
Predators over Pakistan

The U.S. drone campaign is effective—and legal. Why won't the Obama administration's lawyers defend it?

BY KENNETH ANDERSON

Targeting terrorists and militants with Predator drone strikes is one campaign promise President Obama has kept to the letter. Missiles fired from remote-piloted “unmanned aerial vehicles” (UAVs) at al Qaeda and Taliban leadership steadily and sharply increased over the course of 2009. Senior U.S. military and intelligence officials have called them one of the most effective tactics available to strike directly at al Qaeda and the Taliban. Indeed, CIA director Leon Panetta says that drones are “the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership.” There is every reason to believe him.

In January 2010 alone, a dozen strikes were launched just in the Pakistani tribal region of Waziristan. With the beginning of the promised offensive against the Taliban in Afghanistan, Predator attacks have likewise surged against targets in Pakistan, concurrent with moves by Pakistani intelligence to detain Taliban leaders, and also concurrent with the extensive use of UAVs on the battlefield in the Afghan offensive (primarily as an urban surveillance tool but also for missile strikes). Obama promised that his administration would go after al Qaeda and Taliban in their refuges in Pakistan—with or without the permission of the Pakistani government, he pointedly said—and so he has done.

The aggressive expansion of the Predator targeted killing program is the Obama administration's one unambiguous innovation in the war against terrorists. The adaptation of UAV surveillance craft into missile platforms took place as an improvisation in 2002 under the Bush administration—but its embrace as the centerpiece of U.S.

counterterrorism operations belongs to Obama. It is not the whole of it—the Obama administration has expanded joint operations with Pakistan and Yemen, and launched commando operations in Somalia against terrorists. But of all the ways it has undertaken to strike directly against terrorists, this administration owns the Predator drone strategy. It argued for it, expanded it, and used it, in the words of the president's State of the Union address, to “take the fight to al Qaeda.”

As al Qaeda, its affiliates, and other transnational jihadists seek shelter in lightly governed places such as Yemen or Somalia, the Obama administration says the United States will follow them and deny them safe haven. Speaking at West Point, the president obliquely referred to so-called targeted killings—we will have to be “nimble and precise” in the use of military power, he said, adding that “high-ranking al Qaeda and Taliban leaders have been killed, and we have stepped up the pressure on al Qaeda worldwide.”

The Predator drone strategy is a rare example of something that has gone really, really well for the Obama administration. Counterterrorism “on offense” has done better, ironically, under an administration that hoped it could just play counterterrorism on defense—wind down wars, wish away the threat as a bad dream from the Bush years, hope the whole business would fade away so it could focus on health care. Yet for all that, the Obama administration, through Predator strikes, is taking the fight to the enemy.

And, let's face it, in dealing with terrorist groups in ungoverned places in the world, we have few good options besides UAVs. Drones permit the United States to go directly after terrorists, rather than having to fight through whole countries to reach them. Maybe that's not enough to win. Maybe “light-footprint” counterterrorism via drones turns out to be just the latest chimera in the perennial effort to find a way to win a war through strategic airpower. Yet even in a serious counterinsurgency on

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the ground, drones will still be important as a means of attacking terrorists while clearing and holding territory. The upshot? As long as we engage in counterterrorism, drones will be a critical part of our offense.

Obama deserves support and praise for this program from across the political spectrum. More than that, though, the drone strikes need an aggressive defense against increasingly vocal critics who are moving to create around drone warfare a narrative of American wickedness and cowardice and of CIA perfidy.

Here the administration has dropped the ball. It has so far failed to provide a robust affirmation of the propositions that underwrite Predator drone warfare. Namely:

- Targeted killings of terrorists, including by Predators and even when the targets are American citizens, are a lawful practice;
- Use of force is justified against terrorists anywhere they set up safe havens, including in states that cannot or will not prevent them;
- These operations may be covert—and they are as justifiable when the CIA is tasked to carry them out secretly as when the military does so in open armed conflict.
- All of the above fall within the traditional American legal view of “self-defense” in international law, and “vital national security interests” in U.S. domestic law.

There are good reasons for Republicans and centrist Democrats to make common cause in defending these propositions. On the one hand, they should want to aggressively protect the administration against its external critics—the domestic and international left—who are eager to prosecute Americans for their actions in the war on terror. They should also want to make clear that in defending drone strikes, they are defending the American (and not just the Obama) legal and strategic position. Moreover, it will be the American view of domestic and international law for future administrations, Democratic and Republican.

