

PART OF THE MODERN ISSUES IN CONFLICT SERIES



The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions



COLUMBIA LAW SCHOOL

HUMAN RIGHTS CLINIC

**CENTER FOR
CIVILIANS IN CONFLICT**
RECOGNIZE. PREVENT. PROTECT. AMEND.

THE CIVILIAN IMPACT OF DRONES:
UNEXAMINED COSTS, UNANSWERED QUESTIONS

**CENTER FOR
CIVILIANS IN CONFLICT**
RECOGNIZE. PREVENT. PROTECT. AMEND.



COLUMBIA LAW SCHOOL

HUMAN RIGHTS CLINIC

Acknowledgements

This report is the product of a collaboration between the Human Rights Clinic at Columbia Law School and the Center for Civilians in Conflict.

At the Columbia Human Rights Clinic, research and authorship includes: Naureen Shah, Acting Director of the Human Rights Clinic and Associate Director of the Counterterrorism and Human Rights Project, Human Rights Institute at Columbia Law School, Rashmi Chopra, J.D. '13, Janine Morna, J.D. '12, Chantal Grut, L.L.M. '12, Emily Howie, L.L.M. '12, Daniel Mule, J.D. '13, Zoe Hutchinson, L.L.M. '12, Max Abbott, J.D. '12.

Sarah Holewinski, Executive Director of Center for Civilians in Conflict, led staff from the Center in conceptualization of the report, and additional research and writing, including with Golzar Kheiltash, Erin Osterhaus and Lara Berlin. The report was designed by Marla Keenan of Center for Civilians in Conflict.

Liz Lucas of Center for Civilians in Conflict led media outreach with Greta Moseson, program coordinator at the Human Rights Institute at Columbia Law School.

The Columbia Human Rights Clinic and the Columbia Human Rights Institute are grateful to the Open Society Foundations and Bullitt Foundation for their financial support of the Institute's Counterterrorism and Human Rights Project, and to Columbia Law School for its ongoing support.

Copyright © 2012
Center for Civilians in Conflict (formerly CIVIC) and
Human Rights Clinic at Columbia Law School
All rights reserved

Printed in the United States of America.

Copies of this report are available for download at:
www.civiliansinconflict.org

Cover: Shakeel Khan lost his home and members of his family to a drone missile in 2010.

Photo credit: Chris Rogers/Center for Civilians in Conflict.

NOTE: Many names in this report have been changed to protect the identity of those interviewed.

SUMMARY & RECOMMENDATIONS 1

BACKGROUND: KNOWN CHARACTERISTICS OF COVERT DRONE STRIKES 7

The Targets: Who is Killed, and By What Process

- Personality Strikes and Signature Strikes
- “Kill Lists”
- Pre-planned Versus Dynamic Targeting

The Actors: CIA and JSOC

- JSOC’s Emergence
- Blurring Lines, Unclear Roles
- Covert Drone Strikes in Pakistan
- Covert Drone Strikes in Yemen
- Covert Drone Strikes in Somalia

THE CIVILIAN TOLL 19

Scope of Civilian Harm

- Deaths & Injuries
- Retaliation Against and Stigma Attached to Victims
- Increasing Violence and Instability
- Psychological Toll
- Property Loss, Displacement, Development, and Poverty
- Justice and Amends

US Policy on Minimizing Civilian Harm in Covert Drone Strikes

US Government Civilian Casualty Claims

- Military Operations and Persistence of Civilian Casualties
- Assumptions about Identity
- Signature Strikes and the Likelihood of Civilian Casualties

CIVILIAN PROTECTION LIMITATIONS OF DRONE TECHNOLOGY IN COVERT OPERATIONS 35

Intelligence Sources, Analysis, and Drone Development

- Drone Video
- Signals Intelligence
- Human Intelligence
 - “Data Crush” and Skills Lag
 - Limited Situational Awareness and Cultural Intelligence
 - Lack of Proper and Comprehensive Training

Rapid Procurement of Drone Technology

Assessing and Responding to Civilian Harm

- Post-strike Analysis and Investigations into Civilian Harm
- Responding to Civilian Harm

CIA AND JSOC ROLES IN COVERT DRONE STRIKES: IMPLICATIONS FOR ACCOUNTABILITY & CIVILIAN HARM 51

Conventional Military Forces’ Relationship to the Law, the Public, and Civilian Harm

The CIA’s Relationship to the Law and Civilian Harm

- CIA Selective Disclosure & Congressional Oversight

JSOC’s Relationship to the Law and Civilian Harm

- Congressional Oversight

ETHICAL AND LEGAL IMPLICATIONS 67

Public Acceptance of Drones

Drone Strikes as the Norm

Ensuring Drone Strikes Include Precautionary Measures to Mitigate Civilian Harm

- Alternative Approaches

Drone Strikes’ Expansion of Who May be Targeted

Summary & Recommendations

Since 2008, the US has dramatically increased its lethal targeting of alleged militants through the use of weaponized drones—formally called unmanned aerial vehicles (UAV) or remotely piloted aircraft (RPA). Novel technologies always raise new ethical, legal, and practical challenges, but concerns about drone strikes have been heightened by their role in what might colloquially be termed “covert drone strikes” outside the established combat theater of Afghanistan. Airstrike campaigns in Pakistan, Yemen, and Somalia are conducted with a degree of government secrecy enabled by the fact that there are few supporting US ground troops and/or CIA agents in these countries.

Political and public debate has fed on a growing catalogue of news reports and books, which themselves are based primarily on leaks by unnamed government officials. Accounts are sometimes conflicting and leave basic details unclear. US drone operations have been acknowledged by the Obama Administration in Pakistan, Yemen, and Somalia. However, the government has declined to clarify the division of responsibilities between the CIA and the military’s Joint Special Operations Command (JSOC), and the various policies and protocols governing civilian protection in the strikes. This report does not focus on possible drone operations elsewhere in Africa or in the Philippines, as public information is not corroborated, and the extent of US involvement is disputed.

This report details two strains of concern stemming from US covert drone operations. The first and most often cited is secrecy, which has implications for accountability in the use of force; second, the inherent limits of using drone platforms outside of full-scale military operations, which has implications for civilian protection and harm response.

The Obama Administration has recently attempted to respond to concerns about the legality and ethics of covert drone strikes through a series of public addresses by senior Administration officials. While encouraged by the Administration’s assurances about the seriousness with which it takes these issues, we are nonetheless concerned that there are consequences to covert drone strikes that policymakers and the public may underestimate or fail to recognize.

In this report, we describe how, as covert drone strikes by the United States become increasingly frequent and widespread, reliance on the precision capabilities and touted effectiveness of drone technology threatens to obscure the impact on civilians. Even if drone operations outside of traditional conflict zones are found to be legal and to result in relatively few civilian casualties, the authors of this report would nevertheless be concerned with the long-term impact of such operations on the civilian population, the precedent-setting nature of these operations, accountability for the CIA and JSOC's actions, and the inherent limitations these operations to properly address civilian harm.

Rather than presenting evidence of particular abuses or violations, or distilling the catalogue of news reports and books about drone strikes, we identify problems that have gone relatively unnoticed and policies that appear to have gone unchallenged—all in relation to the issue of civilian harm. While our analysis is circumscribed by our limited information about US covert drone operations, what we know suggests there are potential short- and long-term impacts that policymakers have not considered, and which negatively impact civilians.

Throughout the report, we are careful not to draw hard and fast conclusions about covert drone operations. Rather, our role is to question the assumptions being made about civilian protection, harm, and impact by US policymakers, as well as call attention to issues that are ignored or overlooked.

In the **Background** chapter, we describe the basic attributes of US drone strikes—including their frequency, locations, and targets. The scope of our report is limited to what we colloquially term “covert drone strikes,” meaning drone strikes conducted with varying degrees of secrecy by the CIA and JSOC in Pakistan, Yemen, and Somalia. Drone strikes involve targeting individuals whose identities are both known and unknown, and with varying degrees of pre-planning. Both the CIA and US military forces are involved in drone strikes. While the CIA's role is more notorious, JSOC's is also extensive. JSOC and the CIA cooperate in drone strikes, but the secrecy of both organizations obscures basic details about their chain of command and the operational rules they apply to civilian protection.

In **The Civilian Toll**, we describe the far-reaching impact of these operations on civilians and their communities. While headlines focus on putting a hard number to militant versus civilian deaths, covert drone strikes cause other kinds of harm to civilians and local communities, and may fuel anger toward the US in the aggregate. Moreover, US government estimates of extremely low or no civilian harm, while not empirically disproven, may be based on deeply problematic assumptions, including those regarding the identity of individuals present in an area or drone strike zone.

In **Civilian Protection Limitations of Drone Technology in Covert Operations**, we describe how the US government's claims about the “precise” quality of strikes elide operational realities. Whether drone strikes are indeed precise depends in large part on the sufficiency of intelligence sources and analysis. There may be systematic flaws in the intelligence upon which targeting decisions are based, among them limits in drone video surveillance, signals interception, cultural understanding, and “human intelligence” provided by local informants and cooperating governments. These are concerns in any combat mission, but they are compounded when operating outside a fully supported military operation. With obvious hindrances to available information about covert drone procedures, we compare what is known with the civilian protection procedures of traditional armed forces'—highlighting ways in which covert operations may practically differ from those of full-scale military operations.

In **CIA and JSOC Roles, Accountability, and Civilian Harm** we consider the civilian protection implications of CIA and JSOC involvement in drone strikes in light of these organizations' problematic relationships to legal and public transparency. Conventional military forces are a useful baseline for judging the CIA and JSOC, as conventional military structures and processes reflect an interest in public accountability, engagement with complex legal and ethical issues, respect for human rights and legal norms, and efforts to go beyond legal requirements during recent engagements in order to reduce and respond to civilian harm. By contrast, while much about the CIA and JSOC's rules and practices is unknown—indeed, these organizations may apply rules and procedures similar to the conventional military's—their secrecy vis-à-vis the public diminishes their incentive to comply with underlying norms and go beyond legal requirements to mitigate civilian harm. With limited information, we cannot conclude that either the CIA or JSOC is inherently unsuitable to conduct drone strikes, although we have concerns based on their past practices. It is incumbent upon policymakers with access to more information—particularly members of Congress—to scrutinize and inform public debate on the appropriateness of the CIA and JSOC in conducting these operations.

In **Ethical and Legal Implications**, we warn that proliferation of drone strikes outside of traditional armed conflict theaters may undermine US commitment to civilian protection measures and create a normative standard for drone use that risks civilian harm into the future. Drone strikes enjoy wide political and public support in the United States because they spare US forces and are viewed as highly effective against al-Qaeda. Secrecy, framed as preservation of national security, further diminishes the public's interest in exerting pressure on the government to justify lethal operations. However, as drone strikes become increasingly prominent and viewed as a successful tactic, they risk becoming “the norm” and possibly displacing alternatives that could be more respectful of civilian life, in both the short- and long-term.

Methodology

This report is based principally on publicly available materials, and builds on previous studies by Center for Civilians in Conflict and the Human Rights Clinic at Columbia Law School (“Columbia Human Rights Clinic”), as well as numerous reports by journalists and human rights organizations. It is also based on extensive interviews, consultations, and written requests for information. In winter and spring 2012, the Columbia Human Rights Clinic made 133 written requests for information to members of Congress and their staff, as well as agencies including the Department of Defense, the CIA, and the Director of National Intelligence. From October 2010 to July 2012, the Columbia Human Rights Clinic conducted interviews and consultations with 35 current and former government officials and military officers; the majority spoke off the record because of the sensitivity of information. During this period, the Columbia Human Rights Clinic also interviewed or consulted with 38 experts, researchers, and journalists focused on the issues or affected regions. Center for Civilians in Conflict supplemented this research with staff expertise on military operations and previous analyses of civilian harm caused by drone strikes, particularly in Pakistan.

