



Are U.S. Drone Strikes Legal?

A Guide to the Relevant Legal Questions

By Kate Martin | April 1, 2016

There has been much controversy and criticism about drone strikes conducted by the United States, especially those that have targeted Al Qaeda operatives outside Afghanistan in Yemen, Somalia, and the border regions of Pakistan.¹ Many questions have surfaced about the effectiveness of using drone strikes. There is also a widespread perception that strikes have killed many civilians and that they are illegal.²

The Obama administration recently promised to release information about the number of civilians killed, as well as its policy guidance governing drone strikes outside Afghanistan. However, this new information is unlikely to directly address the question of what legal framework governs such drone strikes. In fact, the Obama administration has never been completely clear about its views on the legal basis for the drone program. But an understanding of the legal framework is necessary to evaluate the new information and the legality of the drone program. The relevant questions about that framework include:

- Is the drone program simply a part of the ongoing U.S. war against Al Qaeda, the Taliban, and associated forces that began in Afghanistan? Or is it somehow a separate counterterrorism effort outside the law of armed conflict with particular rules and policies?
- Does the law of armed conflict apply to drone strikes that take place outside Afghanistan?
- If so, what are the applicable rules regarding targeting combatants and civilians, and may innocent civilians be lawfully killed?
- How does the May 2013 Presidential Policy Guidance, or PPG, concerning the use of lethal force “outside areas of active hostilities” relate to the applicable legal requirements—especially regarding the possibility that noncombatants could be injured or killed?³ In what countries does the PPG apply?
- Do different legal rules apply to targeting U.S. citizens with drones?

While senior Obama administration officials and lawyers have spoken about these issues in the past, this issue brief attempts to provide a clear roadmap to the relevant legal questions. This framework is necessary to determine if past U.S. drone strikes were illegal because they were not part of a war; if individual strikes illegally killed civilians; or if the drone program is instead a legal, albeit terrible, part of war.

There is no doubt that these strikes exact an enormous toll—both on those who are unintended victims and those who carry out the operations. But such a toll is paid in almost all warfare; it does not mean that drone strikes are illegal.

Drone program background

Since taking office in 2009, the Obama administration has used drones to conduct targeted strikes against Al Qaeda terrorists outside Afghanistan. Under the George W. Bush administration, the drone program was smaller in scope because the weapons system was not yet fully developed. Some human rights advocates and others have criticized these strikes as both illegal and the cause of excessive civilian casualties.⁴

In May 2013, President Barack Obama attempted to address these concerns in a speech at the National Defense University.⁵ He said:

As was true in previous armed conflicts, this new technology [drones] raises profound questions — about who is targeted, and why; about civilian casualties, and the risk of creating new enemies; about the legality of such strikes under U.S. and international law; about accountability and morality.

The president went on to acknowledge:

To say a military tactic is legal, or even effective, is not to say it is wise or moral in every instance. For the same human progress that gives us the technology to strike half a world away also demands the discipline to constrain that power -- or risk abusing it. And that's why, over the last four years, my administration has worked vigorously to establish a framework that governs our use of force against terrorists -- insisting upon clear guidelines, oversight and accountability that is now codified in Presidential Policy Guidance that I signed yesterday.

That PPG governs the use of lethal military force, including drone strikes, outside “areas of active hostilities”—which, presumably, excludes Afghanistan. With the president’s announcement, the White House issued a fact sheet on the classified PPG that laid out some of its key features, including standards for when drone strikes could be carried out.⁶

Nevertheless, the president’s speech and PPG did little to quell public controversy. Since then, still more questions have been raised concerning the applicability and operation of the PPG.

The Obama administration recently promised to disclose additional information concerning drone strikes. In response to a Freedom of Information Act lawsuit brought by the American Civil Liberties Union, the administration has agreed to the release of a redacted version of the PPG itself and some related documents.⁷ Assistant to the President for Homeland Security and Counterterrorism Lisa Monaco also announced that “in the coming weeks, the Administration will publicly release an assessment of combatant and non-combatant casualties resulting from strikes taken outside areas of active hostilities since 2009” and that these figures will be provided annually thereafter.⁸

The PPG—even with redactions—and the assessment of casualties are important disclosures, but they are unlikely to provide a complete and clear explanation of the legal basis for the drone program.

Moreover, the standards contained in the PPG and the number of civilian casualties can only be properly evaluated in the context of the legal framework governing the drone strikes. While the Obama administration has spoken frequently about the applicable law, its statements have not always been clear about the legal justification for deliberately targeting and killing individuals outside Afghanistan.