At the same time, Congressional Republicans and centrist Democrats need to put Obama’s senior legal officials on the record and invite them to defend their own administration, defend it to the full extent that the Obama administration’s actions require. Which is to say, Congress needs to hear publicly from senior administration lawyers and officials who might be personally less-than-enthused about targeted killings of terrorists and not eager to endorse them publicly, or to do so only with hedged and narrow legal rationales from which they can later walk away.

Consider, for instance, the diffidence of Harold Koh, the legal adviser of the Department of State. In an informal public discussion with his predecessor, John Bellinger, aired on C-SPAN on February 17, he was asked about

drones and targeted killings and declined to say that the practice was lawful. (Granted, it was in an unscripted setting, which cannot be taken as anyone’s last word and on which it would be unfair to place too much weight.) All he said was that if he concluded that it was unlawful, he would, if he thought it appropriate, resign his position. He added that he remained at his post. The statement falls far short of the defense one might hope for from such a high-ranking administration lawyer. More than a year into the new administration, that ought surely to strike the general counsels of the CIA, the Pentagon, the Director of National Intelligence, the NSC, and other agencies directly conducting these activities as somewhat less than reassuring.

In fact, the administration’s top lawyers should offer a public legal defense of its policies, and congressional Republicans and Democrats should insist on such a defense. This is partly to protect the full use-of-force tools of national security for future administrations, by affirming the traditional U.S. view of their legality. But it is also to protect and reassure the personnel of the CIA, NSC, and intelligence and military agencies who carry out these policies that they are not just effective but *lawful* policies of the U.S. government and will be publicly defended as such by their superiors.

Even as the Obama administration increasingly relies on Predator strikes for its counterterrorism strategy, the international legal basis of drone warfare (more precisely, its perceived international legal *legitimacy*) is eroding from under the administration’s feet—largely through the U.S. government’s inattention and unwillingness to defend its legal grounds, and require its own senior lawyers to step up and defend it as a matter of law, legal policy, and legal diplomacy. On the one hand, the president takes credit for the policy—as frankly he should—as taking the fight to the enemy. His vice president positively beams with pride over the administration’s flock of Predator goslings. On the other hand, the Obama administration appears remarkably sanguine about the campaign gearing up in the “international law community” aimed at undermining the legal basis of targeted killing as well as its broad political legitimacy, and ultimately at stigmatizing the use of Predators as both illegal and a coward’s weapon.

Stigmatizing the technology and the practice of targeted killing is only half of it, though. The other half is to undermine the idea that the CIA may use force and has the authority to act covertly under orders from the president and disclosure to Congress, as long provided in U.S. law. The aim is to create a legal and political perception

that, under international law, all uses of force must be overt—either as law enforcement or as armed conflict conducted by uniformed military.

The Obama administration is complacent about this emerging “international soft law” campaign. But Obama’s opponents in this country, for their part, likewise underestimate and ignore the threat such a campaign presents to national security. That’s apparently because many on the right find it hard to imagine that mere congeries of NGOs, academics, activists, U.N. officials, and their allies could ever overcome “hard” American national security interests, particularly when covered by the magic of the Obama administration. Both liberal and conservative national security hands, looking at the long history of accepted lawfulness of targeted killings under American law, think, “Come on, there’s obvious *sense* to this, legal and political. These arguments in domestic and international law have long been settled, at least as far as the U.S. government is concerned.” But if there’s a sense to it, there’s a *sensibility* as well, one that goes to the overall political and legal “legitimacy” of the practice within a vague, diaphanous, but quite real thing called “global public opinion,” the which is woven and spun by the interlocking international “soft law” community and global media.

It’s a mistake to remain oblivious to either the sense or the sensibility. Outside of government, the oblivious include hard-realist conservatives. Inside government, some important political-legal actors are struggling impressively both to overcome bureaucratic inertia and get in front of this issue, and to overcome factions within government unpersuaded by, if not overtly opposed to, this program—particularly as conducted by the CIA. Those actors deserve political support from congressional Republicans and Democrats. Because obliviousness to the sensibility of lawfulness and legitimacy—well, we should all know better by now. Does anyone still believe that the international legal-media-academic-NGO-international organization-global opinion complex cannot set terms of debate over targeted killing or covert action? Or that it cannot overcome “hard” American security interests? Or that this is merely another fringe advocacy campaign of no real consequence, whether in the United States, or abroad in Europe, or at the United Nations?