Recommendations

Our ability to make recommendations is significantly limited by the secrecy of US drone operations. In this report we raise concerns about US standards and practices, though we cannot assess their sufficiency without more information. Below, we make recommendations for greater government disclosure to inform public debate. This is only a first step; policymakers armed with more information should, based on the questions we have raised, assess the value and impact of covert drone strikes, including the sufficiency of civilian protection measures and the suitability of the CIA and JSOC to conduct covert drone strikes.

To the Obama Administration

- » Establish a special interagency task force to evaluate covert drone operations, and make recommendations to the President with regard to the following issues:
 - The extent of civilian casualties from drone strikes and the larger impact on civilian communities, including destruction of homes and displacement, and retaliatory violence by local groups;
 - The sufficiency of civilian protection mechanisms employed by the CIA and JSOC, including civilian casualty mitigation processes;
 - The adequacy of civilian protection standards for the identification of targets, including the reliability of “signatures,” and the sufficiency of intelligence sources and analysis where there is limited US ground presence;
 - The capabilities and limitations of drone technology for reducing and accurately assessing civilian harm, and the adequacy of current technology testing and personnel training;
 - The existence and sufficiency of post-strike assessments and investigations of who is killed, including assessing the appropriateness of the behaviors associated with signature strikes;
 - The existence and sufficiency of processes for recognizing harm and making amends to civilian victims of drone strikes, their families, and communities;
 - The strategic value and humanitarian impact of covert drone strikes compared to other counterterrorism approaches;
 - For joint CIA-JSOC operations, the adequacy of oversight mechanisms, the delineation of responsibilities between the organizations, and the adequacy of agency accountability for civilian protection and harm response.

The task force should be composed of representatives from relevant agencies and departments including the Director of National Intelligence, the State Department, the Department of Justice, the National Security Agency, the Department of Defense, and the Central Intelligence Agency. A declassified version of the task force’s findings should be made publicly available.

- » Continue to engage with civil society regarding legal standards for targeting operations.
- » Identify the international law-related justifications and standards that apply to covert drone strike operations in different countries, including the legal standards for who may be targeted.
- » Encourage the Department of Defense and the CIA to establish or implement processes for declassifying information about targeting operations once they are completed.

To the CIA

- » Acknowledge that the CIA has a role in drone strikes outside of Afghanistan; establish a process for declassifying information about CIA targeting operations once they are completed, and officially provide information on the impact of the program on civilians, including to the relevant US Congress committees and members.
- » Publicly describe the agency’s civilian protection mechanisms, including its civilian casualty mitigation processes and post-strike investigatory procedures.
- » Engage with civil society regarding legal standards for targeting operations; confirm whether the agency regards itself as bound by international law, including under which specific legal framework it is operating the drones program (human rights law, international humanitarian law, etc.), and publicly describe the agency’s legal standards for who may be targeted.
- » Disclose steps the agency takes to train personnel involved in drone operations, including lawyers, on applicable laws and related civilian protection and harm response tactics and procedures.

To the Department of Defense, SOCOM and Joint Special Operations Command (JSOC)

- » Acknowledge that JSOC has a role in drone strikes outside of Afghanistan; in accordance with existing Department of Defense processes for declassifying information on operations, declassify information on drone targeting operations once they are completed; and officially provide information on the impact of operations on civilians, as is done by the military in traditional combat theaters.
- » Publicly describe the agency's civilian protection mechanisms, including its civilian casualty mitigation processes and post-strike investigatory procedures.
- » Clarify whether directives, rules, and manuals in relation to civilian protection and use of force compliance that are a matter of Department of Defense-wide policy also apply to JSOC operations, including operations conducted under the CIA statutory authority.

To Congress

- » Exercise oversight powers to the fullest extent possible in reviewing and evaluating the following issues:
 - The extent of civilian casualties from covert drone strikes and the larger impact on civilian communities, including destruction of homes and displacement, and retaliatory violence by local groups;
 - The sufficiency of civilian protection mechanisms employed by the CIA and JSOC, including civilian casualty mitigation processes;
 - The adequacy of standards for the identification of targets, including the reliability of "signatures," and the sufficiency of intelligence sources and analysis where there is limited US ground presence;
 - The capabilities and limitations of drone technology for reducing civilian harm, and the adequacy of current technology testing and personnel training;
 - The existence and sufficiency of post-strike assessments and investigations that determine who is killed, including the characterization of military-age males as presumptively non-civilian;
 - The existence and sufficiency of processes for recognizing harm and making amends to civilian victims of covert drone strikes, their families, and communities;
 - The strategic value and humanitarian impact of covert drone strikes compared to alternative approaches to counterterrorism;
 - For joint CIA-JSOC operations, the adequacy of oversight mechanisms; the delineation of responsibilities between the organizations, and the adequacy of agency accountability for civilian protection and harm response.
- » Seek information about the impact of covert drone strikes from sources outside of government, including journalists, regional experts, and civil society.
- » Exercise effective oversight of joint CIA-JSOC operations, e.g., by formally requiring that joint operations be reported to both intelligence oversight committees, and the Senate and House Armed Services Committees.
- » Inform public debate about the involvement of the CIA and JSOC in drone strikes, effectiveness of the strikes in counterterrorism operations (including in the long-term), and civilian impact, e.g., through an open congressional hearing.

Background:

Known Characteristics of Covert Drone Strikes

The basic attributes of covert US drone strikes—including their frequency, locations, and targets—have changed rapidly, and sometimes dramatically, since 2008. Many studies have described the history of US use of drone technology, reflecting on the evolution of drones from being used solely for reconnaissance purposes to becoming the “weapon of choice” for counterterrorism targeting operations, including outside of traditional combat theaters.¹

This chapter is a prelude to those that follow and focuses on the fundamental characteristics of drone strikes in Pakistan, Yemen, and Somalia conducted by the CIA and Joint Special Operations Command (JSOC), an agency within the Department of Defense (DOD). The following facts and analysis are, for the most part, based on publicly available material, including accounts from unnamed US government officials who provided information on the condition of anonymity.

The information included here is not comprehensive, as despite public and repeated allusions to covert drone strikes by Obama Administration officials in 2011 and 2012, most official materials related to the drone program are classified. Even the existence of a CIA drone program remains classified, although government officials have repeatedly leaked information to the media.² In our interviews with government officials, most were unwilling to speak about drone operations outside of Afghanistan. The persistent government secrecy on this issue, particularly surrounding the involvement of the CIA and JSOC, leads us to term drone

¹ Reconnaissance drones have existed since the 1980s, and drones provided intelligence for US air campaigns in Kosovo and Iraq. For histories of US use of drone technology, see *generally* Lt. Col. Matt J. Martin and Charles W. Sasser, *Predator: The Remote-Control Air War Over Iraq and Afghanistan: A Pilot's Story*, Minneapolis: Zenith Press, 2010; Aki Peritz and Eric Rosenbach, *Find, Fix, Finish: Inside the Counterterrorism Campaigns that Killed Bin Laden and Devastated Al Qaeda*, New York: Public Affairs, 2012.

² See Brief for Appellee, *ACLU v. CIA*, No. 11-5320 (D.C. Cir. May 21, 2012). In the ongoing *Freedom of Information Act* litigation, the US government's position is that it can neither confirm nor deny whether it has records responsive to the request because the fact of CIA involvement in drone strikes is not officially acknowledged and remains classified.

strikes outside of Afghanistan as “covert.” In this report, we use “covert” in the colloquial, rather than legal sense.³

We often compare covert strikes with drone use in conventional military operations, about which there is far more publicly available information. Still, Department of Defense officials routinely decline to discuss strikes in Yemen and Somalia undertaken by JSOC, in contravention of a general policy of disclosing the details of military operations once they are complete.⁴

Despite the government’s failure to disclose many details, we know enough about drone strikes to discern the basic types of operations. The first section describes the types of targeting that occur with US drones. The second section describes the actors who conduct covert strikes and briefly describes what is known about drone operations in Pakistan, Yemen, and Somalia.

The chapters that follow go into greater detail on what is only briefly covered here.

The Targets: Who is Killed, and By What Process?

In drone operations, the military and CIA target individuals whose identities are both known and unknown, and they conduct targeting with varying degrees of pre-planning. This report finds that all variations of targeting procedures have a civilian impact. The number of people killed is a matter of debate, as is their designation as militant or civilian.

Personality Strikes and Signature Strikes

Targeting identified individuals in “personality strikes” versus targeting unknown individuals—often in groups—in “signature strikes” is a paramount distinction in US drone operations. In a personality strike, the US targets an individual whose identity is known. According to US officials, when the strike is conducted, those making the decision to engage must have a “high degree of confidence” that the particular individual is present.⁵ Government officials and observers have heralded personality strikes as disrupting al-Qaeda plots by killing militant leaders.⁶

A signature strike is one in which the US conducts targeting without knowing the precise identity of the individuals targeted. Instead, the individuals match a pre-identified “signature” of behavior that the US links to militant activity or association. US officials have generally disclosed fewer details about signature strike processes than about personality strikes, even in leaks to media.⁷ Signature strikes are controversial because they can result in the deaths of larger numbers of individuals—in some cases civilians—because of their behavior or affiliations.

Signature Strike:

A signature strike is one in which the US conducts targeting without knowing the precise identity of the individuals targeted. Instead, the individuals match a pre-identified “signature” of behavior that the US links to militant activity or association.

3 See National Security Act of 1947, 50 USC. §413b(e)(2). In the colloquial sense, “covert” often refers to secrecy regarding the sponsor or agent of operations. Under US law, the term “covert action” contrasts with “clandestine activity”—the terms have varying meanings and implications. Covert action is defined under US law as “an activity...to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.” It carries with it authorization and reporting requirements. The Department of Defense denies that any of its current counterterrorism intelligence activities constitute covert action. “Clandestine activity” is not defined by statute, but is understood to consist of activity, which “although intended to be secret, can be publicly acknowledged if it is discovered or inadvertently revealed.”; Alfred Cumming, “Covert Action: Legislative Background and Possible Policy Questions,” *Congressional Research Service* (2009), 4-5, <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA509854>.

4 See Julian E. Barnes, “US Rethinks Secrecy on Drone Program,” *The Wall Street Journal*, May 17, 2012.

5 John Brennan, Assistant to the President for Homeland Security and Counterterrorism, “The Ethics and Efficacy of the President’s Counterterrorism Strategy” (speech, Wilson Center, Washington, DC, April 30, 2012), <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>.

6 See e.g. “CIA Chief: ‘Disrupted’ Al Qaeda Is ‘On the Run,’” *Fox News*, March 18, 2010. Then-CIA director Leon Panetta arguing that the drones program is “seriously disrupting al-Qaeda.”; John Brennan, Assistant to the President for Homeland Security and Counterterrorism, “The Ethics and Efficacy of the President’s Counterterrorism Strategy” (speech, Wilson Center, Washington, DC, April 30, 2012), <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>.

7 See Greg Miller, “White House Approves Broader Yemen Drone Campaign,” *The Washington Post*, April 25, 2012; Adam Entous, Siobhan Gorman and Julian E. Barnes, “US Tightens Drone Rules,” *The Wall Street Journal*, November 4, 2011.

Signature strikes make up a significant proportion of the covert drone campaign, constituting the majority of strikes in Pakistan, according to one report.⁸ Indeed, an unnamed US official said in 2011 that the US has killed twice as many “wanted terrorists” in signature strikes than in personality strikes.⁹ US officials have also reported that most of the people on the CIA’s “kill list” have been killed in signature strikes, “when the [CIA] didn’t know they were there.”¹⁰ In April 2012, the Obama Administration authorized the CIA and JSOC to conduct signature strikes in Yemen, but we do not know how many signature strikes have been conducted there.¹¹ Some media accounts suggest that in 2012 the CIA began reducing the number and pace of signature strikes in Pakistan.¹² We describe the risks of civilian harm posed by signature strikes in the chapter *The Civilian Toll* (“*Civilian Toll*”).

