

# How to Ensure that the U.S. Drone Program does not Undermine Human Rights

BLUEPRINT FOR THE NEXT ADMINISTRATION

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FOR THE NEXT U.S.  
ADMINISTRATION

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# How to Ensure that the U.S. Drone Program does not Undermine Human Rights

*The United States is "establishing precedents that other nations may follow, and not all of them will be nations that share our interests or the premium we put on protecting human life, including innocent civilians."*

John Brennan, then White House Senior Counterterrorism Advisor, April 30, 2012

## Introduction

The Obama Administration has dramatically escalated targeted killing by drones as a central feature of its counterterrorism response. Over the past two years, the administration has begun to reveal more about the targeted killing program, including in a leaked Department of Justice White paper on targeted killing<sup>1</sup> and in public remarks by several senior officials.<sup>2</sup> While this information is welcome, it does not fully address our concerns.

**Experts and other governments have continued to raise serious concerns about:**

<sup>1</sup>Department of Justice White Paper, Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force, *available at*: [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf)

<sup>2</sup>Speeches from senior administration officials on the targeted killing program include those given by: Harold Koh, legal adviser of the U.S. Department of State, on March 25, 2010; John Brennan, Former Assistant to the President for Homeland Security and Counterterrorism, Remarks at Wilson Center on April 30, 2012; and Eric Holder, Attorney General, Remarks at Northwestern University School of Law on March 5, 2012.

- The precedent that the U.S. targeted killing policy is setting for the rest of the world, including countries that have acquired or are in the process of acquiring drones, yet have long failed to adhere to the rule of law and protect human rights;
- The impact of the drone program on other U.S. counterterrorism efforts, including whether U.S. allies and other security partners have reduced intelligence-sharing and other forms of counterterrorism cooperation because of the operational and legal concerns expressed by these countries;
- The impact of drone operations on other aspects of U.S. counterterrorism strategy, especially diplomatic and foreign assistance efforts designed to counter extremism, promote stability and provide economic aid;
- The number of civilian casualties, including a lack of clarity on who the United States considers a civilian in these situations; and
- Whether the legal framework for the program that has been publicly asserted so far by the administration comports with international legal requirements.

The totality of these concerns, heightened by the lack of public information surrounding the program, require the administration to better explain the program and its legal basis, and to carefully review the policy in light of the global precedent it is setting and serious questions about the effectiveness of the program on the full range of U.S. counterterrorism efforts.

While it is expected that elements of the U.S. government's strategy for targeted killing will be classified, it is in the national interest that the government be more transparent about policy considerations governing its use as well as its legal justification, and that the program be subject to regular oversight. Furthermore, it is in U.S. national security interests to ensure that the rules of engagement are clear and that the program minimizes any unintended negative consequences.

How the U.S. operates and publicly explains its targeted killing program will have far-reaching consequences.

The manufacture and sale of unmanned aerial vehicles (UAVs) is an increasingly global industry and drone technology is not prohibitively complicated. Some 70 countries already possess UAVs<sup>3</sup>—including Russia, Syria and Libya<sup>4</sup>—and others are in the process of acquiring them. As White House counterterrorism chief John Brennan stated: the United States is "establishing precedents that other nations may follow, and not all of them will be nations that share our interests or the premium we put on protecting human life, including innocent civilians."<sup>5</sup>

By declaring that it is in an armed conflict with al Qaeda's "associated forces" (a term it has not defined) without articulating limits to that armed conflict, the United States is inviting other countries to similarly declare armed conflicts against groups they consider to be security threats for purposes of assuming lethal targeting authority. Moreover, by announcing that all "members" of such groups are legally targetable, the United States is establishing exceedingly broad precedent for who can be targeted, even if it is not utilizing the full scope of this claimed authority.<sup>6</sup> As an alternative to armed conflict-based targeting, U.S. officials have claimed targeted killings are justified as self-defense responding to an imminent threat, but have referred to a "flexible" or "elongated" concept of imminence,<sup>7</sup> without adequately explaining what that means or how that complies with the requirements of international law.

