable to assume each civilian death was 100% a surprise. For example, on October 30th, 2006 more than eighty people were killed in a drone strike in a madrasa in Pakistan, with as many as seventy of them being children. It would be difficult to believe this was done without knowing a single civilian was present in the blast zone.

It seems a recurring problem for this analysis is the lack of access to government information on its targeted killing policies. This lack of transparency makes it difficult to fully and objectively test their legality. That being said, it appears there are some strikes that are legal, some strikes that are clearly illegal, and even more than lie in a kind of legal gray area. Those strikes that target al-Qaeda leadership, result in no civilian casualties, and take place within the confines of the Afghan combat zone are clearly legal. Signature strikes in Pakistan against low-level Taliban fighters that negligibly

result in civilian casualties are clearly illegal. Even assuming the presence of armed conflict, not enough emphasis is placed on distinguishing between plainly clothed militants and civilians. What about the strikes in Pakistan against mid-level al-Qaeda members that may or may not result in civilian casualties? This is the gray area, and it is nearly impossible to objectively determine its legality without the classified information known by the United States and Pakistani governments. Next chapter will take a look into the future ramifications and non-legal implications associated with the drone program.

**Future Implications**

What does the near and long term future look like for the United States and the globe in respects to drones? Though drones have been around for nearly a century, the modern armed drone is a modern innovation of the twenty-first century. The modern drone is relatively young and is in fairly unexplored territory. One can expect a great deal of change in the near and distant future regarding the United States’ and other nation’s drone programs.

Technologically speaking, drones are just beginning to take off. One could compare the present state of drone technology to the first time militaries realized they could attach machine guns to biplanes in the First World War. The slow moving, propeller powered drones that buzz around for twenty-four hours at a time such as the Predator and Reaper will always have a place in the United States’ inventory. Faster, stealthier, and more heavily armed drones such as the carrier based, jet-powered X-47B capable of carrying over two tons of munitions internally.76

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The United States will undoubtedly lead the way in regards to technology and sheer volume, but other states will also invest in drone programs. According to a recent report, the United States “is projected to account for 62 percent of all drone research and development and 55 percent of all procurement over the next decade. With a projected $80 billion in global spending over the next ten years, drones constitute a potential growth industry for the aerospace and defense sectors.”77 The United States is projected to cover the majority of the market, but that still leaves 45 percent for the rest of the world. That 45 percent will most likely be dominated by the top military powers such as Russia, China, and Israel.78 That being said, the proliferation of technology will make drones available to non-state actors as well. In October 2012, Israel intercepted and shot down a drone belonging to Hezbollah off its coast.79

The United States claims to act within the confines of international law. As has been pointed out, this is a hotly contested claim. Regardless, the drone program has changed international precedents in a variety of ways. It is not necessarily the case that the United States has invented new precedents so much as it has expanded existing ones.

First, the drone program has expanded the definition of an armed conflict. Non-state actors have been around for centuries, and armed conflicts between states and non-state actors have taken place. What is new is the idea of armed conflict between a state and a non-state actor that takes place outside the confines of international borders. The United States claims, citing Article 51 of the United Nations Charter, that it is

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78 Ibid.
79 Fantz, Ashley. "Hezbollah claims it sent drone over Israel, but expert calls it 'rinky-dink.'" CNN. 12 Oct. 2012.
defending itself against al-Qaeda and its affiliates. Over the past decade, it has fought this conflict in Afghanistan, Iraq, Somalia, Pakistan, and Yemen. However, as mentioned earlier, it is becoming more and more problematic to cite the AUMF as legal grounds to execute the ‘War on Terror,’ especially without seeking international support.

Second, the drone program expanded the definitions of unwilling or incapable in regards to other states pursuing Taliban and al-Qaeda members within its borders. Despite public outcry regarding the violation of its sovereignty by Pakistan, the United States continues to carry out drone strikes in the FATA. Colonel John Vermeesch, Colonel Scott Lockwood, and Lieutenant Colonel Thomas Boone came to the University of Arizona in March 2013 as Eisenhower Fellows to discuss the modern challenges faced by the American military. Colonel Boone spoke on the topic by providing a hypothetical. He felt that, as a result of the US drone program, Mexico would have the right to kill an American citizen involved in trafficking guns to Mexican cartels if the Mexican government deemed the United States “unwilling” to intervene. Under this scenario, the Mexican government determines unilaterally whether an individual is a threat and the United States is unwilling to pursue him or her. One can imagine the outcry from the American public and government if this scenario were to actually play out.