“Kill Lists”

Both personality and signature strikes can result in the killing of individuals who are on a “kill list.” Kill lists have made headlines in the drone debate. However, kill lists are not unique to the drone context; they are used in many different conflicts and by many nations. We include the use of kill lists in this report because of the potential for diminished accountability for civilian harm where they are used secretly.

Media reports suggest that the National Security Council (NSC) and the CIA have a list of targetable individuals, as does the military. How many individuals are on these kill lists, and the extent to which they contain the same individuals, is not known. Furthermore, the process of adding an individual to a kill list reportedly differs for CIA and military targets, and continues to evolve over time.¹³ What we detail here may have changed since our publication date.

In October 2011, Congressman Dutch Ruppersberger, the ranking minority member of the House Permanent Select Committee on Intelligence, told reporters that in deciding to strike US citizens, the National Security Council investigates potential targets in coordination with the military, and proposes its selected targets to President Obama.¹⁴

The White House’s role in targeting decisions, and that of the President’s counterterrorism adviser John Brennan, has expanded, according to news reports citing named and unnamed Obama Administration officials.¹⁵ A May 2012 *New York Times* report based on interviews with three dozen current and former Obama advisers describes a weekly Pentagon-run videoconference—dubbed “Terror Tuesday”—in which over 100 national security officials review PowerPoint slides bearing the names and biographies of suspected members of al-Qaeda-affiliated groups in Yemen and Somalia to decide whether to recommend that the President add an individual to the military’s kill list.¹⁶ It is unclear who creates and selects the slides reviewed at the meetings. This process reportedly results in a list of two-dozen individuals whose threat potential must be reviewed again if they are not killed within 30 days.¹⁷

8 See Adam Entous, Siobhan Gorman and Julian E. Barnes, “US Tightens Drone Rules,” *The Wall Street Journal*, November 4, 2011.

9 *ibid.*

10 See Greg Miller, “C.I.A. Seeks New Authority to Expand Yemen Drone Campaign,” *The Washington Post*, April 18, 2012.

11 See Greg Miller, “White House Approves Broader Yemen Drone Campaign,” *The Washington Post*, April 25, 2012.

12 See David Ignatius, “US, Pakistan Take a Breather,” *The Washington Post*, March 7, 2012; David Rohde, “Obama’s Secret War,” *Foreign Policy*, (March/April 2012).

13 See e.g. Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” *The New York Times*, May 29, 2012; Kimberly Dozier, “Who will drones target? Who in the US will decide?” Associated Press, May 21, 2012.

14 See Mark Hosenball, “Secret panel can put Americans on ‘kill list,’” Reuters, October 5, 2011.

15 See Kimberly Dozier, “Who will drones target? Who in the US will decide?” Associated Press, May 21, 2012; Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” *The New York Times*, May 29, 2012; Daniel Klaidman, “Drones: How Obama Learned to Kill,” *The Daily Beast*, May 28, 2012.

16 See Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” *The New York Times*, May 29, 2012; Klaidman, Daniel. *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (New York: Houghton Mifflin Harcourt Publishing Company, 2012), 209-223.

17 See Kimberly Dozier, “Who will drones target? Who in the US will decide?” Associated Press, May 21, 2012.

Brennan's staff, consulting with the Pentagon, State Department, and other agencies, takes the lead in selecting targets, according to a May 2012 Associated Press report citing unnamed officials.¹⁸ White House officials reportedly believe that Brennan's involvement is simply an additional level of scrutiny in target selection, while officials outside the White House are concerned that his office will turn into "a pseudo military headquarters, entrusting the fate of al-Qaeda targets to a small number of senior officials."¹⁹

The President reportedly personally approves every military target in Yemen and Somalia, but reviews only about a third of the CIA's targets in Pakistan—those that seem particularly controversial.²⁰ Little has been reported on the CIA's target selection procedures, which have been described as "insular."²¹ Former CIA General Counsel John Rizzo described the process as housed within the CIA's Counterterrorism Center, with targets approved by the CIA General Counsel's office.²² A more recent account states that targets are added to the kill list by a Covert Action Review Group, made up of high-ranking CIA staff, and then sent on to the CIA's Counterterrorism Center, which directs the strikes.²³

Media accounts of particular operations suggest that some targeting decisions—or at least decisions not to target—may be made outside institutionalized decision-making processes. One account depicts Brennan and then-Vice Chairman of the Joint Chiefs of Staff James Cartwright, pulling the President out of events to make targeting decisions.²⁴ It also describes a phone call in which Pentagon lawyer Jeh Johnson and State Department Legal Adviser Harold Koh were asked to sign off on a list of three individuals to be targeted in Somalia.²⁵ These decisions may be part of the "Terror Tuesday" process—for example, selecting names to be included in the review or deciding the timing of a strike against an approved name—or they could be outside this process.

The process may also be influenced by the political climate. Tensions between the United States and Pakistan in the wake of the killing of Osama bin Laden, for example, reportedly resulted in the implementation of a multi-level "appeals process" in which the US Ambassador to Pakistan and the Secretary of State had the opportunity to object to targets, though the director of the CIA retained authority to order a strike.²⁶

The "kill list" is not the only way the US targets individuals using drones. A significant proportion of the individuals killed in drone strikes are not, by even the US government's account, militant leaders and thus are unlikely to be on the "kill list." According to one media account, a White House evaluation of drone strikes in summer 2011 found that "the CIA was primarily killing low-level militants."²⁷ Similarly, a 2011 New America Foundation report found that just one out of every seven drone attacks in Pakistan kills a "militant leader."²⁸ A Reuters study found that more than 90 percent of the estimated 500 individuals killed in drone strikes in Pakistan were "lower-level fighters," based on an analysis of data provided by unnamed US officials in May 2010.²⁹

18 *ibid.*

19 *ibid.*

20 See Jo Becker and Scott Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will," *The New York Times*, May 29, 2012.

21 See Kimberly Dozier, "Who will drones target? Who in the US will decide?" Associated Press, May 21, 2012.

22 See Tara McKelvey, "Inside the Killing Machine," *Newsweek*, February 13, 2011.

23 See Kimberly Dozier, "Who will drones target? Who in the US will decide?" Associated Press, May 21, 2012.

24 See Daniel Klaidman, "Drones: How Obama Learned to Kill," *The Daily Beast*, May 28, 2012.

25 See *ibid.*; see also Klaidman, *Kill or Capture*, 199-223.

26 See Adam Entous, Siobhan Gorman and Julian E. Barnes, "US Tightens Drone Rules," *The Wall Street Journal*, November 4, 2011.

27 See Peter Bergen and Jennifer Rowland, "CIA Drone War in Pakistan in Sharp Decline," CNN, March 27, 2012.

28 See Peter Bergen and Katherine Tiedemann, "Washington's Phantom War," *Foreign Affairs* 90.12 (2011).

29 Adam Entous, "Drones Kill Low-level Militants, Few Civilians: US," Reuters, May 3, 2010.

Pre-planned versus Dynamic Targeting

In conventional military operations, pre-planned or “deliberate” drone operations are conducted at a scheduled time and after elaborate processes of collateral damage estimation (CDE) and other steps to reduce the risk of harming civilians.³⁰ According to one study, “most collateral damage in US operations occurs when [collateral damage mitigation] is not followed”—presumably, when operations are not pre-planned.³¹ The implications of such processes being opaque with regard to covert drone strikes are described in the chapter *CIA and JSOC Roles, Accountability, and Civilian Harm*.

In contrast, “dynamic” targeting occurs when targeting decisions are made during a short window of time, on the basis of recently received or time-sensitive information. Due to the quick turnaround time from intelligence to strike, dynamic targeting may occur without the benefits of a full collateral damage estimation and mitigation processes.

Dynamic targeting can occur for both personality strikes and signature strikes. In a personality strike, dynamic targeting would occur, for example, if the US intercepted a phone conversation that indicated a previously identified target was traveling to a specific location. In a signature strike, dynamic targeting would occur if drone operators fired upon unknown individuals who appeared to be engaging in a pattern of behavior previously designated as a signature of militancy.

The Actors: CIA and JSOC

Both the CIA and US military forces are involved in drone strikes. A common misconception is that US drone strikes fall neatly into two programs: the military’s overt drone strikes in Afghanistan; and the CIA’s covert strikes beyond Afghanistan.³² In fact, US government disclosures—mostly in the form of leaks to the press— suggest that the military and CIA are both involved in covert drone operations around the world.

Conventional military forces have some involvement in operations conducted by the CIA. Air force personnel reportedly pilot drones owned by the CIA.³³ However, the scope and frequency of this cooperation and assignment is unclear. In particular, it is unknown whether military personnel seconded to the CIA follow CIA protocols, and whether they continue to be bound by Department of Defense rules of engagement and directives. Because CIA and military cooperation is not limited to the operation of drones, these questions also apply to contexts such as intelligence-gathering and detention.³⁴

Our interest is in the increasingly close ties between the CIA and the military’s special operations forces, in particular, the Joint Special Operations Command (JSOC). Although US officials have leaked information about particular strikes involving JSOC and the CIA, they have repeatedly declined to delineate the roles of the agencies in Pakistan, Yemen, and Somalia. Most of what we know comes from reports by journalists and scholars. The catalogue of reporting contains information that is at times conflicting and ambiguous, but overall suggests two kinds of CIA-JSOC cooperation. First, JSOC and the CIA conduct

30 For a comparison between dynamic targeting and “pre-planned” or “deliberate” targeting, see US Air Force, Targeting: Air Force Doctrine Document 2-1.9 (June 8, 2006), http://www.dtic.mil/doctrine/jel/service_pubs/afdd2_1_9.pdf; Sharon Weinberger, “How it Works: A US Military Airstrike,” *Popular Mechanics*, December 13, 2011.

31 See Gregory S. McNeal, “US Practice of Collateral Damage Estimation and Mitigation,” Social Science Research Network, November 9, 2011. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1819583.

32 See e.g. Jane Mayer, “The Predator War: What are the risks of the C.I.A.’s covert drone program?” *The New Yorker*, October 26, 2009; Afshien John Radsan and Richard Murphy, “Measure Twice, Shoot Once: Higher Care for CIA Targeted Killing,” *University of Illinois Law Review* 1202 (2011).

33 See Greg Miller and Julie Tate, “CIA Shifts Focus to Killing Targets,” *The Washington Post*, September 1, 2011.

34 For a study on the history of CIA and military cooperation and related legal questions, see Robert Chesney, “Law of Title 10/ Title 50 Debate” *Journal of National Security Law and Policy*, 539, (2012): 222.

parallel operations, meaning separate campaigns of strikes in the same region. In these parallel operations, the CIA and JSOC may exchange information and provide each other operational support. Second, the CIA and JSOC conduct joint operations. Cooperation is significant but bifurcated, for example, with JSOC taking a lead on operations that are conducted under CIA legal authorities.

JSOC's Emergence

The CIA's involvement in drone strikes has a much higher public profile due to extensive government leaks to media, but some observers believe that JSOC's role in lethal targeting generally is far more extensive.³⁵ JSOC has evolved into what a former counterinsurgency adviser to General David Petraeus described as “an almost industrial-scale counterterrorism killing machine.”³⁶ One former military general described JSOC as “a parallel universe.”³⁷

JSOC was established in 1980 by a classified charter.³⁸ JSOC originally reported directly to the Joint Chiefs of Staff to allow for rapid decision-making.³⁹ It was later moved under the US Special Operations Command (SOCOM), which provides forces to regional commanders rather than directing operations.⁴⁰ In 2003, then-Secretary of Defense Donald Rumsfeld was frustrated at the CIA's better positioning in Afghanistan, in getting in on the ground and making contacts much more deftly than Special Operations Forces.⁴¹ He made SOCOM a “supported command,” allowing it—and thus JSOC—to plan and execute its own missions.⁴²

Media reports suggest that JSOC has functioned as the “President's Army,” with Bush Administration officials able to bypass SOCOM and issue orders directly to JSOC.⁴³ A September 2003 Execute Order known as the al-Qaeda or “AQN EXOrd” authorized JSOC operations in Afghanistan, Iraq, and a dozen other countries, reportedly including Pakistan and Somalia. The EXOrd is not public. Under the Obama Administration, this and other EXOrds have reportedly been rewritten to require more vetting by the White House.⁴⁴ There are also reports that General David Petraeus, as head of the military's Central Command (CENTCOM), expanded and updated an order in 2009 regarding the military's clandestine activity in the Middle East.⁴⁵

35 See e.g., Dana Priest and William Arkin, *Top Secret America: The Rise of the New American Security State*, New York: Hachette Book Group, 2011. “Of all the top secret units fighting terrorism after 9/11, this is the single organization that has killed and captured more al-Qaeda members around the world and destroyed more of their training camps and safe houses than the rest of the US government forces combined.”