The Obama administration assumes that it uniquely sets the terms of legal legitimacy and has the final word on political sensibility. This is not so—certainly not on this issue. The international soft-law campaign looks to the long-term if necessary, and will seek the political death of targeted killings, Predator drones, and their progeny, and even perhaps to CIA covert action, by

a hundred thousand tiny paper cuts. The campaign has already moved to the media. Starting with Jane Mayer’s narrative of Predator drone targeted killing in the *New Yorker* last October, and followed by many imitators, the ideological framework of the story has shifted. In the space of a year—Obama’s year, no less—it has moved from Candidate Obama’s brave articulation of a bold new strategy for attacking terrorists to the NGOs’ preferred narrative of a cowardly, secretive American CIA dealing collateral damage from the skies. Here’s the thumbnail version of drone warfare, as portrayed in the media.

Focus first on the dozens of civilian victims in a Predator strike, particularly wives of the (merely alleged) al Qaeda suspect and many, many children. You don’t actually have to go to Waziristan, by the way, al Jazeera will have done all the “reporting” for you (relying on local, Taliban-influenced sources). Emphasize the casualties, without, however, comparing the casualties that would result from realistic military alternatives, which include bombing or perhaps a rolling artillery barrage by the Pakistani army. Insinuate strongly that it is not known for sure (at least with courtroom levels of proof) if the target was al Qaeda.

Second, cut directly to a Nevada military base from which the UAV was directed and interview U.S. military controller, off duty and headed to baseball game with kid. Strongly imply that the military controller is a coward, using a coward’s weapon, unwilling to confront his (brave but overmatched) enemies in honorable combat, up close and personal. Sententiously note that Predator drones “reduce American disincentives to violence.” Announce, more in sorrow than anger, that if this is all not due to American cowardice, American forces have perhaps been corrupted and rendered insensible to the sufferings of their victims on account of playing too many video games.

Third, interview a human rights lawyer who, relying on the International Committee of the Red Cross’s new “guidance” as to who is a “combatant” and who takes “direct participation in hostilities,” will say that the problem is not just collateral damage. The new “direct participation” standard means that even al Qaeda leaders have a right to attend a wedding undisturbed. They cannot be considered a lawful target at that moment, or while they are merely drinking tea or watching *American Idol* or consorting with their wives.

Fourth, find a human rights advocate who will say that, after all, although the Americans believe they came up with targeted killing to reduce collateral damage when going after those who hide among civilians as shields, in actuality the “insurgents” were forced to commingle with civilians. (I have been told this, recited as a little mantra, by at least four well-regarded European human rights

lawyers in two years now.) Artfully distinguish between what the uniformed U.S. military does and what the civilian CIA does. Be careful not to raise any questions about “Our Brave Men and Women in Uniform”—but strongly suggest that the CIA might be up to no good. Cue a war crimes lawyer who will be willing to say (as a recent academic paper by a highly respected international law professor did) that members of the “CIA are not lawful combatants and their participation in killing persons—even in an armed conflict—is a crime.” Goodness. This, despite U.S. statutory authorization for such participation dating back to the founding of the CIA in 1947. Oh, and by all means suggest that the January wave of drone strikes was merely the CIA engaged in vicious, petty vengeance for the December suicide bombing against its base in Afghanistan. The suicide bomber succeeded because of the CIA’s own incompetence, and innocent civilians are paying the price as collateral damage.

Finally, interview International Criminal Court prosecutors, independent magistrates in hospitable jurisdictions like Spain, or U.N. officials, who will describe drone attacks as “extrajudicial execution” and, at bottom, simple murder by people who are often not even uniformed members of a military fighting a war. Neglect to mention that the United States has always rejected, over many administrations and many decades, the interpretation of the international convention that might yield this legal conclusion. Conclude by observing—just observing, that’s all—that the legal basis for targeted killing, drone warfare, and particularly its conduct by the civilian CIA, is unclear and fraught with uncertainty. It might someday (read: post-Obama, in the next Republican administration) result in international criminal charges.

There have been some fine and useful articles written about targeted killing and the law—a recent piece in the *National Journal* by Shane Harris, for example, which was the first to report on the profoundly troubling issues raised by the Red Cross’s new and little-remarked “direct participation in hostilities” interpretive guidance. For that matter, too, Dana Priest’s detailed, closely sourced, admirably objective narrative a few weeks ago in the *Washington Post*, describing U.S. forces’ deep involvement in Yemen, does not conform to the stereotypical portrait I have sketched above.