Third, the drone program expanded the definitions of direct participation in hostilities and imminent threat. The traditional example of direct participation in hostilities by a civilian was a civilian driving a truck transporting ammunition to the front lines or, more obvious, a civilian picking up a rifle and firing on enemy

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combatants.\textsuperscript{81} That civilian was only eligible for attack during that specific act. Returning home for the night or putting down the rifle restored their immunity from attack. The new interpretation of participation is much “stickier” in that the civilian that drives munitions to the front line does not gain his or her immunity from attack when returning home if he or she intends to return the next day and resume transporting munitions.

Now, however, the United States is looking to establish some sort of international guidelines to drone use.\textsuperscript{82} To many, it may seem hypocritical of the United States to propose a framework of rules only after discovering its monopoly appears to be in question. However, the responsible thing moving forward is to begin exploring an international framework for drone usage. The number of countries operating drones in 2005 was only forty-one, and in 2012 that number had increased to seventy-six.\textsuperscript{83} That is an eighty-five percent increase in just seven years. As drone technology becomes more advanced and widely available, one would expect the aircraft to proliferate faster and wider.

Though new precedents have already been set and cannot be taken back, there are still a variety of policy changes the United States could implement moving forward. In his Nobel Peace Prize acceptance speech, President Obama state, “Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe


\textsuperscript{82} Zakaria, Tabassum. “As drone monopoly frays, Obama seeks global rules.” Reuters. 17 March 2013.

the United States of America must remain a standard bearer in the conduct of war.”

The Executive and the United States government should strive to fulfill the President’s declaration. To do otherwise would open the door to a chaotic future of multiple states using armed drones without guidance or repercussions.

The United States claims to target the high-value leadership of al-Qaeda and its affiliates. It is true that the drone program has resulted in the complete decimation of the al-Qaeda and Taliban leadership. However, leadership fatalities represent a tiny fraction of total deaths from drone strikes, coming in at under 2% of the total. Drones are an invaluable tool for carrying out the mission set forth by the AUMF of 2001, which is dismantling al-Qaeda’s operational leadership. However, men driving in pickup trucks with rifles on their way to the Afghan border are not members of al-Qaeda’s leadership and do no pose an imminent threat to the American public. Those men are most likely on their way to fight American soldiers across the border in Afghanistan, however on the off chance they are engaging in more innocent activities, possible blowback from an errant strike should deter policy makers from firing. For example, in 2009 it was estimated that al-Qaeda in the Arabian Peninsula had 300 members, but in 2012 their numbers were estimated to be at least 700. It is entirely possible that other factors contributed to this rise in membership, but it is plain to see drone strikes in Yemen were unable to stop the augmentation. By limiting targets to only al-Qaeda leadership, the United States can help mitigate potential blowback from errant strikes.

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86 Hudson, John. “Fewer than 2 percent of drone-strike victims in Pakistan are senior al-Qaeda leaders.” Foreign Policy. 10 April 2013.
By targeting only top-level al-Qaeda members who the United States has hard evidence against, one could hope to see a stronger focus of attacks against actual militants as opposed to sympathizers.

Another issue to address is the lack of transparency. Even this paper ran into problems of available information. Much of the analysis depended on information, often second-hand, gathered by news outlets. If the United States is truly confident in its claim to be acting within domestic and international law, there is nothing to be lost in opening up to the public its targeting criteria and steps it takes to limit civilian casualties. The administration could easily open up the mysterious program to the public without revealing classified information that would compromise the mission. The government also owes it to the international community to make its evidence public. It is a very serious action to violate the sovereignty of another state, such as the case with Pakistan, and the United States must submit its evidence and claims to the United Nations for judgment. The lifting of the veil could start with Congress and move to the public; the important thing is that the transition to transparency begins.