36 Lt. Col. John Nagl quoted in Gretchen Gavett, “What is the Secretive US ‘Kill/Capture’ Campaign?” PBS, June 17, 2011.

37 Gen. Barry McCaffrey, USA (Ret.), “Afghanistan and Iraq: Perspectives on US Strategy, Part 1,” (statement, House Hearing of the Committee on Armed Services, Oversight and Investigations Subcommittee, H.A.S.C. No. 111-103, October 22, 2009).

38 See Jennifer D. Kibbe, “Covert Action and the Pentagon.” *Intelligence and National Security*, 22.1, (2007): 57-58; Marc Ambinder and D. B. Grady, *The Command: Deep Inside the President's Secret Army* (New Jersey: John Wiley and Sons, 2012) Chapter 1.

39 See Steven Emerson, *Secret Warriors: Inside the Covert Military Operations of the Reagan Era* (Putnam, 1988), 59; Marc Ambinder and D. B. Grady, *The Command: Deep Inside the President's Secret Army* (New Jersey: John Wiley and Sons, 2012). “In 1987, the organization was subordinated to a new US Special Operations Command, though JSOC reported directly to the National Command Authority, meaning that its units could be tasked directly by the president and the secretary of defense.”

40 See Jennifer D. Kibbe, “Covert Action and the Pentagon.” 22 *Intelligence and National Security* 1 (2007)

41 See David Ignatius, “The Blurring of CIA and Military,” *The Washington Post*, June 2, 2011, reporting John McLaughlin, CIA deputy director from 2000 to 2004, as stating “Rumsfeld was frustrated that he sat on this enormous capability he could not fully realize.”

42 Department of Defense, News Briefing (January 7, 2003), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=1226> announcing steps to strengthen US Special Operations Command.

43 See Jeremy Scahill, “The Secret US War in Pakistan,” *The Nation*, November 23, 2009, quoting Col. Lawrence Wilkerson, Secretary of State Colin Powell's chief of staff from 2002 to 2005: “I think Cheney and Rumsfeld went directly into JSOC. I think they went into JSOC at times, perhaps most frequently, without the SOCOM [Special Operations] commander at the time even knowing it. The receptivity in JSOC was quite good.”; Eric Black, “Investigative reporter Seymour Hersh describes ‘executive assassination ring,’” *The Minnesota Post*, March 11, 2009, reporting on speech in which Hersh said of JSOC, “They do not report to anybody, except in the Bush-Cheney days, they reported directly to the Cheney office.”

44 See David Ignatius, “Rewriting Rumsfeld's Rules,” *The Washington Post*, June 3, 2011.

45 See Mark Mazzetti, “US Is Said to Expand Secret Actions in Mideast,” *The New York Times*, May 5, 2010, describing the Joint Unconventional Warfare Task Force Execute Order, signed Sept. 30, 2009 as authorizing Special Operations in Yemen; Jeremy Scahill, “Osama's Assassins,” *The Nation*, June 8, 2011, reporting that Petraeus “expanded and updated” the AQN EXOrd in September 2009. .

As we describe in the chapter *CIA and JSOC*, basic details about JSOC are unknown and the organization operates with a greater degree of secrecy than even the CIA. Military officials do not speak publicly about JSOC's structure, size, or budget. JSOC reportedly includes "more than 4,000 soldiers and civilians,"⁴⁶ and has "all of the pieces of a self-sustaining secret army," including its own intelligence division and its own drones.⁴⁷

The secrecy of both JSOC and CIA drone operations may have implications for preventing civilian harm and addressing it when it occurs. We describe the potential ramifications in the chapter *CIA and JSOC*.

Blurring Lines, Unclear Roles

The CIA and JSOC are organizations with divergent genealogies and traditions, but at present their roles are converging in drone strikes.

CIA and JSOC cooperate extensively in counterterrorism operations generally.⁴⁸ Scholars note the blurring of roles between the CIA and Special Forces reflects a shift from "boots on the ground" strategy to one of counterterrorism and discrete attacks.⁴⁹ Admiral William McRaven, former commander of JSOC and current head of SOCOM, described the two agencies as having spent "a decade in bed together."⁵⁰ Robert Gates, then-Secretary of Defense, heralded CIA-JSOC cooperation after the joint raid that killed Osama bin Laden, calling it "an extraordinary coming together" that is "unique in anybody's history."⁵¹

According to journalists Marc Ambinder and D.B. Grady, after some early turf conflicts between the organizations, "the integration" in Yemen, at least, "is almost seamless. JSOC and the CIA [are] alternating Predator missions and borrowing each other's resources, such as satellite bandwidth."⁵² This increasing synergy has, for the most part, gained praise among policymakers for the flexibility it provides in planning and executing missions. As one Department of Defense official told Congress:

*Whichever organization has primary authority to conduct the operation leads; whichever organization has the superior planning and expertise plans it; both organizations share information about intelligence, plans, and ongoing operations fully and completely.*⁵³

President Obama's decision to swap General David Petraeus and Leon Panetta as the respective heads of the Department of Defense and CIA underscores the blurring of roles. General Petraeus is now the director of the CIA, but as commander of the military's CENT-COM he oversaw the expansion of special operations, including JSOC authority.⁵⁴ Panetta, now director of the Department of Defense, presided over the CIA's rapid escalation of

46 Marc Ambinder, "The Secret Team That Killed bin Laden," *The National Journal*, May 2, 2011.

47 Dana Priest and William Arkin, *Top Secret America*, (2011): 225.

48 See *ibid.*, 222, noting that when the CIA "needs help, or when the president decides to send agency operatives on a covert mission into a foreign country, it often borrows troops" from JSOC; Marc Ambinder and D. B. Grady, *The Command: Deep Inside the President's Secret Army*. New Jersey: John Wiley and Sons, 2012, noting that JSOC's Mission Support Activity unit has "gathered intelligence directly, technically reporting to the CIA."

49 See e.g. Paul Rogers, "America's military: failures of success," *Open Democracy*, May 12, 2011.

50 Graham Allison, "How It Went Down," *Time*, May 7, 2012.

51 Eric Schmitt and Thom Shanker, *Counterstrike: The Untold Story of America's Campaign Against al-Qaeda* (New York: Times Books, 2011): 259.

52 Ambinder, Marc, and D. B. Grady, *The Command: Deep Inside the President's Secret Army* (New Jersey: John Wiley and Sons, 2012).

53 Michael D. Lumpkin, Acting Assistant Secretary of Defense, Special Operations/ Low-Intensity Conflict, "The Future of US Special Operations Forces: Ten Years After 9/11 and Twenty-Five Years After Goldwater-Nichols," (statement, Hearing Before the Emerging Threats and Capabilities Subcommittee of the House Committee on Armed Services, 112th Congress, 2011), 62.

54 *Supra* note 45 and accompanying text..

drone strikes in Pakistan under Obama.⁵⁵ We note that, in practice, this exchange may in some instances benefit civilian protection, since General Petraeus was a primary driver behind counterinsurgency strategy in Iraq and Afghanistan that favored limiting civilian casualties as a strategic imperative.

CIA and JSOC cooperation means that at times, the agencies operate under each other's authorities in US law, with implications for accountability. Title 10 and Title 50 in the US code provide various and often mutually supporting authorities for the military and intelligence services. There are some reports of JSOC and CIA operations being conducted under CIA authority because it provides foreign governments a "fig leaf of deniability."⁵⁶

The responsibilities and conduct of the two organizations can be difficult to distinguish on the ground. "[C]o-mingling at remote bases is so complete that US officials ranging from congressional staffers to high-ranking CIA officers said they often find it difficult to distinguish agency from military personnel," reported the *Washington Post* in 2011.⁵⁷ According to another report, "American military and intelligence operatives are virtually indistinguishable from each other as they carry out classified operations in the Middle East and Central Asia."⁵⁸ During the al-Awlaki strike, "the operation was so seamless that even hours later, it remained unclear whether a drone supplied by the CIA or the military fired the missile that ended the al-Qaeda leader's life."⁵⁹ Being unable to identify which agency carried out an operation could make it difficult for the public and policymakers to assign responsibility in the event of abuses or mistakes, particularly for civilians looking for an explanation or redress. We explore issues of congressional oversight and accountability further in the chapter *CIA and JSOC*.

Covert Drone Strikes in Pakistan

The vast majority of US drone strikes have occurred in Pakistan, and US officials have credited them with severely diminishing al-Qaeda's capacity in the region.⁶⁰ In Pakistan, the CIA began conducting strikes in 2004. President Bush ordered an increase late in his second term, in 2008.⁶¹

Until 2006, the US reportedly notified the Pakistani government before launching strikes.⁶² Since that time, the Pakistani government has publicly signaled its rejection of drone strikes as a violation of sovereignty, but there are numerous reports of its consent to continuing

55 Eric Schmitt and Thom Shanker, *Counterstrike: The Untold Story of America's Campaign Against al-Qaeda* (New York: Times Books, 2011): 245.

56 Adam Entous, "Special Report: How the White House learned to love the drone," Reuters, May 18, 2010, "A former US intelligence official said the CIA was conducting the drone strikes instead of the US military because the covert nature of the program gives Islamabad the 'fig leaf of deniability.'"; see also David Ignatius, "Rewriting Rumsfeld's Rules," *The Washington Post*, June 3, 2011, reporting that the "coordination process is often informal" with the CIA director and military commander calling each other "to sort out which activities should be done by the military under Title 10 and which should be CIA Title 50 'covert' activities."

57 Greg Miller and Julie Tate, "CIA shifts focus to killing targets," *The Washington Post*, September 1, 2011.

58 Eric Schmitt and Thom Shanker, *Counterstrike: The Untold Story of America's Campaign Against al-Qaeda* (New York: Times Books, 2011): 245.

59 Greg Miller, "Strike on Aulqi demonstrates collaboration between CIA and military," *The Washington Post*, September 30, 2011.

60 Supra note 6 and accompanying text.

61 See Bobby Ghosh and Mark Thompson, "The CIA's Silent War in Pakistan," *Time*, June 1, 2009, describing George W. Bush's order, during the final months of his presidency, that the CIA greatly increase drone strikes in Pakistan; Peter Bergen and Katherine Tiedemann, "Washington's Phantom War," *Foreign Affairs* 90.12 (2011).

62 See Greg Miller, "At CIA, a convert to Islam leads the terrorism hunt," *The Washington Post*, March 24, 2012, noting that under CIA director Hayden, "the agency abandoned the practice of notifying the Pakistanis before launching strikes, and the trajectory began to change: from three strikes in 2006 to 35 in 2008."

strikes.⁶³ In spring 2012, the US increased the frequency of drone strikes, reportedly out of concern that the CIA would soon need to halt operations due to the opposition of the Pakistani government.⁶⁴ The degree of Pakistani government cooperation, including intelligence and surveillance support, may be diminished at present.⁶⁵

While the CIA's campaign is well-known and US officials have repeatedly alluded to it, there are also reports of parallel JSOC operations.⁶⁶ A Wikileaks cable from October 2009 appears to confirm US Special Forces involvement in drone strikes, with the knowledge and consent of the Pakistani Army.⁶⁷ A military intelligence official told the Nation in 2009 that, "[s]ome of these strikes are attributed to . . . [the CIA], but in reality it's JSOC and their parallel program of UAVs strikes."⁶⁸ According to one account, JSOC carried out three drone strikes in Pakistan under the Bush Administration before being pulled out in response to public outcry and the concerns of the US ambassador to Pakistan.⁶⁹ Other reports suggest that JSOC's role in Pakistan has been limited to providing intelligence for drone strikes conducted under CIA authority. US officials maintain that Special Operations Forces in Pakistan have been present only to train Pakistani forces.⁷⁰



Children in North Waziristan with debris from drone missile.