But a thorough reading of the Predator coverage calls to mind how the detention, interrogation, and rendition debates proceeded over the years after 9/11. As Brookings scholar Benjamin Wittes observes, those arguments also had elements of both legal sense and sensibility. Ultimately the battle of international legal legitimacy was lost,

even though detention at Guantánamo continues for lack of a better option. It is largely on account of having given up the argument over legitimacy, after all, that it never occurred to the Obama administration *not* to Mirandize the Christmas Bomber. Baseline perceptions of legitimacy have consequences.

Nor is the campaign to delegitimize targeted killing only about the United States. Legal moves in European courts have already been made against Israeli officials involved in targeted killing against Hamas in the Gaza war. Unsavory members of the U.N. act alongside the world’s most fatuously self-regarding human rights groups to press for war crimes prosecutions. All of this is merely an opening move in a larger campaign to stigmatize and delegitimize targeted killing and drone attacks. What can be done to Israelis can eventually be done to CIA officers. Perhaps a London bookmaker can offer odds on how soon after the Obama administration leaves office CIA officers will be investigated by a court, somewhere, on grounds related to targeted killing and Predator drone strikes. And whether the Obama administration’s senior lawyers will rise to their defense—or, alternatively, submit an amicus brief calling for their prosecution.

Thus it matters when the U.N. special rapporteur on extrajudicial execution, Philip Alston, demands, as he did recently, that the U.S. government justify the legality of its targeted killing program. Alston, a professor at New York University, is a measured professional and no ideologue, and he treads delicately with respect to the Obama administration—but he treads. Likewise it matters when, in mid-January, the ACLU handed the U.S. government a lengthy FOIA request seeking extensive information on every aspect of targeted killing through the use of UAVs. The FOIA request emphasizes the legal justification for the program as conducted by the U.S. military and the CIA.

Legal justification matters, partly for reasons of legitimacy and partly because the United States is, and wants to be, a polity governed by law. This includes international law, at least insofar as it means something other than the opinions of professors and motley member-states at the U.N. seeking to extract concessions. International law, it is classically said, consists of what states consent to by treaty. Add to this “customary law”—as evidenced by how states *actually* behave and as provided in their statements, their so-called *opinio juris*. Customary law is evidenced when states do these things *because* they see them as binding obligations of law, done from a sense of legal obligation—not merely habit, policy, or convenience, practices that they might change at any moment because they did not engage in them as a matter of law.

What the United States *says* regarding the lawfulness of its targeted killing practices matters. It matters both

that it says it, and then of course it matters *what it says*. The fact of its practices is not enough, because they are subject to many different legal interpretations: The United States has to assert those practices as lawful, and declare its understanding of the content of that law. This is for two important reasons: first to preserve the U.S. government's views and rights under the law; and second, to make clear what it regards as binding law not just for itself, but for others as well.

Other states, the United Nations, international tribunals, NGOs, and academics can cavil and disagree with what the United States thinks is law. But no Great Power's consistently reiterated views of international law, particularly in the field of international security, can be dismissed out of hand. It is true of the United States and it is also true of China. It is not a matter of "good" Great Powers or "bad." Nor is it merely "might makes right." It is, rather, a mechanism that keeps international law grounded in reality, and not a plaything of utopian experts and enthusiasts, departing this earth for the City of God. It remains tethered to the real world both as law and practice, conditioned by how states see and act on the law.

The venerable U.S. view of the "law of nations" is one of moderate moral realism—the world "as it is," as the president correctly put it in his Nobel Prize address. It is not the vision of radical utopians and idealists; neither is it that of radical skeptics about the very existence of law in international affairs. On the contrary, the time-honored American view has always been pragmatic about international law (thereby acting to preserve it from radical internationalism and radical skepticism). But upholding the American view requires more than simply dangling the inference that if the United States does it, it means the United States must intend it as law. Traditional international law requires more than that, for good reason. The U.S. government *should* provide an affirmative, aggressive, and uncompromising defense of the legal sense and sensibility of targeted killing. The U.S. government's interlocutors and critics are not wrong to demand one, even those whose own conclusions have long since been set in stone.

A clear statement of legal position need not be an invitation to negotiate or alter it, even when others loudly disagree. In international law, a state's assertion that its policies are lawful, particularly such an assertion from a great power in matters of international security, is an important element all by itself in making it lawful, or at least not unlawful. But in vast areas of security, self-defense, and the use of force, the U.S. government has in recent years left a huge deficit as to how its actions constitute a coherent statement of international law.