In a white paper leaked to NBC news in February 2013, for example, the Department of Justice adopts what it calls a "broader concept of imminence" that has no basis in law. According to the white paper, an imminent threat need be neither immediate nor specific. This is a

dangerous, unprecedented and unwarranted expansion of widely-accepted understandings of international law.<sup>8</sup>

It is also not clear that the current broad targeted killing policy serves U.S. long-term strategic interests in combating international terrorism. Although it has been reported that some high-level operational leaders of al Qaeda have been killed in drone attacks, studies show that the vast majority of victims are not high-level terrorist leaders.<sup>9</sup> National security analysts and former U.S. military officials increasingly argue that such tactical gains are outweighed by the substantial costs of the targeted killing program, including growing anti-American sentiment and recruiting support for al Qaeda.<sup>10</sup> General Stanley McChrystal has said: "What scares me about drone strikes is how they are perceived around the world. The resentment created by American use of unmanned strikes ... is much greater than the average American appreciates."<sup>11</sup> The broad targeted killing program has already strained U.S. relations with its allies and thereby impeded the flow of critical intelligence about terrorist operations.<sup>12</sup>

While the U.S. government does not report the number of deaths from drone strikes, independent groups have

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<sup>8</sup> The most widely cited standard in international law for when a threat is "imminent" and therefore justifies the use of force is the Caroline doctrine, arising from an incident in 1842 where British soldiers crossed into the United States to destroy a ship carrying arms to insurgents in Canada. British and American officials at the time agreed in an exchange of diplomatic notes that the use of defensive force is permitted when the "[n]ecessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." John B. Moore, 2 A Digest of International Law 409, 412 (1906); Oscar Schachter, *International Law in Theory and Practice*, 150-52 (2d ed. 1991). The Caroline doctrine was reaffirmed by the Nuremberg Tribunal after World War II.

<sup>9</sup> Peter Bergen and Katherine Tiedemann, *Washington's Phantom War*, FOREIGN AFFAIRS, July/August 2011.

<sup>10</sup> Former Director of National Intelligence Admiral Dennis Blair and former CIA chief Robert Grenier have both raised these concerns. (Dennis C. Blair, *Drones Alone Are Not the Answer*, N.Y. TIMES, August 15, 2011 and Paul Harris, *Drone attacks create terrorist safe havens, warns CIA official*, THE GUARDIAN, June 5, 2012. News reports from Yemen confirm that drone strikes there are causing "strong shift in sentiment toward militants affiliated [with al Qaeda in the Arabian Peninsula]." Sudarsan Raghavan, *In Yemen, U.S. airstrikes breed anger, sympathy for al-Qaeda*, WASH. POST, May 29, 2012.

<sup>11</sup> David Alexander, *Retired general cautions against overuse of "hated" drones*, REUTERS, January 7, 2013.

<sup>12</sup> Germany, for example, has said that it will not provide intelligence to the U.S. government on potential terrorism suspects in Pakistan because it believes the U.S. drone program there is illegal. Holger Stark, *Germany Limits Information Exchange with US Intelligence*, DER SPIEGEL, May 17, 2011.

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<sup>3</sup> Peter Bergen and Jennifer Rowland, *A Dangerous New World of Drones*, CNN, October 2, 2012.

<sup>4</sup> Government Accountability Office, *Nonproliferation: Agencies Could Improve Information Sharing and End-Use Monitoring on Unmanned Aerial Vehicle Exports*, July 2012.

<sup>5</sup> John Brennan, Former Assistant to the President for Homeland Security and Counterterrorism John Brennan, Remarks at Wilson Center on April 30, 2012.

<sup>6</sup> See *id.*

<sup>7</sup> John Brennan, Former Assistant to the President for Homeland Security and Counterterrorism, Remarks at Harvard Law School on September 16, 2011; Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency*, quoting former State Department legal advisor Harold Koh.

estimated that the drone program has claimed several thousand lives so far. Senator Lindsey Graham in February 2013 said that the United States has killed 4,700 individuals with drone strikes—the first time a U.S. official has put a number on drone deaths.<sup>13</sup> Although the number of civilian casualties is disputed,<sup>14</sup> sources report that 20–25 percent of deaths caused by drones are civilian casualties.<sup>15</sup>

The government has not provided any information about civilian casualties, other than to say that they do not exist or are extremely rare. The confusion surrounding this issue may be due in part to the government's failure to make clear its definition of a "civilian." Instead, government sources speak of "militant" deaths in a manner that appears to presume targetability of the victims without providing any information either before or after a strike demonstrating that the victims were in fact targetable.