Photo by Chris Rogers/Center for Civilians in Conflict

Covert Drone Strikes in Yemen

In Yemen, the CIA and JSOC both operate drones and have repeatedly conducted strikes since 2011.⁷¹ The Obama Administration has signaled that it views Yemen as an increasingly important front in counterterrorism operations, declaring in 2012 al-Qaeda's affiliate in Yemen to be the biggest terror threat to Americans today. In April 2012, the US dramatically increased the frequency of strikes in Yemen and for the first time authorized signature strikes by the CIA and JSOC.⁷²

Drone strikes in Yemen apparently target al-Qaeda in the Arabian Peninsula (AQAP), a group the Obama Administration has described as an al-Qaeda affiliate and "associated force."⁷³ Observers warn of the increasing intermingling of AQAP and various groups opposing the Yemeni government under President Abd Rabuh Mansur Hadi, with implications for

63 See e.g., Sebastian Abbott, "Pakistan: US drones kill 18 suspected militants," Associated Press, August 24, 2012, reporting "[d]espite Pakistan's public protests, the government is widely believed to have supported the attacks quietly in the past."; Eric Schmitt and Mark Mazzetti, "Pakistan Arrests C.I.A. Informants in Bin Laden Raid," The New York Times, June 14, 2011, quoting an unnamed official as stating that drone operations "are consistent with the US-Pakistan agreements that have been in place for some time."

64 See Indira A.R. Lakshmanan, "Obama Increases Pakistan Drone Strikes As Relations Sour," Bloomberg News, June 8, 2012.

65 See "Pakistan: US drones kill 18 suspected militants," Associated Press, August 24, 2012; Eric Schmitt and Mark Mazzetti, "Pakistan Arrests C.I.A. Informants in Bin Laden Raid," The New York Times, June 14, 2011.

66 See Jeremy Scahill, "The Secret US War in Pakistan," The Nation, December 7, 2009.

67 See US Embassy Cable, "Pakistan Army GHQ Again Approves Embedding," EO 12958 Decl. 10/05/2034 (October 9, 2009), <http://www.guardian.co.uk/world/us-embassy-cables-documents/229065>.

68 Jeremy Scahill, "The CIA's Secret Sites in Somalia," The Nation, July 12, 2011.

69 See Dana Priest and William Arkin, "Top Secret America" The Washington Post (2011) 227.

70 See Department of Defense, "News Brief with Geoff Morrell from the Pentagon," November 24 2009, stating that Special Operations Forces "have been for months, if not years now, training Pakistani forces so that they can in turn train other Pakistani military on how to -- on certain skills and operational techniques" and emphasizing "that's the extent of our -- our, you know, military boots on the ground in Pakistan."

71 CIA drone strike in 2002 killed a US citizen suspected of ties to Al Qaeda, but the US reportedly did not begin strikes against until May 2011. See Jeb Boone and Greg Miller, "US drone strike in Yemen is first since 2002," The Washington Post, May 5, 2011.

72 See Hakim Almasmari, "Officials: Drone strike kills 13 suspected militants in Yemen," CNN, May 3, 2012, reporting an unnamed Yemeni presidential aide as stating that at least two US drone strikes are conducted daily since mid-April in southern regions controlled by al Qaeda fighters.

73 See Peter Finn, "Secret US Memo Sanctioned Killing of Aulaqi," The Washington Post, September 30, 2011.

killing secessionist rebels and turning communities against the US.⁷⁴ We discuss the impact on local communities in the chapter *Civilian Toll*.

US strikes in Yemen increased in spring 2012, with between 15 and 62 reported strikes, more than in the previous ten years combined.⁷⁵ Media reports suggest that JSOC personnel are on the ground in Yemen, coordinating the drone strikes. US officials state that current drone strikes are only carried out with Yemeni government approval.⁷⁶ However, in 2011, during a period of political turmoil and government transition in Yemen, the United States reportedly conducted strikes without approval.⁷⁷

It remains unclear which agency takes operational lead or under which agency's legal authority the operations are conducted.⁷⁸ In 2011, unnamed Obama Administration officials described JSOC and CIA operations as "closely coordinated" but separate campaigns.⁷⁹ Some 2011 media accounts described US operations as run by JSOC, but with CIA assistance.⁸⁰ According to one account, CIA and JSOC alternate Predator missions in Yemen and borrow each other's resources.⁸¹ JSOC commanders "appear on videoconference calls alongside CIA station chiefs."⁸²

According to unnamed US officials, the CIA took a more dominant role in 2011 due to uncertainty about continuing Yemeni government consent, in light of the political uprising against then-leader and US ally Ali Abdullah Saleh. US officials believed that if Saleh's regime failed and they lost the consent of the Yemeni government, the CIA could still carry out the strikes as "covert actions."⁸³ The CIA reportedly suspended strikes for several months in 2011 and 2012—during the political transition from Saleh to current president Abed Rabbo Mansour Hadi. Drone strikes resumed by spring 2012, but whether they are currently conducted under CIA or military authority is unclear.⁸⁴

Covert Strikes in Somalia

Drones have reportedly tracked individuals in Somalia since 2007.⁸⁵ For the next four years, drones were used strictly for surveillance, and it was not until June 2011 that the first widely

74 See Micah Zenko, "Escalating America's Third War in Yemen," Council on Foreign Relations Blog, May 14, 2012, "The likelihood that US air power will target only those (anonymous) individuals who aspire to attack the United States, while sparing Yemeni rebels, is low. Perhaps more importantly, drone strikes could ultimately unite these disparate groups behind a common banner that opposes both the Hadi regime and its partner in crime, the United States."; see also Mark Mazzetti, "US Is Intensifying a Secret Campaign of Yemen Airstrikes," The New York Times, June 8, 2011, noting "using force against militants in Yemen was further complicated by the fact that Qaeda operatives have mingled with other rebels and antigovernment militants, making it harder for the United States to attack without the appearance of picking sides."

75 See Greg Miller and Karen DeYoung, "US Launches Airstrike in Yemen as New Details Surface About Bomb Plot," The Washington Post, May 10, 2012; "Minimum total confirmed and possible strike events, Yemen January to July 2012," Bureau of Investigative Journalism, estimating between 20 and 62 "strike events" from March to May 2012.

76 See Kimberly Dozier, "Officials: Expanded Drone Strikes Approved," Associated Press April 26, 2012.

77 See Dana Priest and William Arkin, *Top Secret America* (2011) 209.

78 See, e.g., Greg Miller and Karen DeYoung, "US Launches Airstrike in Yemen as New Details Surface About Bomb Plot," The Washington Post, May 10, 2012, "US officials said it was too early to determine whether any high-value targets had been killed in the Thursday attack and declined to say whether it had been carried out by the CIA or the US Joint Special Operations Command, which also patrols Yemen with armed drones and conventional aircraft."

79 See Adam Entous, Siobhan Gorman and Julian E. Barnes, "US Relaxes Drone Rules," The Wall Street Journal, April 26, 2012, "Both the CIA and US military's Joint Special Operations Command, or JSOC, conduct parallel drone campaigns in Yemen."; Greg Miller, "CIA to Operate Drones Over Yemen," The Washington Post, June 14, 2011; Mark Mazzetti, "US Is Intensifying a Secret Campaign of Yemen Airstrikes," The New York Times, June 8, 2011.

80 See Mark Mazzetti, "C.I.A. Building Base for Strikes in Yemen," The New York Times, June 14, 2011.

81 Marc Ambinder and D. B. Grady, *The Command: Deep Inside the President's Secret Army*, New Jersey: John Wiley and Sons, 2012.

82 *ibid.*

83 See Mark Mazzetti, "C.I.A. Building Base for Strikes in Yemen," The New York Times, June 14, 2011; Greg Miller, "CIA to operate drones over Yemen," The Washington Post, June 14, 2011; Siobhan Gorman and Adam Entous, "CIA Plans Yemen Drone Strikes," The Wall Street Journal, June 14, 2011.

84 See e.g., "Yemen: Deadly airstrikes against Qaeda militants days after drone strike kills Fahd al-Quso," Associated Press, May 10, 2012; Kimberly Dozier, "Officials: Expanded Drone Strikes Approved," Associated Press, April 26, 2012.

85 See David Axe, "Hidden History: America's Secret Drone War in Africa," Wired Magazine, August 13, 2012.

reported US drone strike in Somalia took place.⁸⁶ While most reports attributed the strike to JSOC or SOCOM,⁸⁷ CNN described the strike as “part of a new secret joint Pentagon and CIA war” against the Somali-based al-Shabaab, a claim based on a statement by Panetta then downplayed by the Pentagon.⁸⁸

The scale of drone strikes in Somalia is still unknown, but appears to be increasing. A Bureau of Investigative Journalism study estimated between ten and 21 US airstrikes in Somalia as of publication—three to 12 of which may have been drone strikes. According to the Bureau, the strikes resulted in between 58 and 169 deaths.⁸⁹ The UN Monitoring Group on Somalia and Eritrea stated in late June 2012 that “the number of reports concerning the use of Unmanned Aerial Vehicles in Somalia in 2011-12 has increased.”⁹⁰

One source of ambiguity in Somali drone strike figures is that conventional airstrikes are also occurring. Alongside US drone operations, JSOC has reportedly conducted helicopter raids and airstrikes with manned vehicles in Somalia since 2007.⁹¹ The CIA, US Air Force, and American security contractors are reportedly operating air bases in East Africa, as well as the Seychelles,⁹² and the US military is building “a constellation of bases in the Horn of Africa and the Arabian Peninsula.”⁹³ According to one account, American bases in the region operate as many as 12 Predators and Reapers at a time.⁹⁴

The degree of CIA and JSOC involvement in drone strikes in Somalia is unclear and media reports are conflicting. The military does not ordinarily confirm strikes in Somalia and the CIA has never done so, while some news reports attribute strikes only to the US generally.⁹⁵ For example, a July 2011 report by The Nation magazine indicated that a JSOC helicopter picked up people who had been killed or injured after the June 23 drone strike, but did not specify whether the strike was carried out by JSOC, the CIA, or some other entity.⁹⁶ In Sep-

86 See Aweys Cadde and Mohamed Ahmed, “Airstrikes Hit Al-Shabaab Camp Near Kismayo,” *Somalia Report*, June 24, 2011; Greg Jaffe and Karen DeYoung, “US drone targets two leaders of Somali group allied with al-Qaeda, official says,” *The Washington Post*, June 29, 2011; Mark Mazzetti and Eric Schmitt, “US Expands Its Drone War Into Somalia,” *The New York Times*, July 1, 2011; see also Abdi Guled and Malkhdir M. Muhumed, “‘Partner’ Airstrike Hits Somali Militants’ Convoy,” *Associated Press*, June 24, 2011.

87 See e.g., Karen DeYoung, “CIA idles drone flights from base in Pakistan,” *The Washington Post*, July 1, 2011; Greg Jaffe and Karen DeYoung, “US drone targets two leaders of Somali group allied with al-Qaeda, official says,” *The Washington Post*, June 29, 2011.