For once, Washington should move to get ahead of a contested issue of international legal legitimacy and "soft

law." Why else have an Obama administration, if not to get out in front on a practice that it has ramped up on grounds of both necessity and humanitarian minimization of force? The CIA has taken a few baby steps by selectively leaking some collateral damage data to a few reporters. But the CIA is going to have to say more. The U.S. government needs to defend targeted killings as both lawful, and as an important step forward in the development of more sparing and discriminating—more humanitarian—weaponry.

Human rights advocates are reactionaries, it turns out, when it comes to technological innovation and humanitarian advance in making weapons more discriminating. They are locked into a view that each successive innovation constitutes a violation of the laws of war, that no evolution is possible in more discriminatory technology, because each increment (and progress comes incrementally) will be legally as much of a violation as the previous, similar effort. A generation ago, at the beginning of the NGO movement to ban landmines, international advocates demanded that military designers come up with more discriminating weapons. Well, they did—that is what drones are par excellence—and for the advocates, these still violate the laws of war.

Does the United States really believe it a good idea to cede, through complacency as much as anything, either the legitimacy of targeted killing as a practice, or the legitimacy of the covert services? Why was the CIA, not the military, originally tasked with attacks in Pakistan? For many reasons, but one is surely for the ability to deny that the U.S. military was engaged in operations on the ground there. This points to a looming civil war in the Democratic party's national security leadership. On the one hand, its transnational law wing seems not to defend the administration's policy of using the CIA in targeted killing. The silence is so stunning that one cannot help but wonder whether those same appointees plan to return to private life after the Obama administration and encourage their prosecution—having been careful never to opine while in office on targeted killing policy or its lawfulness, particularly as undertaken by CIA officers.

Career CIA and NSC officials (those who supervise target lists for non-military Predator attacks as well as make the strike determination, subject to the president's personal authorization and disclosure to congressional leaders) must be wondering and should wonder. Uncertainty is precisely what the international soft-law campaigners seek to leverage—raise enough personal legal insecurity among mid-tier CIA officers to affect their decisions on whether and how much to strike, and how close to "court-

room” standards of evidence they must come before identifying a target.

On the other hand, longtime national security hands among the Democrats apparently cannot imagine there might be a problem with targeted killing in Pakistan—let alone with the idea of targeted killing through CIA covert action. Democratic party *éminences grises* of national security Graham Allison and John Deutch, for example, wrote last year that Predator strikes in Pakistan offer “our best hope” in dealing a “decisive blow against al Qaeda.” Implementing these operations, they say, requires “light U.S. footprints backed by drones and other technology that allows missile attacks on identified targets.”

Shall Allison and Deutch be referred to Spanish prosecutor Baltasar Garzón for possible complicity in war crimes? Does collateral damage amount, for example, to unlawful “collective punishment” of the population? Disproportionate damage? Extrajudicial execution? Their sense of the legitimacy of covert action is sufficiently robust for them to write that if “many Pakistanis see covert actions carried out inside their country as America ‘invading an ally,’” the problem is not the drone campaign. It is, rather, that “the U.S. government no longer seems to be capable of conducting covert operations without having them reported in the press.” Well. The problem they see is not a legal one. It is an operational one of not shutting out the news media and the NGOs and the international community sufficiently to be able to conduct covert operations unmolested.

These two views of U.S. national security cannot be reconciled, frankly. But in that case, what did President Obama say at West Point? Certainly he did not say that the United States would follow some absurdly literal reading of the U.N. Charter, waiting upon an armed attack to occur before responding. On the contrary, the United States will not allow terrorists to hide in safe havens, wherever they might be. Nor did he say that the United States would respect as absolutely inviolate the territorial integrity of states where terrorists had taken refuge. He re-stated the customary position of U.S. presidents that “we cannot tolerate a safe-haven for terrorists whose location is known, and whose intentions are clear.” Location within a sovereign state will not shield them. And intentions are enough for the United States to take a decision to strike.

Coming from the president, this is a statement of U.S. policy more than of formal law. One expects the legal counselors of the government to reiterate these views as lawyerly statements of law. The president’s traditional yet sweeping claim to be able to use force to defend the United States is not a statement limited to “war” or “armed conflict.” It is broader than “armed conflict” (in its technical legal meaning). Yet it contemplates uses of force that

might also be more minimal than the ordinary idea of armies “marching as to war.”

