

New Federal Initiatives Project

**The Use of Drones and Targeted Killings
in Counterterrorism**

By

Michael W. Lewis and Vincent J. Vitkowsky*

December 13, 2010



*The Federalist Society
for Law and Public Policy Studies*

The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author or authors. We hope this and other publications will help foster discussion and a further exchange regarding current important issues.

www.fed-soc.org

The Use of Drones and Targeted Killing in Counterterrorism

Shortly after September 11, 2001, President George W. Bush, as Commander in Chief, authorized unmanned aerial vehicles (UAVs), or drones, to target and kill enemy leaders pursuant to Congress' Authorization for Use of Military Force (AUMF) against al Qaeda.¹ The President designated "Afghanistan and the airspace above" a combat zone,² but the United States also launched drone strikes against al Qaeda targets in other countries. The drone program received widespread attention in November 2002, when the C.I.A. launched a Predator drone strike in Yemen, killing the mastermind of the October 2000 attack on the U.S.S. Cole and six other men. Following the Yemen attack, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions asserted that the attack was "a clear case of extrajudicial killing."³ In response, the U.S. defended the drone strike as permissible under international law of armed conflict, broadly asserting that al Qaeda terrorists who continue to plot attacks may, in appropriate circumstances, be lawful subjects of armed attack without regard to their location.⁴

Since taking office, President Obama has expanded the previous administration's use of drones to target al Qaeda and Taliban leaders. Central Intelligence Agency Director Leon Panetta has called the Predator program "the only game in town" in terms of disrupting the al Qaeda leadership.⁵ Many have urged the Obama administration to articulate legal justification for the continued use of drones to target and kill terrorists. The administration addressed such concerns on March 25, 2010, when State Department Legal Adviser Harold Koh made a speech to the American Society of International Law (ASIL).⁶

In his speech, Mr. Koh defended targeted drone killings: "[I]t is the considered view of this Administration . . . that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war."⁷ Mr. Koh cites both domestic law, under the AUMF,⁸ and international law as proof that the U.S. is engaged in armed conflict with al Qaeda, the Taliban, and "associated forces."⁹ Targeted killings, a vital tool in this war, are justified because they are performed in accordance with the laws of war. The U.S., according to Mr. Koh, conducts targeted strikes consistent with the principles of "distinction" and "proportionality" to ensure that the targets are legitimate and collateral damage minimized.¹⁰

Mr. Koh lists four reasons why targeted drone killings are legal. First, enemy leaders are legitimate targets because they are belligerent members of an enemy group in a war with the U.S.¹¹ Second, drones are appropriate instruments for such missions, so long as their use conforms to the laws of war.¹² Third, enemy targets selected through "robust" procedures require no legal process and are not "unlawful extrajudicial" killings.¹³ Finally, Mr. Koh argues that using drones to target "high level belligerent leaders" does not violate domestic law banning assassinations.¹⁴

The administration's arguments raise four important questions about the administration's targeted killings policy. Who may be targeted? Where may the targeting take place? Does the use of UAVs for targeted killings comport with International Humanitarian Law (IHL)? And finally, are targeted killings illegal assassinations under U.S. domestic law?

Regarding the question of who may be targeted, IHL divides people into two groups: combatants and civilians.¹⁵ In order to qualify as a combatant, an individual must belong to a group that has an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.¹⁶ Those that are not combatants are civilians, and these civilians may only be targeted when they are “directly participating in hostilities.”¹⁷ In his speech, Mr. Koh argued that “individuals who are part of such an armed group [as al Qaeda] are belligerents and, therefore, lawful targets under international law.”¹⁸ Critics of the policy, on the other hand, argue that international law must be interpreted more narrowly to exclude the targeted killing of non-combatants when they do not present an immediate threat to others.¹⁹

Similarly, critics argue that the U.S. may not attack militants “[o]utside of a battle zone or zone of armed conflict” unless “it is clearly necessary to save lives immediately.”²⁰ Because many U.S. strikes in Yemen and Pakistan arguably occur outside of this context, these critics condemn the use of drone strikes in these countries. However, supporters of the policy deny that “armed conflict” can be defined by international boundaries and instead argue that the state must decide the scope of the conflict based on the realities on the ground.

Some commentators and international figures remain skeptical about whether UAVs conform to the laws of war, but their reservations are generally related more to the accountability and review of targeting decisions than to the use of UAVs specifically.²¹ Mr. Koh argued in his speech to the ASIL that drone attacks are the best method for missions to kill al Qaeda leaders, due to their precision and the relatively minimal collateral damage caused,²² and the Bush Administration decided to use the drones rather than C.I.A. hit teams to take out such leaders largely because of the lower risk that drones posed to U.S. personnel.²³

Finally, as to whether U.S. domestic law prohibits targeted killings because they are assassinations, the U.S. has repeatedly affirmed a ban on assassinations, beginning with an executive order signed by President Gerald Ford.²⁴ Subsequent executive branch interpretations of this ban have generally defined “assassination” as the killing of public officials²⁵ or killing with a political purpose.²⁶ Supporters of targeted killings argue that these killings, which are carried out as part of a wartime strategy, therefore are not assassinations, since they are not committed against public officials and are not political killings. Mr. Koh, in his speech, statedp that the killings are not “assassinations” because it is lawful to use weapons systems in this manner “when acting in self-defense or during an armed conflict.” There also seems to be widespread agreement among those who consider UAV attacks on terrorist leaders “assassinations” that such attacks are not prohibited by domestic law because the ban on assassinations is only codified in an executive order, which can be altered by the President at any time, and because the executive orders issued by President Ford and later Presidents leave the term “assassination” undefined and open to the President’s interpretation.²⁷

** Michael W. Lewis is a Professor at Ohio Northern University Law School, teaching the Law of War and International Law. He is a Topgun graduate who flew F-14’s for the United States Navy in Operation Desert Storm.*

Vincent J. Vitkowsky is the Chairman of the Federalist Society's International and National Security Law Practice Group, an attorney in private practice in New York City, and an Adjunct Fellow at the Center for Law and Counterterrorism.