The following is a guide to the legal framework applicable to those drone strikes. Put most simply, the framework is necessary to evaluate whether drone strikes outside Afghanistan, including those that have accidentally killed civilians, were part of a war—which, by definition, countenances the accidental killing of civilians—or whether they were instead illegal killings not part of any war.

Have all the drone strikes been conducted as part of the war against Al Qaeda and its associated forces that began in 2001 in Afghanistan?

President Obama has repeatedly said that the United States is at war with Al Qaeda. In contrast, the George W. Bush administration claimed that the United States was engaged in a global war against terror. Congress initially authorized war against Al Qaeda and the Taliban in its 2001 Authorization for Use of Military Force, or AUMF, and the Obama administration continues to rely on that AUMF as congressional authority for ongoing military operations.

The U.S. military is still fighting Al Qaeda, the Taliban, and associated forces in Afghanistan—sometimes using drones. Since 2009, the Obama administration has acknowledged targeted drone strikes in Yemen and Somalia as well. It has also carried out drone strikes in the border regions of Pakistan, although it is unclear whether the U.S. has officially acknowledged those operations.⁹ The administration has also relied upon the 2001 AUMF to fight the Islamic State in Iraq and Syria since 2014 using both manned and unmanned aircraft.

Much of the public controversy about drone strikes stems from confusion about whether the strikes outside of Afghanistan are part of the armed conflict—the war—with Al Qaeda and its associated forces. The press and critics frequently describe the strikes as taking place outside of active battlefields and as targeted killings or self-defense operations; government officials sometimes describe them as counterterrorism operations.¹⁰ Such descriptions all obscure the basic question: Is the United States carrying out drone strikes as part of the war? The answer is key to determining their legality. For example, the concept of an active battlefield does not have any recognized legal meaning—even if it were clear what the term means in the context of the kind of war being waged in Afghanistan.

The most likely reading of the Obama administration's statements over the years is that, in its view, all of the drone strikes since 2009 have been authorized and conducted as part of the armed conflict with Al Qaeda and associated forces pursuant to the 2001 AUMF. It would be useful for the administration to clearly state this. While the administration may believe that the strikes are also justified on other grounds—for example, some kind of independent self-defense theory—it should clarify whether this is an additional rationale to the armed conflict justification.

Does the law of armed conflict apply to drone strikes conducted as part of the war, even if they occur outside Afghanistan?

Much of the controversy surrounding the legality of drone strikes, particularly, the killing of civilians, is tied up with the question of whether the law of war—also called the law of armed conflict, or LOAC, and international humanitarian law—applies. The LOAC is the body of law—including the Geneva Conventions, other treaties, and customary law—that applies to the conduct of war.¹¹ Much of the scholarly discussion about these strikes revolves around the geography of the war with Al Qaeda; whether strikes outside Afghanistan are prohibited uses of military force;¹² or whether international human rights law or some self-defense doctrine applies instead of the LOAC.

But if the drone strikes are part of the armed conflict with Al Qaeda—as the Obama administration's statements seem to imply—there is no doubt that the LOAC applies. The United States recognizes as a general matter that the LOAC applies to all military operations. U.S. Department of Defense directives require all personnel to “comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”¹³

The applicability of the law of armed conflict is key to determining the legality of the strikes because, in a war, a party is entitled to deliberately target and kill the enemy so long as other requirements of the LOAC are met. Outside war, such killings are likely to be murder.

In addition, the CIA's participation in the drone program has raised questions about the applicability of the LOAC to drone strikes—even though they are part of the armed conflict. There are many public reports that the CIA—rather than the Department of Defense—carries out drone strikes in some countries, and the government has not disputed these reports. This raises the issue of whether the CIA follows the LOAC in carrying out these strikes. The CIA's mission, unlike that of the Department of Defense, includes violations of foreign or international law when authorized by the president. The CIA, unlike the military, is not trained and steeped in the requirements and doctrine of the LOAC.

While Obama administration officials have affirmed that all targeting operations abide by the LOAC,¹⁴ they have not explicitly addressed the concern that CIA drone strikes may not comply with these requirements. The administration should specifically state whether all agencies—including the CIA—have been obliged to follow the LOAC in conducting drone strikes since 2009. It should also explain how it ensures that the requirements of the LOAC are followed if drone strikes are carried out by an agency other than the Department of Defense.

What are the LOAC rules regarding targeting combatants and civilians?