What the president meant, rather, is the traditional international legal doctrine of self-defense. A broader legal category than “armed conflict” (a subset of it), self-defense might consist of tiny strikes using, for example, covert CIA actors against terrorists, yet not rising to the full level of sustained fighting that crosses the legal threshold into “armed conflict.” It might be invoked in places and ways outside of traditional theaters of armed conflict such as Afghanistan, Pakistan, or Iraq. The president’s legal advisers should be elaborating the legal arguments for self-defense, and not solely armed conflict, as the proper international law “frame” of the president’s statements.

Self-defense, after all, is what the United States has traditionally claimed regarding the use of force against terrorists. The United States has made many statements to that effect dating back many decades. One of the most comprehensive examples was offered in a well-known address in 1989 by then-State Department legal adviser Abraham Sofaer (the Harold Koh of the second Reagan administration and the George H.W. Bush administration). Although unusually comprehensive with respect to terrorism, it contained nothing legally new. The United States endorses the legal “right of a State to strike terrorists within the territory of another State where the terrorists are using that territory as a location from which to launch terrorist attacks and where the State involved has failed to respond effectively to a demand that the attacks be stopped.”

Importantly, Sofaer embeds these views on using force for self-defense against terrorists within the U.S. tradition of pragmatic realism regarding international law. Accepting international law as a category of constraint in international relations, it is nonetheless pragmatically flexible and evolves according to conditions, including new threats. It contains no novelty; on the contrary, any legal novelties have consisted in NGOs and the “soft-law” community trying to rewrite international law to their specifications. Self-defense in international law therefore offers a category for the use of force that is not law enforcement—and yet is not necessarily “armed conflict” involving uniformed military forces. After all, many instances of using force against terrorist groups in the past have been exactly that—pinprick covert operations against terrorists not reaching to war, involving civilian CIA officers.

The U.S. government has always held out these smaller, “non-armed conflict” uses of force as lawful under domestic law, and moreover not a violation of international law (even if it might constitute a violation of the domestic law

of the place where the operation unfolded). Strategically, it has seen such use of force as the prudent alternative to what might otherwise escalate into a far larger, undesirable conflict. Overt is not always better than covert. But, then, why not just say that even these tiny instances of using force, wherever in the world they might occur, are still “war” and “armed conflict” against non-state-actor terrorists? The Bush administration told us we were in a “global” war on terror—wasn’t it right?

Successive administrations began sliding into narrow “armed conflict” legal justifications beginning in the Clinton years. The relevant legal opinions and memoranda are not publicly available, and we have only bits and pieces to go on. But sometime in the Clinton administration, as al Qaeda began to be recognized as a threat to which the United States was going to respond, the U.S. government seems to have begun internally to justify its uses of force against suspected terrorists (and their training camps and safe havens) not in the traditional terms of self-defense, but instead by characterizing the targets as combatants who could be targeted under the laws of war.

A legal standard of combatancy, it appears, began to substitute for a more general invocation of self-defense under international law and its domestic law cognate, vital national security interests. The Obama, Bush, and Clinton administrations each (apparently) believed that they were on firmer legal ground going after “combatants” in an “armed conflict” than relying on the customary law of self-defense as an independent ground for the use of force. Certainly it sounded better, as a law-PR matter, to say that one was targeting “combatants.”

What these administrations seemingly neglected to consider, as a legal matter, is that law of war treaties and customary law defining armed conflict actually have formal conditions—thresholds that must be met before all the particulars of the laws of war kick in. Armed conflict in a legal sense is *lex specialis*, and you get its very special rights, immunities, privileges, and obligations *only* if the circumstances meet either the treaty law (in the case of inter-state conflict), or the customary law standards for armed conflict with a non-state actor. An armed conflict with a non-state actor (traditionally civil war) has to rise to some level of fighting that is more than just, for example, internal civil disturbances and riots. It requires sustained, persistent fighting occurring in a theater of conflict. A theater of war even if loosely defined is not simply the whole planet. Armed conflict can break out in new places with a non-state actor, if that’s where they happen to go (Yemen, Somalia, etc.), but the fighting in those new places does have to rise to meet those thresholds.