Besides a moral obligation to the way we engage in warfare, the United States must change its policies so as to act as a model for future armed-drone states to follow. One can understand why the government would act so secretive with such a new technology and form of warfare, but that mysteriousness is misguided. It is a short-term shield that will have negative long-term ramifications. The reality is that drones are a low-cost and highly effective weapon that will be a mainstay of future military inventories around the world. The United States is running out of time to alter the trajectory of its drone policy and act as a responsible model for the rest of the global community to follow.
Conclusion

It is still questionable whether the United States can execute drone strikes against al-Qaeda members and remain within the confines of domestic and international law. The armed drone is just another platform to deliver munitions that have been in use for decades. However, drones are special in that they lower the barrier to entry of conflict due to their low-cost, loitering ability, and limited risk associated with flying within hostile areas.

In certain scenarios, when members of al-Qaeda take refuge in a foreign state and that state is either unwilling or incapable of apprehending those individuals, the United States may legally violate its borders to deal with the al-Qaeda members. However, the United States cannot do this unilaterally without first seeking the approval of the international community. International law does not adapt to the will of individual states. Issues arise when determining what exactly counts as “unwilling or incapable.” To counter these issues, the United States should go before the United Nations, the official caretakers of international peace and security, to argue its case.

The drone debate is at its heart a debate over the legality of targeted killings. A targeted killing is perfectly legal when they meet the five requirements put forward by Dr. Solis of Georgetown University. It must be in the presence of an armed conflict, it must target a specific individual or group, the individual must be out of the reach of arrest or capture, a senior leader must authorize the strike, and the target must be actively participating in hostilities.

The United States government claims to follow these rules. Citing Article 51 from the United Nations Charter and the Authorization for Use of Military Force passed by Congress in September 2001, the government is engaged in a defensive armed conflict.
with al-Qaeda and its affiliates around the globe. In the eyes of the United States government, the targets of drone strikes in Yemen, Somalia and Pakistan are directly participating in hostilities and pose an imminent threat to the American public. However, the claims of one state are not sufficient evidence for determining combatant status or whether a state is “unwilling or incapable” of dealing with threats. Opponents of the drone program claim the United States goes too far in its justifications. Terrorism is a law enforcement problem, not a military matter. Strikes in Pakistan are gross violations Pakistan’s sovereignty and International Human Rights Law and could be classified as war crimes. Disregarding the program’s legality, it has resulted in the deaths of thousands, including hundreds of civilians.

The future of drones, both in the United States and globally, is uncertain. Drone technology continues to advance and proliferate rapidly. The United States’ has already opened the door to loose drone policy by foreign nations as a result of its targeted killing program of the last decade. Though some damage is already done, it is not too late to pull back and attempt to promote international guidelines for future armed-drone states to follow. In order to do this, the government must drastically cut back on drone strikes to only those that are militarily necessary and target operational leaders within al-Qaeda. The blowback resulting from errant strikes undermines any benefit that could result from the killing of low-level Taliban or al-Qaeda militants. Additionally, the government must become more transparent in its drone operations. Doing so will make it easier to defend the program and to act as a model for future armed-drone states to follow.
I was fortunate to have the opportunity of asking C. Dixon Osburn, Director of Law and Security at Human Rights First, a question on *The Diane Rehm Show*. In response to my question regarding possible blind spots in international law, he said,

“We work with a group of about 50 retired general and admirals, and they bring with them quite a bit of wisdom over a number of conflicts. And they reminded me that back in World War II, the comment was we’ve never seen a war like this before. Well, every single conflict that we face, people say, this is not like anything that we’ve seen before. That doesn’t mean that you throw away the legal framework. Actually, the legal framework remains quite robust.”

He is absolutely correct in saying one cannot throw away the centuries of legal framework, but he was wrong to criticize those that described World War II as something that had never before been seen. That war gave the international community the atomic bomb, a weapon that completely changed the world and warfare. The ‘War on Terror” has given the world the armed drone, another weapon that is likely to change warfare. Do we abandon our civil and military laws because of technological advancements or geopolitical shifts? No, but the world must adapt accordingly or risk a chaotic future where its ability to employ advanced technologies far outpaces its ability to control them.

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