The LOAC requires the following principles to be followed when targeting individuals:

*(1) military necessity, which requires that the use of military force (including all measures needed to defeat the enemy as quickly and efficiently as possible, which are not forbidden by the law of war) be directed at accomplishing a valid military purpose; (2) humanity, which forbids the unnecessary infliction of suffering, injury, or destruction; (3) distinction, which requires that only lawful targets—such as combatants and other military objectives—be intentionally targeted; and (4) proportionality, which requires that the anticipated collateral damage of an attack not be excessive in relation to the anticipated concrete and direct military advantage from the attack.*¹⁵

The LOAC includes specific rules on targeting individuals that are intended to protect civilians. Those rules may be summarized as only permitting the targeting of combatants or civilians who are directly participating in hostilities. Targeting of other civilians is prohibited and may constitute a war crime.

Thus, all drone strikes since 2009 carried out as part of the war against Al Qaeda had to meet the basic principles of the LOAC—military necessity, humanity, distinction, and proportionality. In addition, the specific targeting requirements protecting civilians applied to all the drone strikes.

In evaluating whether civilian deaths in drone strikes were a violation of the law, it is these standards—which require the targeting of combatants, prohibit the targeting of noncombatants, but also allow the possibility of innocent civilian bystanders being killed—that must be applied.

How does the Presidential Policy Guidance of 2013 concerning the use of drone strikes “outside areas of active hostilities” relate to the LOAC requirements?

The U.S. position on the applicability of the LOAC to drone strikes has been obscured in part by the Obama administration’s efforts to apply more restrictive standards to at least some drone strikes than what is required by the LOAC. The 2013 PPG, which applies to strikes “outside areas of active hostilities,” prohibits strikes even when they would be legal under the LOAC.¹⁶

But the public description of the PPG offers little clarity on how its standards relate to or replace LOAC rules.¹⁷

In May 2013, when President Obama gave a speech on the progress of the war against Al Qaeda and issued the new PPG, the president described the policy as follows:

*[W]e act against terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat. And before any strike is taken, there must be near-certainty that no civilians will be killed or injured -- the highest standard we can set.*¹⁸

Since that announcement, there has been much confusion concerning the requirements of the PPG. How do those requirements relate to less stringent traditional LOAC requirements? What does continuing and imminent threat mean? Where does the PPG apply? Has it always been followed? And is it still being followed?

Although the Obama administration could have explained it more clearly, the PPG apparently incorporates a policy decision that, when conducting drone strikes in particular areas, the United States will comply not only with the LOAC but will also follow more stringent requirements that set a higher standard for conducting lethal actions. For example, there is no requirement in war that lethal action be restricted to situations where there is near certainty that civilians will not be killed or injured. To the contrary, civilians are sometimes accidentally killed during war—even in instances when the laws of war are followed.¹⁹

There is important information, however, that is still unknown about the applicability of the more stringent standards set forth in the PPG, including the countries where the United States has carried out drone strikes subject to the PPG. One of the widespread concerns about the use of drone strikes is that they allow the United States to carry out so-called secret wars abroad. While secret wars are rarely secret from those who live where the fighting or bombing is happening, U.S. failure to acknowledge that it is engaged in a military campaign in a particular country undercuts both democratic accountability at home, as well as the policy objectives of the military action by undermining the population's support for those objectives. Although there may be occasions where considerations of military necessity support secrecy for a limited period of time, refusing to acknowledge sustained U.S. military operations in another country is virtually certain to backfire.

The Obama administration has identified most countries in which it has conducted military operations, whether as part of the war against Al Qaeda or otherwise.²⁰ Nevertheless, it has made ambiguous statements that leave the perception that the United States has engaged in secret operations—including drone strikes—in many more countries. For example, administration officials have claimed that the United States is entitled to conduct military operations against Al Qaeda outside Afghanistan but has insisted that considerations of international law limit those countries in which it would be lawful to do so.²¹ However, it has neither outlined what those legal limits are or even provided a public list of all countries in which it has engaged in military actions against Al Qaeda or its associated forces.

In particular, the Obama administration has failed to forthrightly acknowledge that it has conducted drone strikes in the border regions of Pakistan—even while describing counterterrorism operations along the “border of Afghanistan/Pakistan”²² and acknowledging a particular strike that killed two Western hostages by mistake.²³ Indeed, there is a long series of statements by current and former officials referring to strikes in Pakistan.²⁴ And the press has reported that there have been more than 400 such strikes.²⁵

Such ambiguity prevents the necessary public debate on the effects, costs, and effectiveness of drone strikes. It is generally assumed that the Obama administration refuses to acknowledge them because the Pakistani government has insisted on such refusal as a condition for consenting to the strikes. But if that is so, there is reason to be concerned that acceding to that request—even if doing so is necessary to obtain Pakistan's consent—undercuts rather than advances the fight against the extremists targeted by the drones. The secrecy allows the Pakistani government not only to lie to its own people but also to issue statements condemning the very U.S. strikes to which it has consented.²⁶ Such statements are, at a minimum, unhelpful in the struggle for public opinion in Pakistan against terrorist violence.