The authors gratefully acknowledge Marc Stepper and Matthew Linder, J.D. candidates at Cornell Law School, for their significant contributions to the research and drafting of this paper.

¹ S. J. Res. 23, 107th Cong. (2001) (enacted).

² Exec. Order No. 13,239, 66 Fed. Reg. 64907 (Dec. 14, 2001).

³ Letter from Jeffrey De Laurentis, Chief of Section, Political and Specialized Agencies of the Permanent Mission of the United States of America, to the the secretariat of the Commission on Human Rights, United Nations Office at Geneva, (E/CN.4/2003/3).

⁴ *Id.*

⁵ See Pam Benson, *U.S. Airstrikes in Pakistan Called "Very Effective,"* May 18, 2009, available at <http://www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/>.

⁶ Harold Koh, Legal Adviser, U.S. Dep't of State, Address at the Annual Meeting of the American Society of International Law (March 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

⁷ *Id.*

⁸ S. J. Res. 23, 107th Cong. (2001) (enacted) (authorizing the use force against "those nations, organizations, or persons [the president] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons").

⁹ See Koh, *supra* note 6.

¹⁰ *Id.*

¹¹ See *id.*

¹² See *id.*

¹³ See *id.*

¹⁴ *Id.*

¹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, (API) Art. 43 and 51. Article 43 discusses combatants while Article 51 describes civilians and their immunity. Although the United States has not ratified Protocol I, it recognizes much of Protocol I as descriptive of customary international law.

¹⁶ API Art. 43(1).

¹⁷ API Art. 51.

¹⁸ Koh, *supra* note 6.

¹⁹ See Complaint for Declaratory and Injunctive Relief, *Al-Aulaqi v. Obama*, No. 10-cv-____ (D.D.C. August 30, 2010) (claiming that the federal government's "policy of targeted killings violates treaty and customary international law by authorizing, outside of armed conflict, the killing of individuals . . . without judicial process in circumstances in which they do not present concrete, specific, and imminent threats to life or physical safety, and where there are means other than lethal force that could reasonably be employed to neutralize any such threat").

²⁰ Mary Ellen O'Connell, *Respect the Battlefield*, CBSNews.com, April 9, 2010, available at <http://www.cbsnews.com/stories/2010/04/08/opinion/main6377556.shtml>.

²¹ See *U.S. Use of Drones Queried by U.N.*, N.Y. TIMES, Oct. 28, 2009, at A17, available at <http://www.nytimes.com/2009/10/28/world/28nations.html>. Philip Alston, Special Rapporteur on Extrajudicial Executions pursued an inquiry into the U.S. drone program over concerns that it “is killing significant numbers of people and there is absolutely no accountability in terms of international law.”

²² See Koh, *supra* note 6.

²³ See Pamela Hess, *AP Sources: Tenet Canceled Secret CIA Hit Teams*, ABC NEWS, 2010, available at <http://abcnews.go.com/Politics/wirestory?id=8095609&page=2>.

²⁴ See, e.g., Exec. Order 11,905, 41 Fed. Reg. 1041 (Jan. 6, 1976); Exec. Order 12,036, 43 Fed. Reg. 3674 (Jan. 24, 1978); Exec. Order 12,333, 46 Fed. Reg. 12333 (Dec. 4, 1981) (“No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”).

²⁵ See Colonel W. Hayes Parks, Memorandum on Executive Order 12333 and Assassination, Nov. 2, 1989 (stating that assassinations are killings carried out unilaterally by agents or agencies against foreign public officials), available at http://www.hks.harvard.edu/cchrp/Use%20of%20Force/October%202002/Parks_final.pdf.

²⁶ See Kenneth Anderson, *Assassination and the Koh Speech*, Opinio Juris, Mar. 28, 2010, <http://opiniojuris.org/2010/03/28/assassination-and-the-koh-speech/> (quoting a speech by Legal Adviser to the DOS Abraham Sofaer in 1989 in which he defines “assassination” as “any unlawful killing of particular individuals for political purposes”).

²⁷ See, e.g., Michael P. Scharf, *In the Cross Hairs of a Scary Idea*, WASH. POST, Apr. 25, 2004, at B01 (criticizing U.S. “assassination policy,” but recognizing that “since an executive order is not a statute, the president can get around the [assassination] ban simply by approving secret case-by-case exceptions, as we now know Clinton did with respect to bin Laden”).

Related Links:

“Due Process and Targeted Killing of Terrorists,” by Prof. Afsheen John Radsan, William Mitchell College of Law, and Prof. Richard W. Murray, Texas Tech University School of Law, *Cardozo Law Review*, Vol. 31 (2009)
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1349357

“Targeted Killing in U.S. Counterterrorism Strategy and Law,” by Prof. Kenneth Anderson, American University Washington College of Law (May 11, 2009)
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1415070

“Suit Over Targeted Killings Is Thrown Out,” by Charlie Savage, *The New York Times* (December 7, 2010)
<http://www.nytimes.com/2010/12/08/world/middleeast/08killing.html>