The dispute highlights the need for increased transparency regarding both the number of unintended deaths, or "collateral damage" resulting from targeted killing operations and how the government determines who is a "civilian" and who is a "militant," a term that has no meaning in international law, both before and after a strike. In general, the United States should assess its own level of transparency about the program against what it would expect from other governments, including those who don't share U.S. interests or commitment to protecting human rights.

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<sup>13</sup> Senator Graham's remarks to the Easley Rotary Club in Easley, South Carolina were quoted in the Easley Patch, *available at* <http://easley.patch.com/articles/sen-graham-i-support-drone-strikes>.

<sup>14</sup> Reasons for dispute concern not only questions of fact, such as whether the victim was a terrorist, militant, or insurgent, but most importantly whether the victim was targetable under the laws of war. If the individual was not targetable under the laws of war, then he was a civilian even if the government intended to kill him on account of his alleged activities. The only exception is if the justification for targeting him is that he posed an "imminent threat," outside the context of armed conflict.

<sup>15</sup> Chris Woods, *Drone War Exposed – the complete picture of CIA strikes in Pakistan*, BUREAU OF INVESTIGATIVE JOURNALISM.

# How to Ensure that the U.S. Drone Program does not Undermine Human Rights

## DETAILS

### MAINTAINING FIDELITY TO INTERNATIONAL LAW AND THE NEED FOR TRANSPARENCY

As the most forwardly deployed military force in the world, the United States has a strong national interest in maintaining the integrity of international law. To the extent that its targeted killing program fails to maintain—and be seen to maintain—fidelity to these rules, the United States risks not only committing war crimes, but also undermining a system of rules that has protected our own military for decades. White House counterterrorism advisor John Brennan has said, "I think the rule should be that if we're going to take actions overseas that result in the deaths of people, the United States should take responsibility for that."<sup>16</sup> The administration should be doing more to make that rule a practical reality.

Targeted killing is lawful in an armed conflict pursuant to the rules of international humanitarian law, also known as the law of armed conflict (IHL/LOAC), which permits lethal targeting of members of enemy armed forces and others while they directly participate in hostilities.

These rules apply only in armed conflict, and the distinction between armed conflict and lower level hostilities is an important one. For hostilities between a state and an armed group to be considered "armed conflict" under international law, they must be conducted by an organized armed group, for a prolonged period of time, and reach a certain level of intensity that

distinguishes them from sporadic acts of violence or low-level domestic disturbances.<sup>17</sup>

Outside of an armed conflict, targeted killing is permissible only pursuant to international human rights law when the target poses an imminent threat presenting a substantial risk to life that cannot be eliminated by other means. The Obama Administration has said that the United States is engaged in an armed conflict with "al Qaeda, the Taliban, and associated forces,"<sup>18</sup> but it has never publicly disclosed which organizations it considers "associated forces," nor demonstrated that such groups are sufficiently organized or conducting hostilities against the United States with a level of sustained intensity that would constitute armed conflict under the law.<sup>19</sup> The administration has not demonstrated that groups such as al Qaeda in the Arabian Peninsula (AQAP), al-Shabab in Somalia, and others are centrally organized groups, engaging in attacks against the United States that reach a certain level of intensity that distinguishes them from sporadic acts of violence or low-level domestic disturbances.

The administration should explain how it justifies targeted killing of individuals who are members of groups that do not appear to be engaged in activities that rise to the level of armed conflict under international law. In the absence of clarity around this issue, and by appearing to rely on the more permissive targeting standards of IHL in situations that do not rise to the level of an armed conflict, the United States is blurring a fundamental distinction in international law—the line between armed conflict and other circumstances.<sup>20</sup>

According to former senior counterterrorism advisor, and current Director of the CIA John Brennan, the Obama Administration takes the view that all "members" of al

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<sup>17</sup> Int'l Committee of the Red Cross, International Humanitarian Law and the challenges of contemporary armed conflicts. November/December 2011, available at: <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>

<sup>18</sup> Brennan, *supra* note 5.