The Obama administration should identify all countries in which it has carried out military operations, including drone strikes, as part of the war with Al Qaeda and associated forces. It should also disclose the countries where it has applied the PPG to drone strikes because they were considered to be outside “areas of active hostilities,” as well as the countries where the PPG currently applies.²⁷

What legal rules apply to targeting U.S. citizens with drone strikes?

As the president acknowledged in 2013, the United States targeted and killed at least one U.S. citizen with a drone strike in Yemen: Anwar Aulaqi, the chief of external operations for Al Qaeda in the Arabian Peninsula.²⁸

The president explained the basis for targeting him as follows:

When a U.S. citizen goes abroad to wage war against America and is actively plotting to kill U.S. citizens, and when neither the United States, nor our partners are in a position to capture him before he carries out a plot, his citizenship should no more serve as a shield than a sniper shooting down on an innocent crowd should be protected from a SWAT team.

He acknowledged that “the targeting of any American raises constitutional issues that are not present in other strikes.” Since that speech, various U.S. Department of Justice, or DOJ, memoranda concerning those constitutional issues have been publicly disclosed and debated.²⁹

However, neither the president’s speech nor the DOJ memoranda made adequately clear whether the legal threshold for targeting such a U.S. citizen is the same threshold for targeting a non-U.S. citizen, as well as whether that threshold is defined by the LOAC. The effect has been further public confusion about the legality of a drone strike against an American who is fighting with Al Qaeda or its associated forces. While the DOJ memoranda serve as the Obama administration’s legal analysis on the constitutionality of such strikes, the administration’s view of the role of international law and, in particular, the LOAC in determining the legality of such strikes remains ambiguous.

The Obama administration should clarify whether, in its view, U.S. citizens such as Aulaqi can be targeted with drones only when doing so would be permitted by the LOAC as part of the armed conflict with Al Qaeda and its associated forces. In particular, the administration should clarify whether both LOAC requirements and constitutional requirements must be met in order to carry out such drone strikes.

Conclusion

The Obama administration's recent promises of more specific disclosures are welcome responses to public demands for more information. Evaluating the legality of the drone strikes must begin with an understanding of how the law of armed conflict applies, as well as the administration's view of its applicability. This analysis will likely demonstrate that the more serious questions raised by the use of drones in this war are their effectiveness rather than their legality.