88 Barbara Starr, “US strikes al Qaeda affiliate in Somalia,” *CNN*, June 28, 2011; Leon Panetta, (statement, Hearing to Consider the Nomination of Hon. Leon E. Panetta to be Secretary of Defense, Senate Committee on Armed Services, 112th Congress, 2011), 43, “So that we are doing that in Yemen. It is obviously a dangerous and uncertain situation, but we continue to work with elements there to try to develop counterterrorism. We are working with JSOC as well in their operations. Same thing is true for Somalia and with regards to AQIM in North Africa, we are working with both the Spanish and the French to develop approaches there that will contain them as well.”; Z. Byron Wolf, “Panetta Says Yemen Still Cooperating in Counterterrorism,” *ABC News Political Punch*, June 9, 2011, “Panetta] appeared to indicate that the CIA was also working with JSOC in operations in Somalia targeting the terror group al Shabab. Pentagon officials later said that Panetta was speaking about counterterrorism cooperation in broad terms and not specifically about JSOC operations in Somalia.”

89 Chris Woods, “Militants and civilians killed in multiple US Somalia strikes,” *Bureau of Investigative Journalism*, first published Feb. 22, 2012; continuously updated, last visited August 21, 2012, *The Iranian TV station Press TV* has reported on a much large number of drone strikes in Somalia—83, as of May 2012—however, the *Bureau of Investigative Journalism*, finding no other news reports corroborating these strikes, has suggested these reports were fabricated by *Press TV*. See “*Press TV’s Somalia Claims 2011-2012*,” *Bureau of Investigative Journalism*, December 2, 2011; Emma Slater and Chris Woods, “*Iranian TV Station ‘faked’ Somali deaths by US drones*,” *Bureau of Investigative Journalism*, December 2, 2011.

90 “*Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2002 (2011)*,” *Letter to UN Security Council*, UN Doc. No. S/2012/544 (July 13, 2012) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/376/40/PDF/N1237640.pdf?OpenElement>

91 See e.g., Michael R. Gordon and Mark Mazzetti, “US Used Base in Ethiopia to Hunt Al Qaeda,” *The New York Times*, February 23, 2007; Sean D. Naylor, “Years of detective work led to al-Qaida target,” *Air Force Times*, November 21, 2011; Jeremy Scahill, “Blowback in Somalia,” *The Nation*, September 26, 2011; “US troops raid Somali town controlled by fighters,” *The Guardian*, September 14, 2009.

92 See David Axe, “*Hidden History: America’s Secret Drone War in Africa*,” *Wired*, August 13, 2012.

93 See Craig Whitlock and Greg Miller, “US assembling secret drone bases in Africa, Arabian Peninsula, officials say,” *The Washington Post*, September 20, 2011; Julian E. Barnes, “US Expands Drone Flights to Take Aim at East Africa,” *The Wall Street Journal*, September 21, 2011.

94 See David Axe, “*Hidden History: America’s Secret Drone War in Africa*,” *Wired*, August 13, 2012.

95 See e.g., Aweys Cadde, “Suspected US Drone Down In Kismayo,” *Somalia Report*, September 25, 2011; Ian Cobain, “British ‘al-Qaida member’ killed in US drone attack in Somalia,” *The Guardian*, January 22, 2012; Mohammed Ibrahim, “US Drone Strike Kills Foreign Commander Fighting for Militants in Somalia,” *The New York Times*, January 23, 2012; “Somali militants in key port ‘attacked by US drones,’” *BBC News*, September 25, 2011; but see Abdi Guled and Malkhdir M. Muhumed, “‘Partner’ Airstrike Hits Somali Militants’ Convoy,” *Associated Press*, June 24, 2011, referring to strike by “military aircraft” from a “partner country”; “Deaths in US drone strike in Somalia,” *Al Jazeera*, February 25, 2012, referring to a US military strike.

96 See Jeremy Scahill, “The CIA’s Secret Sites in Somalia,” *The Nation*, July 12, 2011.

tember 2011 the Wall Street Journal reported that the drone program in Somalia was conducted by the military, but it also reported that operations in Yemen are conducted by the military—less than two weeks before the CIA-led strike there that killed Anwar al-Awlaki.⁹⁷

Somalia's Transitional Federal Government has voiced support for US airstrikes. In a September 2011 interview with the *Wall Street Journal*, prime minister Abdiweli Mohamed Ali said that he did not object to US drone strikes so long as his government was consulted.⁹⁸ More recently, Omar Jamal, charge d'affaire of the Permanent Mission of Somalia to the United Nations, said that the Somali government coordinates with NATO, the US, and the U.K., is notified in advance of drone strikes, and approves of them on the condition that civilian casualties are avoided.⁹⁹

⁹⁷ See Julian E. Barnes, "US Expands Drone Flights to Take Aim at East Africa," *The Wall Street Journal*, September 21, 2011.

⁹⁸ *ibid.*

⁹⁹ See Press Conference: Omar Jamal, April 4, 2012, <http://www.unmultimedia.org/tv/webcast/2012/04/press-conference-omar-jamal-somalia.html> (at 10:49); see also "Mr. Omar Jamal (Somalia) on the outcome of London Conference," Press Conference, April 3, 2012, <http://www.unmultimedia.org/tv/webcast/2012/04/press-conference-mr-omar-jamal-somalia-on-the-outcome-of-london-conference.html> (at 12:50).

The Civilian Toll

While headlines focus on putting a hard number to militant versus civilian deaths, covert drone strikes cause other kinds of harm to civilians and local communities. These second and third order effects are often overlooked in foreign policy and national security circles in favor of praise for the drone program's apparent effectiveness in counterterrorism efforts.

This chapter begins by describing the impact of covert drone strikes on civilian populations. The latter part of the chapter focuses on the US government's narrative of precise targeting with extremely low or no civilian deaths. This narrative obscures the true civilian toll of drone operations outside the Afghanistan combat theater. While official US estimates are not empirically disproven, they appear to be based on deeply problematic assumptions about who is a civilian and are therefore questionable given experience with military operations generally and the attributes of signature strikes in particular.

Scope of Civilian Harm

Deaths and Injuries

There has been no large-scale study of covert drone strikes based on ground reporting in any of the places where the US operates, but several organizations have investigated incidents of civilian harm in Pakistan or aggregated news reports of particular strikes. Although their findings diverge on the ultimate figures of civilian deaths, they consistently point to significantly higher civilian casualties than those suggested by the US government's statements. It is little wonder these studies differ on the number of civilian deaths; the majority of covert strikes in Pakistan take place in North and South Waziristan, areas inaccessible to foreigners as well as to many Pakistani journalists and researchers. Most estimates are based on media reports, local fixers, leaked intelligence, and legal claims. Media reports routinely cite unnamed Pakistani government officials as confirming the identity of the individuals killed as "militants," and the information is rarely corroborated. Moreover, statistics will vary depending on the definition and category—"militant" or "civilian"—that journalists and governments use. While the terms seem intuitive, they are in fact ambiguous, controversial, and susceptible to manipulation.¹⁰⁰

¹⁰⁰ For a study of media reports and drone strike estimates, including "militant" and "civilian" categories, see "Counting Drone Strike Deaths," Human Rights Institute, Columbia Law School, October 2012.

Estimates of Deaths by U.S. Drone Strikes in Pakistan

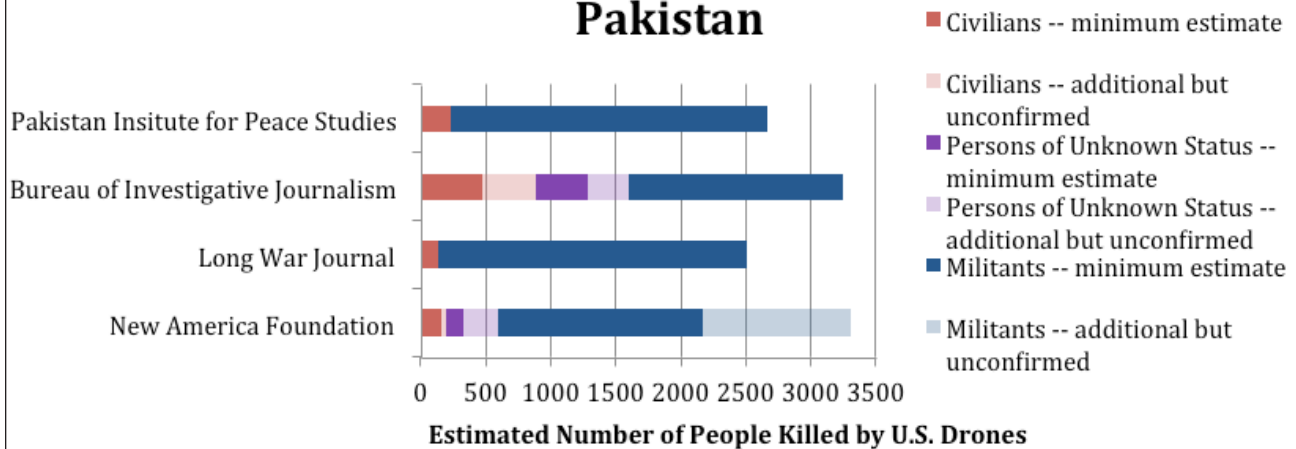


Figure 1.1 Estimates of Drone Strike Deaths as of August 2012ⁱ

Long War Journal's estimates date from 2006, while the other organizations date their estimates from 2004. Pakistan Institute for Peace Studies has estimate current to July 2012 only., although more recent subscription-only data may be available. The Bureau considers all of its estimates of militants to be alleged, but not proven.

The same conflicting casualty rates exist for reports on Somalia and Yemen, although it is clear that the drone strikes have affected the civilian population in these locations (from November) as well.

As a sampling of figures:

In Somalia, the Bureau of Investigative Journalism reports that since 2007, US covert actions—including operations other than drone strikes—have resulted in the death of 58 to 169 individuals as of September 2012, of which 11 to 57 were civilians.¹⁰¹

In Yemen, the New America Foundation reports that drone strikes killed 531 to 779 people, with a civilian casualty rate between 4 percent and 8.5 percent, as of June 2012.¹⁰²

In Pakistan, statistics are compiled by both Pakistan-based organizations and foreign organizations, and they vary.¹⁰³ The Bureau of Investigative Journalism reports a total of 2,562 to 3,325 total killed in drone strikes, including 474 to 881 civilian deaths as of September 2012.

The numbers debate aside, one civilian death or injury is enough to dramatically alter families' lives. In Pakistan, families are often large, and their well being is intricately connected among many members. The death of one member can create long-lasting instability, particularly if a breadwinner is killed. A man named Hakeem Khan told Center for Civilians in Conflict that he lives in pain and struggles to move since he lost his leg to flying debris after a drone strike struck his neighbor's house.¹⁰⁴ In regions most often targeted by drones,

¹⁰¹ "Somalia Reported US Covert Actions 2001-20012," Bureau of Investigative Journalism, February 22, 2012.

¹⁰² "About the National Security Studies Program," accessed August 27, 2012, New America Foundation. <http://yemendrones.newamerica.net/about>.

¹⁰³ For a review of drone casualty estimates provided by various organizations, "Counting Drone Strike Deaths," Human Rights Institute, Columbia Law School, October 2012.

¹⁰⁴ *ibid.*, 62.

women often have a limited earning capacity, and savings and insurance are not common, which leaves widows and orphans extremely vulnerable. Sons may drop out of school to provide for their family, and daughters may forgo education to become caretakers.¹⁰⁵ Similar familial dynamics exist in Somalia.

Injuries due to covert drone strikes are noted less often in research and media reports than are deaths, although they do occur. Due to the precision of drones when striking a particular target, a missile is far more likely to kill than to injure. (Whether or not that target is legitimate is a separate issue.)