<sup>19</sup> Jennifer K. Elsea, Congressional Research Service, Legal Issues Related to the Lethal Targeting of U.S. Citizens Suspected of Terrorist Activities, May 4, 2012, p.4.; *Prosecutor v. Tadic*, IT-94-1-T, Judgment (7 May 1997), para.562.

<sup>20</sup> The Justice Department white paper leaked to media in February underscores this problem by failing to acknowledge the different legal frameworks applicable inside and outside of armed conflict.

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<sup>16</sup> Karen DeYoung, *A CIA veteran transforms U.S. counterterrorism policy*, WASH. POST, October 24, 2012.

Qaeda, the Taliban, or “associated forces” are targetable, just as commanders of the enemies’ armed forces were targetable during World War II.<sup>21</sup> However, unlike in a traditional armed conflict between states (“international armed conflict” or “IAC”) that typically maintain standing armies comprised of members in uniform, armed conflicts with non-state actors (“non-international armed conflicts” or “NIAC”) often involve hostilities with civilians who take up arms and engage in combat. Because such individuals do not wear uniforms and often mix with the broader civilian population, international law requires that extra care be taken to ensure that only those who are members of enemy armed forces or are otherwise directly participating in hostilities are the object of attack.

Under IHL, individuals who are directly participating in hostilities are subject to attack while they do so. In addition, and according to International Committee of the Red Cross (ICRC) guidance, individuals who assume a continuous combat function—serving as a bomb maker, for example—within an organized armed group are subject to attack until they cease to assume that function.<sup>22</sup> IHL does not permit “members” of terrorist groups to be lethally targeted based on their membership status alone. Couriers, financiers, and cooks, for example, may be “members” of al Qaeda, but such individuals are not lawfully subject to attack in armed conflict unless and until they directly participate in hostilities or assume a continuous combat function in an organized armed group.

International law restricts the use of lethal force outside of armed conflict to situations in which such force is a last resort and in response to an imminent threat that poses a substantial risk to human life.

The administration asserts that, as a matter of policy, it targets only “operational leaders” of terrorist groups who pose an imminent threat, whether or not in the context of an armed conflict. But it has not made clear how it determines whether an individual is an “operational leader.” Moreover, the Department of Justice white paper defines an imminent threat based not on the

actual imminence of the threat, but on the “relevant window of opportunity” to kill the target, assuming that the target is “continually plotting attacks against the United States” even if the U.S. government has no evidence of any particular plot being hatched. This suggests that the United States is making targeting decisions based on future predictions that it cannot reasonably make, and is using an overly elastic interpretation of the law to justify targeting based on a standing “kill list.” Such a list by its very nature cannot reliably identify threats that are “imminent” and therefore cannot be a legitimate basis for targeting outside of an armed conflict.<sup>23</sup>

One of the most troubling aspects of the targeted killing program is the perception, confirmed by administration officials in news reports,<sup>24</sup> that the administration treats all military-age males within a strike zone as “combatants,” irrespective of whether these individuals have been determined to be either members of enemy forces or directly participating in hostilities. Such a practice is unlawful; IHL requires that civilians be distinguished from combatants and requires positive identification of individuals as valid military objectives prior to commencing a strike. In addition, IHL prohibits targeting when the anticipated civilian casualties would be disproportionate to the military gain associated with the strike. Presuming that all military-age males are combatants not only undercounts civilian casualties, it also seriously compromises any attempt to comply with the IHL principle of proportionality. It is vitally important that the administration make clear publicly that it is not its policy to treat all military-aged males in a strike zone as combatants subject to lethal targeting.

<sup>21</sup> Brennan, *supra* note 5.

<sup>22</sup> Int’l Committee of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, Vol. 90/Number 872, December 2008.

<sup>23</sup> Eric Holder, Attorney General, Remarks at Northwestern University School of Law on March 5, 2012.