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Endnotes

- 1 While strikes by drones, unmanned aerial vehicles controlled by remote operators, are no different from a legal perspective than strikes by manned bombers or other weapons, there is much public concern about the practical and policy implications of using drones. Those concerns have focused on the use of drones outside Afghanistan and that is the focus of this paper.
- 2 Craig Whitlock, "Drone strikes killing more civilians than U.S. admits, human rights groups say," *The Washington Post*, October 22, 2013, available at https://www.washingtonpost.com/world/national-security/drone-strikes-killing-more-civilians-than-us-admits-human-rights-groups-say/2013/10/21/a99cbe78-3a81-11e3-b7ba-503fb5822c3e_story.html.
- 3 The White House, *Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities* (2013), available at https://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf.
- 4 Jameel Jaffer and Brett Max Kaufman, "Limit the Next President's Power to Wage Drone Warfare," *The New York Times*, March 8, 2016, available at http://www.nytimes.com/2016/03/08/opinion/limit-the-next-presidents-power-to-wage-drone-warfare.html?_r=0.
- 5 The White House, "Remarks by the President at the National Defense University," Press release, May 23, 2013, available at <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.
- 6 The White House, *Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*.
- 7 Letter from Benjamin Mizer and Preet Bharara to Hon. Colleen McMahon, March 4, 2016, available at <http://i2.cdn.turner.com/cnn/2016/images/03/04/ppg.letter.pdf>.
- 8 The White House, "Remarks by Lisa O. Monaco at the Council on Foreign Relations," Press release, March 7, 2016, available at <https://www.whitehouse.gov/the-press-office/2016/03/07/remarks-lisa-o-monaco-council-foreign-relations-kenneth-moskow-memorial>.
- 9 See, for example, The White House, *National Strategy for Counterterrorism* (2011), available at https://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf.
- 10 The White House, "Remarks by Lisa O. Monaco at the Council on Foreign Relations."
- 11 For a comprehensive review of the law of armed conflict, see, The International Committee of the Red Cross, "War & Law," available at <https://www.icrc.org/en/war-and-law> (last accessed March 2016).
- 12 When a country has no right to use military force, it is said to violate *jus ad bellum* principles, which govern when a country is entitled to use military force, in contrast to *jus in bello* principles, which govern how military force must be used e.g. no intentional attacks on civilians.
- 13 U.S. Department of Defense, *Directive 2311.01E: Law of War Program* (2006), § 4.1, available at <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf>.
- 14 Harold Hongju Koh, "The Obama Administration and International Law," U.S. State Department, March 25, 2010, available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.
- 15 See, U.S. Department of Defense Joint Statement for the Record, "Law of Armed Conflict, the Use of Military Force and the 2001 Authorization for Use of Military Force," Testimony before the Senate Committee on Armed Services, May 16, 2013, available at http://www.armed-services.senate.gov/imo/media/doc/Taylor-Sheehan-Nagata-Gross_05-16-133.pdf; U.S. military lawyers summarize these principles as: 1. Fight only combatants; 2. Attack only military targets; 3. Spare civilian persons and objects; 4. Restrict destruction to what your mission requires. See, U.S. Army Center for Law and Military Operations, "Rules of Engagement Handbook for Judge Advocates, App. C-17" (2000).
- 16 The White House, *Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*.
- 17 Ibid.
- 18 The White House, "Remarks by the President at the National Defense University."
- 19 The LOAC, however, does prohibit the killing of innocent bystanders when doing so is excessive or disproportional to the military advantage to be gained from the strike. Thus, the legality of each drone strike under the LOAC must be evaluated in terms of what was known and foreseeable at the time the strike was taken.
- 20 See, for example, the War Powers Reports sent to Congress, e.g. The White House, "Letter from the President—War Powers Resolution," Press release, December 11, 2015, available at <https://www.whitehouse.gov/the-press-office/2015/12/11/letter-president-war-powers-resolution>. See, press briefings concerning operations in Somalia, U.S. Department of Defense, "Department of Defense Press Briefing by Adm. Kirby in the Pentagon War Room," Press release, February 3, 2015, available at <http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/607008/departement-of-defense-press-briefing-by-rear-adm-kirby-in-the-pentagon-briefing>; U.S. Department of Defense, "News Transcripts," available at <http://www.defense.gov/News/News-Transcripts> (last accessed March 2016).
- 21 The White House, "Remarks of John O. Brennan, 'Strengthening our Security by Adhering to our Values and Laws,'" Press release, September 16, 2011, available at <https://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.
- 22 Stephen W. Preston, "The Legal Framework for the United States' Use of Military Force Since 9/11," U.S. Department of Defense, April 10, 2015, available at <http://www.defense.gov/News/Speeches/Speech-View/Article/606662>.
- 23 Peter Baker, "Obama Apologizes After Drone Kills American and Italian Held by al Qaeda," *The New York Times*, April 23, 2015, available at <http://www.nytimes.com/2015/04/24/world/asia/2-qaeda-hostages-were-accidentally-killed-in-us-raid-white-house-says.html>.
- 24 See, for example, the comments of Leon Panetta quoted in Peter Baker and Julie Hirschfeld Davis, "Amid Errors, Obama Publicly Wrestles With Drones' Limits," *The New York Times*, April 24, 2015, available at http://www.nytimes.com/2015/04/25/us/politics/hostage-deaths-show-risk-of-drone-strikes.html?_r=1.
- 25 Ibid.

- 26 See, for example, Pakistani Ministry of Foreign Affairs, "Pakistan Condemns US Drone Strike in North Waziristan," Press release, May 18, 2015, available at <http://www.mofa.gov.pk/pr-details.php?mm=Mjc5NA>; Pakistani Ministry of Foreign Affairs, "Pakistan Condemns US Drone Strike in North Waziristan," Press release, August 7, 2015, available at <http://mofa.gov.pk/pr-details.php?mm=Mjk5OQ>.
- 27 The White House, *Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*.
- 28 The White House, "Remarks by the President at the National Defense University."
- 29 David J. Barron, "Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi" (Washington: U.S. Department of Justice, 2010), available at https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf; David J. Barron, "Memorandum for the Attorney General Re: Lethal Operation Against Shaykh Anwar Aulaqi" (Washington: U.S. Department of Justice, 2010), available at https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-02-19_-_olc_aaga_barron_-_al-aulaqi.pdf; U.S. Department of Justice, "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," November 8, 2011, available at <http://www.fas.org/irp/eprint/doj-lethal.pdf>.