Retaliation Against and Stigma Attached to Victims

In northern Pakistan, civilians have been caught in a dangerous position between local militant groups and US drones. Militant groups, such as the Khorasan Mujahedin in Waziristan, pursue retaliatory attacks against local civilians they suspect of being US informants. According to one report, tribal elders in North Waziristan say that most of the people killed by such militant attacks have never acted as informants, though they usually confess after beatings.¹⁰⁶

In one case reported by the *Los Angeles Times*, a shop owner was taken from his shop in Mir Ali by a band of Khorasan gunmen, who threw him into a car and drove away. According to a relative, they took him to a safe house where they locked up him and others suspected of spying for the US drone program. The Khorasan bludgeoned him with sticks for eight weeks, trying to get him to confess that he was a spy, which his relative said he was not. Unable to determine whether he was guilty, the Khorasan released him to another militant group, which set him free 10 days later.¹⁰⁷

In Somalia, on October 4, 2011, al-Shabaab bombed the Transitional Federal Government compound in Mogadishu as revenge for the growing number of drone strikes against its forces, according to one report. The suicide bombing killed over 70 people and injured hundreds more, most of whom were Somali teenagers.¹⁰⁸

While drone attacks have led to the torture and death of civilians alleged to be in collusion with the US, they have also led to the stigmatization of civilians mistakenly targeted. The fabled precision of drones can mean that civilian victims of drone strikes are assumed by their community to be connected to militancy. Victims face the double burden of dealing with the physical attack and also clearing their name.¹⁰⁹

In one drone attack in Pakistan, instead of striking a Taliban hideout, missiles hit the house of Malik Gulistan Khan, a tribal elder and member of a local pro-government peace committee. Five members of his family were killed. "I lost my father, three brothers, and my cousin in this attack," said Adnan, his 18 year-old son. Adnan's uncle claimed, "We did nothing, have no connection to militants at all. Our family supported the government and in fact...was a member of a local peace committee." The family provided Center for Civilians in Conflict with detailed documentation of the deaths of the five family members, including a report from the Assistant Political Agent of South Waziristan and a local jirga requesting that the government pay compensation.¹¹⁰

While terms
"civilian" &
"militant"
seem intuitive,
they are in fact
ambiguous,
controversial,
and susceptible
to manipulation.

105 "Civilian Harm and Conflict in Northwest Pakistan," Center for Civilians in Conflict, 2010.

106 See Alex Rodriguez, "Pakistani Death Squads Go After Informants to US Drone Program," *Los Angeles Times*, December 28, 2011; Jane Mayer, "The Predator War: What Are the Risks of the CIA's Covert Drone Program?" *The New Yorker*, October 26, 2009.

107 Alex Rodriguez, "Pakistani Death Squads Go After Informants to US Drone Program," *Los Angeles Times*, December 28, 2011.

108 "Al-Shabaab Sets the Agenda," *Africa Confidential*, 52.20 (October 7, 2011): 10.

109 Center interview with Pakistani civilian (name withheld), interview no. 20, Northwest Pakistan, 2010.

110 *ibid.*

Describing another unintended consequence, one expert told NYU's Center for Human Rights and Global Justice that al-Qaeda propaganda in Yemen claims US drones are taking pictures of women, which could be used as an excuse to limit women's movement outside the home.¹¹¹ Blame for such a situation rests with al-Qaeda for the false propaganda; however, it is important for the US government to note such hidden ramifications of drone operations.

As an example of another unexpected consequence, in Yemen, an American drone strike in May 2010 killed Jabir al-Shabwani, a prominent sheik and the deputy governor of Marib Province. The sheik's tribe then attacked the country's main pipeline in revenge. With 70 percent of the country's budget dependent on oil exports, Yemen—and thus its people—lost over \$1 billion.¹¹²

Increasing Violence & Instability

Some commentators are concerned that drones may actually be contributing to an increase in violence in Pakistan and Yemen, although studies are not conclusive and some observers disagree. Since the drone program in Pakistan began, there has been an increase in deaths due to terrorist incidents, peaking at 2,500 civilians killed in 2011, according to the US State Department's National Counterterrorism Center.¹¹³ This increase appears to pre-date the escalation of drone strikes in 2008; we are not aware of a study that conclusively demonstrates a causal link between drone strikes and increased violence. To the contrary, some commentators argue that drone strikes have correlated with a slight decrease in violence.¹¹⁴ The conflicting evidence illustrates the confusion over the effectiveness of the US counterterrorism strategy, and the imperative for US policymakers to question—and fully and adequately clarify—the impact of covert drone operations on the ground, including the changing impact over time.

James Traub, a fellow of the Center on International Cooperation, notes that public outrage over drone strikes in Pakistan has “made it almost impossible for the United States to achieve its long-term

goals of helping Pakistan become a stable, civilian-run state.”¹¹⁵ In other words, whatever the short-term benefits of drone strikes, the anger and disrespect felt by the Pakistani civilian population is spurring more discontent generally, and in particular against the Pakistani government due to its collusive role in US drone strikes.

David Kilcullen, former counterinsurgency adviser to General David Petraeus, and Andrew Exum of the Center for a New American Security and a former US army officer in Iraq and Afghanistan, notes:

“If the US and Pakistan continue their aggression, their drone attack policy, the tribal people who are not [militants] will become extremists, so it should be stopped.”

Hakeem Khan, a Pakistani civilian injured by debris from a nearby drone strike.

¹¹¹ See “A Decade Lost: Locating Gender in US Counter-Terrorism,” Center for Human Rights and Global Justice at NYU School of Law, 2011.

¹¹² Ibrahim Mothana, “How Drones Help Al Qaeda,” *The New York Times*, June 13, 2012.

¹¹³ Compare “Country Reports on Terrorism 2011,” Bureau of Counterterrorism, US Department of State, 2012 141, <http://www.state.gov/documents/organization/195768.pdf>; with Peter Bergen and Katherine Tiedemann, “Washington’s Phantom War: The Effects of the US Drone Program in Pakistan,” *Foreign Affairs*, July 2011: 12, 14.

¹¹⁴ See Peter Bergen, “Drones decimating Taliban in Pakistan,” *CNN*, July 4, 2012; Patrick B. Johnson and Anoop Sarbahi, “The Impact of US Drone Strikes on Terrorism in Pakistan,” (unpublished working paper, 2012), <http://patrickjohnston.info/materials/drones.pdf>.

¹¹⁵ James Traub, “Terrorist Fishing in the Yemen,” *Foreign Policy*, May 11, 2012.

Imagine, for example, that burglars move into a neighborhood. If the police were to start blowing up people's houses from the air, would this convince homeowners to rise up against the burglars? Wouldn't it be more likely to turn the whole population against the police? And if their neighbors wanted to turn the burglars in, how would they do that, exactly? Yet this is the same basic logic underlying the drone war.¹¹⁶

Likewise, there are reports that violence in Yemen and anti-US sentiment are increasing as the US drone campaign ramps up. The apparent target of US drone strikes is al-Qaeda in the Arabian Peninsula (AQAP) and Ansar-al-Shariah; however, observers warn that AQAP and various groups opposing the current Yemeni government are intermingling. Drone strikes may fail to distinguish between fighters in the south of the country who are part of an essentially secular southern secessionist movement, and the groups the US believes are affiliated with al-Qaeda. One senior US official questioned how discriminating drone strikes can be, noting that AQAP is "joined at the hip" with fighters whose main goal is to oust the country's government.¹¹⁷

Some Yemeni observers argue that US drone strikes may create or contribute to anti-US opinions and violence. One independence fighter told *The Guardian*, "If young men lose hope in our cause they will be looking for an alternative. And our hopeless young men are joining al-Qaeda."¹¹⁸ A lawyer in Yemen tweeted in May: "Dear Obama, when a US drone missile kills a child in Yemen, the father will go to war with you, guaranteed. Nothing to do with al-Qaeda."¹¹⁹ In May 2012, a *Washington Post* study based on interviews with government officials, tribal elders, and others in Yemen concluded, "an unintended consequence of the attacks has been a marked radicalization of the local population."¹²⁰ As Mohammed al-Ahmadi, a legal coordinator for a local human rights group, said, "The drones are killing al-Qaeda leaders, but they are also turning them into heroes."¹²¹ Destruction of family homes and civilian deaths have reportedly resulted in some instances where local leaders refuse to cooperate with US or Yemeni government-led counterterrorism efforts.

Some US commentators agree that drone strikes in Yemen may have unintended consequences.¹²² The former head of the CIA's counterterrorism center, Robert Grenier, warns that drone strikes in Yemen risk turning "Yemeni militants with strictly local agendas...[into] dedicated enemies of the West in response to US military actions against them."¹²³

One expert notes that Ansar al-Sharia has played a role "in soothing the humanitarian crisis in South of Yemen, [and] civilians respect them as administrators of an area."¹²⁴ Drone strikes against these groups can polarize public opinion of the Yemeni government. While the dynamics of violence, the connection of local groups to al-Qaeda, and the Yemeni political context should not be oversimplified, increasing conflict-related violence will certainly affect civilians, filling communities with guns, munitions, and fighters, and placing the local population at greater risk of being caught up in future drone strikes or violence by militant groups.

116 David Kilcullen and Andrew McDonald Exum, "Death from Above, Outrage Down Below," *The New York Times*, May 16, 2009; Noah Shachtman, "Call Off Drone War, Influential US Adviser Says," *Wired*, February 10, 2009.

117 Greg Miller, "CIA Seeks New Authority To Expand Yemen Drone Campaign," *The Washington Post*, April 18, 2012.

118 Ghaith Abdul-Ahad, "Yemenis Choose Jihad over Iranian Support," *The Guardian*, May 10, 2012; Micah Zenko, "Escalating America's Third War in Yemen," *Council on Foreign Relations*, May 14, 2012.

119 Haykal Bafana, Twitter post, May 11, 2012, 5:50 AM, <https://twitter.com/BaFana3/statuses/200930818816880640>; Ibrahim Mothana, "How Drones Help Al Qaeda," *The New York Times*, June 13, 2012.

120 Sudarsan Raghavan, "In Yemen, US Airstrikes Breed Anger, and Sympathy for Al Qaeda," *The Washington Post*, May 29, 2012.

121 Theodore Karasik, "The Drone Doctrine in Yemen - Understanding the Whole Picture," *Arabian Aerospace*, July 24, 2012.

122 See e.g., Robert Grenier, "Yemen and the US: Down a Familiar Path," *Al Jazeera*, May 10, 2012; Joshua Foust, "American Drones Will Not Save Yemen," *The Atlantic*, May 13, 2012.; Gregory Johnsen, "How Does this End?" *Waq al-Waq*, April 26, 2012.

123 Robert Grenier, "Yemen and the US: Down a Familiar Path," *Al Jazeera*, May 10, 2012.

124 Theodore Karasik, "The Drone Doctrine in Yemen - Understanding the Whole Picture," *Arabian Aerospace*, July 24, 2012.

Psychological Toll

Civilian deaths, injuries, displacement, and property loss caused by conflict are always traumatic for the population. Covert drone strikes take a particular toll, striking unannounced and without any public understanding of who is—and importantly, who is not—a target. For victims in particular, there is no one to recognize, apologize for, or explain their sorrow; for communities living under the constant watch of surveillance drones, there is no one to hold accountable for their fear.

In locations such as northern Pakistan, where drones often buzz overhead 24 hours a day, people live in constant fear of being hit.¹²⁵ Michael Kugelman of the Woodrow Wilson International Center for Scholars notes: “I have heard Pakistanis speak about children in the tribal areas who become hysterical when they hear the characteristic buzz of a drone. [...] Imagine the effect this has on psyches, and particularly on young ones already scarred by war and displacement.”¹²⁶ Unlike deaths and property loss, which may affect one or more families, the fear associated with covert drone strikes affects nearly everyone in a community.