What happens if for some reason you flunk the requirements of an “armed conflict” with a non-state actor—

because your use of force was discrete, discriminating, a targeted killing but certainly not sustained and systematic hostilities over time? If there is no armed conflict, there is no “combatant.” Combat is a special status under the laws of war; there has to be a legal armed conflict, and if there’s not, there is no combatancy. And if your claim is solely combatancy when there is no armed conflict, then your targeted killing is, other things held equal, a violation of human rights law. It is, other things equal, the extrajudicial execution that the human rights advocates always said it was (although the U.S. government also says that the human rights treaty does not apply to U.S. agents extraterritorially in any case; for that and other reasons, all things are not equal).

Legally complicated? Yes. But let’s not suddenly get all hard-realist and say, “Oh, well, it doesn’t matter anyway, that’s just lawyers’ mumbo-jumbo.” We thought the mumbo-jumbo important enough to employ many lawyers to labor writing secret opinions on its legality. Although one can offer a legally defensible, pragmatic, flexible view of the law, one does have to offer it. Self-defense, not combatancy under armed conflict, is in fact the legal category that applies. It is the category that describes the actions President Obama and his predecessors have taken in confronting non-state actor terrorists with force.

Still, why not the Bush administration’s “global war on terror”? As a practical matter, this global characterization has the virtue of being an accurate strategic frame—a global and prolonged struggle, like the Cold War, seeing it as war from a strategic vantage point. From a legal standpoint, it seemingly offers all the flexibility of “self-defense” and the legal specificity of “combatancy” in armed conflict, too. Thus war in a legal sense without territorial restriction, a function solely of where targets happened to be located, anywhere in the world? If the armed conflict is global in that legal sense, then combatants can be located and targeted anywhere (subject to practical policies distinguishing ungoverned places like Somalia from London or Bombay). It adopts a “global” legal standard for “aggregating” all the violence, across the world and across time, into a single conflict. On this account, targeted killing in each case, in each place, is aggregated to rise to the level of an armed conflict, and so trigger combatancy.

But this is not the legal case. In the case of non-state actors, there is a customary law standard (to which the U.S. government has long agreed), and it involves minimum levels of sustained hostilities. Individual incidents of targeted killing will not actually meet that threshold in many instances. More important, this is not how the Bush administration conducted the actual “global” war on terror. Meaning: The Bush administration was not interested, for obvious reasons, in actually conducting hostili-

ties in a zillion places worldwide. What it wanted was to have available to it the legal incidents of armed conflict (as the lawyers say) when it sought to detain, kill, capture, or perform extraordinary rendition on terrorists. Which is to say, it wanted the legal privileges that attach to the actual conduct of hostilities, even in circumstances where it had no intention or desire to conduct any.

This was a bad legal move—not illegal, just imprudent. The tail of law wagging the dog of war. One sees the attractiveness of the frame. If you see it strategically as war, and a global one, then shouldn't your legal frame follow your strategy? Consider that the Cold War was usefully seen as "war" in strategic global terms, too. Yet we never saw every moment, everywhere, in confrontation with the Soviets over forty years, to be a matter of legal armed conflict governed by rules that are supposed to apply in the actual conduct of hostilities. The actual law of armed conflict applied in the Cold War only when there were actual armed conflicts in actual places and theaters.

So the legal basis for targeted killing, Predator drone strikes, and covert action involving the CIA is not really the "combatancy" standard under armed conflict into which we have mistakenly subsided. The United States today needs to reassert and reaffirm something it has never given up—but also not reiterated for a generation—the traditional standard of self-defense. As customary law doctrine, it is not (as some might reasonably fear) utterly discretionary, empty, and standardless. On the contrary, while self-defense does not invoke the technical rules of armed conflict, it does have to conform to the usual, fundamental customary law requirements of necessity and proportionality. Note, too, that insofar as the U.S. military carries out any such attacks, they already adhere to international laws of war and their standards, irrespective of whether the operation is part of an armed conflict in a legal sense.

Whether necessity or proportionality, however, the legal standard for the CIA cannot be lower than the equivalent standard in armed conflict for launching an attack upon a lawful target (and might under many circumstances be higher). But proportionality with respect to collateral damage always raises a special problem. It is customarily stated that anticipated harms, including innocent deaths, must not be "excessive" in relation to the anticipated benefits (to paraphrase from the laws of war). It should never be lower and in some instances possibly higher.