<sup>24</sup> Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES, May 29, 2012.

## A SECRET DRONE COURT IS NOT THE ANSWER

Former Pentagon General Counsel Jeh Johnson and others have expressed deep skepticism about recent proposals<sup>25</sup> to create a secret FISA<sup>26</sup>-like court to sanction targeted killings in advance. As Johnson noted, “courts exist to resolve cases and controversies between parties, not to issue death warrants based on classified, *ex parte* submissions.”<sup>27</sup> Such a court would likely be unconstitutional because it would violate the separation of powers and would be asked to render advisory opinions rather than rule on actual cases and controversies. The result would be to give a patina of legitimacy to a ruling for summary execution following a one-sided argument.

Aside from the constitutional problems, the drone court would undermine national security. In an armed conflict, lethal force is appropriate under the laws of armed conflict, and no court should be asked to second-guess a commander’s decision. Outside an armed conflict, the Constitution authorizes the President to defend Americans with lethal force only in the face of an imminent threat when no other feasible means to disrupt the threat is available. When the threat is imminent, there is by definition insufficient time to seek judicial review. Adding a requirement of judicial process is impractical and would likely encourage the use of lethal force in situations where the threat is not actually imminent.

A court could, however, provide meaningful judicial review of targeting decisions after the fact, when claims for liability for unlawful killings are brought by survivors. Those wrongfully targeted, or their survivors, are entitled to remedy, and the Administration should refrain from claiming that “state secrets” or the “political question” doctrine should foreclose such claims.

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<sup>25</sup> See, e.g., Editorial, *A Court for Targeted Killings*, N.Y. TIMES, Feb. 13, 2013.

<sup>26</sup> The Foreign Intelligence Surveillance Act created a Foreign Intelligence Surveillance Court housed within the Justice Department that operates in secret to oversee requests for surveillance warrants.

<sup>27</sup> Jeh Johnson, Former Department of Defense General Counsel, Remarks at Fordham Law School on March 18, 2013.

## RECOMMENDATIONS

To ensure that the U.S. targeted killing/drone program is not undermining human rights, the president should prioritize transparency, legality, and oversight.

### TRANSPARENCY AND OVERSIGHT

- Order the Justice Department to release all Office of Legal Counsel memoranda setting forth its legal analysis of and justification for the targeted killing program, including the memorandum on the lethal targeting of Anwar al-Awlaki—an account of which has appeared in *The New York Times*.<sup>28</sup> Such memoranda should be released with as few redactions as possible.
- Cooperate with all congressional oversight efforts and make transparency a high priority in the conduct of ongoing targeted killing operations.
- Identify the measures in place for agencies engaged in targeted killing to protect civilians.
- Identify the current processes and procedures used by the Central Intelligence Agency (CIA) and Department of Defense (DOD) to conduct post-strike casualty assessments, and whether any procedures exist to compensate civilians and communities who are harmed.
- Order the Justice Department not to assert the state secrets privilege or to otherwise argue that legal claims of unlawful killings are non-justiciable in federal court to prevent post-targeting liability cases alleging human rights or constitutional violations from being heard on their merits.

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<sup>28</sup> Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, October 8, 2011.

## LEGALITY

**Assure the public that the program is being conducted legally. Specifically, the administration should state clearly that:**

- In armed conflict, the United States will only target members of enemy armed forces or civilians while they are directly participating in hostilities, and only in compliance with the principles of proportionality and military necessity.
- Outside of armed conflict, the United States will use lethal force only as a last resort, in response to an imminent threat that poses a substantial risk to human life that cannot be otherwise ameliorated.

## POLICY REVIEW

- Order the senior White House counterterrorism advisor to conduct a policy review of the drone/targeted killing program, to be made public with as few redactions as possible, that evaluates the potential risk of U.S. actions setting precedent for other nations such as China, Russia, and Syria; the impact of drone strikes on counterterrorism cooperation with allies; and the impact of drone strikes on other U.S. political and economic counterterrorism measures in countries where the strikes are occurring. Undertaking this policy review shall not prevent the president from implementing the other recommendations in this blueprint immediately.



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