Beyond that, however, one cannot go—if for no other reason than that the international legal standards on proportionality are not more specific. Human rights groups sometimes talk as if there were some decreed standard of

proportionality. One to one? Two to one? One to two? Fifty to one? One to fifty? Sometimes they sound as though they have a special moral faculty to spot "disproportionality." But in fact there is no fixed legal standard that goes beyond this obligation on the part of commanders. The law requires a good faith effort to weigh anticipated benefits against anticipated harms. It provides no mathematical formulas, and it is disingenuous, though common, to suggest to credulous journalists and the public that it is more definitive than it is.

For that reason—quite apart from operational security—the CIA has to resist getting into a pissing match with the soft-law community over collateral damage numbers. The best non-official, non-CIA-leaked estimates are found at the blog *Long War Journal*, which keeps a running count based on a wide range of public reporting. *Long War Journal's* tabulations suggest far lower collateral damage rates than the global press seems to believe. Leaks by government officials to journalists on a couple of occasions have expressed the same view—in even stronger terms. (When I have asked reporters about this, they appear to take the view that the more "conservative" way to report civilian casualty figures is to err on the high side, if necessary through that weaselly journalistic locution, "as high as.") Perhaps some mechanism could be worked out for overtly informing the press about the aggregate collateral damage from the now obviously overt targeted killings campaign in Afghanistan and Pakistan. But the U.S. government can't fall into the losing game of arguing with the press and human rights groups over proportionality. The standards and mechanisms for review should be tailored as closely as possible to military standards of review, and left at that.

Making clear that the U.S. government is operating under the legal standard of self-defense would not quiet critics who believe it is all just murder, anyway. But it would provide a public, principled legal position by which this administration and future administrations could defend themselves against the charge of lawlessness. Congress has an important legitimating role to play in this—to show that the two political branches of government have policies in place that they regard as lawful and defensible, to occupy a ground of lawful national security that would otherwise invite inappropriate judicial entry, and to offer a check on covert actions that sometimes achieve momentum within the executive but, seen by congressional outsiders, raise commonsense questions.

The U.S. government should, moreover, defend what its officers in fact believe to be the case—that targeted killing from drone platforms is not merely a question of hard-edged military necessity, but is also a humanitarian step forward in technology. The president believes that and so

does the vice president, and they are correct. These technologies are lessening, not increasing, civilian damage, are being applied in ways (because it is killing that is, indeed, targeted) that lessen collateral damage from what it would otherwise be in traditional war. The U.S. government should react with outrage to the charge, implied or express, of American cowardice or some abstract increased propensity to violence on account of drone strikes, and assert its humanitarian moral ground.

For that matter, hostile journalists ought to be pressed to explain why drone attacks are significantly different from missiles fired from aircraft or offshore naval vessels—save for the vastly greater ability to monitor the circumstances of firing through sensor technologies. Senior officials believe that drone warfare allows the United States to take far greater measure and care with collateral damage than it can using either conventional war or attack teams on the ground. The U.S. government should say so, rather than simply falling back on narrow arguments of military necessity, operational convenience, and force protection, while ceding the moral high ground to the international soft-law community.

But in making its case, the United States government has to be clear that it is reaffirming self-defense as its legal basis, not simply combatancy and not simply armed conflict. Congress—Republicans and Democrats—should endeavor to get the senior legal officials of the Obama administration to say so, on the public record. This will be important down the road for U.S. officials not protected by the aura of the Nobel Peace laureate now in the Oval Office.

The administration itself might consider that a narrow justification of drone strikes under combatancy with respect to al Qaeda and the Taliban, rather than a broader legal basis in self-defense, is most likely to work for it under one circumstance—a one-term presidency. Indeed, the silence of the administration's senior international lawyers, and in particular their failure to defend the practice on a basis broad enough to encompass the circumstances under which it might be used in the next seven years, rather than the next three, might be taken as their implied view of the administration's life expectancy.

The U.S. government ought to consider that, over time, terrorist groups the United States will believe itself compelled to attack will not always be al Qaeda. They may also be found in places beyond Yemen and Somalia, without obvious connection to the existing theaters of armed conflict in Iraq and South Asia. Unless the United States moves to self-defense as its fundamental legal basis for using force against terrorists, it will find itself pushed to revive the discredited "global" war on terror.

Finally, future administrations, long beyond the

Obama administration, may one day have to confront non-state enemies that are not al Qaeda, have no relation whatever to 9/11, and are not jihadists but espouse some other violent cause against the United States. Future presidents will also have to respond with force, sometimes covert force, to such threats. The Obama administration has an obligation to itself and its successors to preserve their legal powers of national security. The United States must use these legal powers or lose them. ♦