One victim told Center for Civilians in Conflict: “We fear that the drones will strike us again... my aged parents are often in a state of fear. We are depressed, anxious, and constantly remembering our deceased family members...it often compels me to leave this place.”¹²⁷ Another man described the anguish of his sister-in-law, who lost her husband and two sons in a US drone strike in Pakistan: “After their death she is mentally upset...she is always screaming and shouting at night and demanding me to take her to their graves.”¹²⁸ An investigator at the UK charity, Reprieve, who met a young man named Tariq Aziz shortly before he was killed in a March 17, 2011 strike, reported: “I asked him, ‘Have you seen a drone,’ and I expected him to say, ‘Yes, I see one a week.’ But he said they saw 10 or 15 every day. And he was saying at nighttime, it was making him crazy, because he couldn’t sleep. All he was thinking about at home was whether everyone was okay. I could see it in his face. He looked absolutely terrified.”¹²⁹

With US targeting criteria classified, civilians in Pakistan, Yemen, and Somalia do not know when, where, or against whom a drone will strike. The US policy of “signature strikes”—in which targeting is conducted on the basis of behavior and not identity, as we explain in greater detail below—substantially compounds the constant fear that a family member will be unexpectedly and suddenly killed. A civilian carrying a gun, which is a cultural norm in parts of Pakistan, does not know if such behavior will get him killed by a drone.

Property Loss, Displacement, Development and Poverty

A house is often a family’s greatest financial asset. In northern Pakistan, homes are often shared by multiple families, compounding the suffering and hardship caused when a house is destroyed.¹³⁰

Unfortunately, examples of such suffering are not difficult to find. Usman Wazir is now homeless and sleeps at the local mosque or with relatives since a drone destroyed his

125 Center interview with Pakistani civilian (name withheld), interview no. 59, Northwest Pakistan, 2010; Jane Perlez and Pir Zubair Shah, “Drones Batter Al Qaeda and Its Allies Within Pakistan,” *The New York Times*, April 4, 2010.

126 Michael Kugelman, “In Pakistan, Death Is Only One of the Civilian Costs of Drone Strikes,” *Huffington Post*, May 2, 2012.

127 Center interview with Pakistani civilian (name withheld), interview no. 62, Northwest Pakistan, 2010.

128 “Civilian Harm and Conflict in Northwest Pakistan,” Center for Civilians in Conflict, 2010, 27.

129 See Nick Schifrin, “Was Teen Killed by CIA Drone a Militant – or Innocent Victim?” *ABC News*, December 30, 2011.

130 Center interview with Pakistani civilian (name withheld), interview no. 34, Northwest Pakistan, 2010.

home, killing his brother, his wife, and their two teenage children. Shakeel Khan and his elderly parents survived a drone attack on their home, which killed his brother and his brother's wife and children. Khan told Center for Civilians in Conflict that he is struggling to support himself and his parents, adding: "We don't have enough to reconstruct our house and fear that the drones will strike us again."¹³¹ Daud Khan and his surviving family were forced to move from their village in Waziristan when they could not afford to rebuild their home destroyed in a drone strike.¹³²

Drone strikes have also hit many homes in Yemen.¹³³ Strikes have contributed to ongoing violence, which has led to the displacement of over 100,000 people.¹³⁴ Displacement impacts every layer of civilian life and threatens the stability of the community. An airstrike in Jaar, a town in southern Yemen, reduced an entire block to rubble in two consecutive explosions; however, whether the strike was by the US or Yemeni government is unknown.¹³⁵

In Somalia, there are reports that some civilians have been forced to flee their homes in rebel-held areas for fear of drone attacks that target al-Shabaab militants. In January 2012, citizens of the small town of Elasha Biyaha on the outskirts of Mogadishu fled to the larger city to seek refuge after strikes killed a senior rebel leader there.¹³⁶ As Lisa Schirch of 3P Human Security explains, "drone-related displacement disrupts long-term stability by decreasing the capacity of local people to respond through civil society initiatives that foster stability, democracy and moderation and increase displaced people's vulnerability to insurgent recruitment."¹³⁷

According to media reports, the threat or prevalence of drone strikes in Yemen and Pakistan mean some parents are unwilling to send their children to school out of fear.¹³⁸ In Pakistan, there have been several reports of drone strikes that have damaged or destroyed local schools.¹³⁹

Ten-year-old Nadia was at school when a drone strike hit her house, killing her mother and father. Having moved in with an aunt in a nearby town, Nadia told Center for Civilians in Conflict she had "no source of income with my parents gone... my aunt looks after me now and I help her in the house... but I want admission to school. I want an education."¹⁴⁰ According to the BBC, a teenager called Saadullah survived a drone strike that killed three of



"I was resting with my parents in one room when [the drone] hit. God saved my parents and I, but my brother, his wife, and children were all killed. I must support my aged parents now, but I earn a very little amount which can hardly meet our expenses."

—Shakeel Khan

131 "Civilian Harm and Conflict in Northwest Pakistan," Center for Civilians in Conflict, 2010, 60–62.

132 *ibid.*, 60–62.

133 "Frontline: Understanding Yemen's Al Qaeda Threat," PBS, May 29, 2012.

134 See "Yemen: tens of thousands in Abyan in need of urgent help," International Committee of the Red Cross, June 6, 2012, noting that "fierce fighting, sometimes involving air strikes, has led to a severe deterioration of the humanitarian situation" in parts of southern Yemen; "Briefing Notes: Internal displacement grows in Yemeni," Office of the UN High Commissioner for Refugees, March 9, 2012, estimating 150,000 internally displaced people in the south.

135 Kelly McEvers, "Yemen Airstrikes Punish Militants, and Civilians," NPR, July 6, 2012.

136 "Locals Flee Their Homes in Elasha Biyaha," Bar Kulan, January 22, 2012.

137 Lisa Schirch, "9 Costs of Drone Strikes," Huffington Post, June 28, 2012.

138 See Peter Gelling, "Obama's counterterrorism strategy: New York Times buries the lead," GlobalPost, May 29, 2012.

139 See e.g., "Three US Drone Strikes Kill At Least 12 in NW Pakistan," BNO News, May 28, 2012.

140 "Civilian Harm and Conflict in Northwest Pakistan," Center for Civilians in Conflict, 2010, 62.

his family members, but lost both of his legs and one eye. He said: "I wanted to be a doctor... but I can't walk to school anymore. When I see others going, I wish I could join them."¹⁴¹

Justice and Amends

It is important to note that while the US had a practice of offering amends in the form of recognition, explanations, and monetary payments to civilians suffering losses as a result of US combat operations in Vietnam, Iraq, and Afghanistan, no such amends exist for civilians harmed by US drones in Pakistan, Yemen, or Somalia. Humanitarian organizations may sometimes provide help to civilians impacted by drones in accessible areas, but many families are left with nothing. We detail how the covert nature of drone strikes interferes with the US practice of providing recognition and help for civilian harm in the chapter *Civilian Protection Limitations of Drone Technology in Covert Operations*.



"I have no source of income with my parents gone... my aunt looks after me now..."

-Nadia, 10

When Center for Civilians in Conflict conducted interviews of Pakistani drone victims in 2010, all the victims believed the Pakistani or US government owed them compensation for harm resulting from drones, yet not one had received assistance.

Habib Khan is struggling to support his brother's family after his brother was killed when a US drone mistakenly targeted and destroyed his home. Khan said: "After his death all the responsibility for his family and my own is now on me. I am borrowing money from friends but we are living a miserable life and need the help of the government of Pakistan or the US very soon..."¹⁴²

Usman Wazir was at his job selling fruits when a drone hit his house, killing his younger brother, his wife, their 15-year-old son, and 13-year-old daughter. He told the Center, "I demand compensation for each member of my family and demand that my house is rebuilt."¹⁴³ For civilians who demand justice for such losses, there is no known process in Pakistan, Yemen, or Somalia by which they can apply for compensation or file a claim of personal loss. This is compounded by the fact that the existence of the drone program has for so long been officially denied by the US government.

Compensation aside, recognition of harm by the warring party itself often fulfills an important emotional need for civilians harmed in conflict. The secrecy surrounding the drone program, combined with its operation in many areas that are inaccessible, has meant that civilians harmed by drones have no recourse and no point of contact to hold accountable for the sudden devastation they face. This vacuum of accountability can lead to anger, despair, and even hatred, directed at their own government or at the US.

With no ability to voice their grievances directly, drone strike victims in Pakistan are increasingly turning to the nation's legal system for recourse. At the time of publication, there were several cases pending in Pakistani courts against the Pakistani government for failure to

¹⁴¹ See Orla Guerin, "Pakistani Civilian Victims Vent Anger over US Drones," BBC News, November 3, 2011.

¹⁴² "Civilian Harm and Conflict in Northwest Pakistan," Center for Civilians in Conflict, 2010.

¹⁴³ *ibid.*

protect its citizens from drone strikes.¹⁴⁴ There were also suits filed against CIA officials.¹⁴⁵ In August 2012, the Peshawar High Court requested a detailed report from the Pakistani government regarding losses related to drone strikes in the Federally Administered Tribal Areas.¹⁴⁶

US Policy on Minimizing Civilian Harm in Covert Drone Strikes

US officials have repeatedly alluded to a general policy of avoiding covert drone strikes where there is a known risk of civilian death. This policy may have been shaped by hard lessons learned in Afghanistan and Iraq, where the US military consistently amended tactical procedures to minimize civilian casualties as a result of public and official outrage over deaths.

The recently released *US Army Manual on Civilian Casualty Mitigation* advises that civilian casualty mitigation efforts be integrated into military operations. These include: long- and short-term preparation and planning; assessments, reporting and investigations; responding to “allegations and actual incidents of civilian casualties”; and ensuring that “civilian casualty analysis translates into operational lessons learned for...doctrine and training.”¹⁴⁷ (For more, see chapter on *Civilian Protection Limitations*.)

Unlike this US military guidance on civilian casualties, which is publicly available, the exact ways in which the CIA and JSOC minimize harm remains unknown, subject neither to analysis or accountability. However, various US officials—named and anonymous—came forward in spring 2012 to describe aspects of civilian protection procedures.

In May 2012, *The New York Times* reported a White House policy, dictated by President Obama, that unless the CIA had “near certainty” that a strike would result in zero civilian deaths, explicit presidential approval was required.¹⁴⁸ According to one account of the presidential approval process, in “many instances” personnel “would not even take a proposed operation to the president if there was a reasonable chance civilians would be killed.”¹⁴⁹

In a major address in April 2012, counterterrorism adviser John Brennan described the policy in regard to personality strikes, stating:

*We only authorize a particular operation against a specific individual if we have a high degree of confidence that innocent civilians will not be injured or killed, except in the rarest of circumstances.*¹⁵⁰

Recognition of harm by the warring party itself often fulfills an important emotional need for civilians harmed in conflict.

144 In May 2012 two lawsuits were filed in the Peshawar High Court on behalf of relatives and victims of a drone strike in North Waziristan that occurred in March 2011. According to the UK charity Reprieve, the first petition was filed by a family member; the second was filed by Pakistani lawyer Shahzad Akbar of the Islamabad based legal charity, Foundation for Fundamental Rights, on behalf of eight local families who lost family members in the attack; Michele Langevine Leiby, “2 Pakistani Lawsuits Pressure Government To Deal with CIA Drone Strikes,” *The Washington Post*, May 14, 2012; “Drone Strikes,” Reprieve, accessed September 14, 2012, <http://www.reprieve.org.uk/investigations/drones/>.

145 See Pratap Chatterjee, “US ambassador to Pakistan threatened with lawsuit over drone deaths,” *Bureau of Investigative Journalism*, December 9, 2011.

146 See “Court Seeks Record of Drone Strikes,” *Dawn.com*, July 18, 2012; “Peshawar High Court Seeks Report on FATA Drone Losses,” *Daily Times*, August 17, 2012.

147 See generally “ATTP 3-37.31: Civilian Casualty Mitigation,” Headquarters, Department of the Army, 2012, <http://www.fas.org/irp/doddir/army/attp3-37-31.pdf>.

148 See Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” *The New York Times*, May 29, 2012.

149 Daniel Klaidman, “Drones: How Obama Learned to Kill,” *DailyBeast*, May 28, 2012. (Excerpt from Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency*, Boston: Houghton Mifflin Harcourt, 2012).

150 John Brennan, Assistant to the President for Homeland Security and Counterterrorism, “The Ethics and Efficacy of the President’s Counterterrorism Strategy” (speech, Wilson Center for International Scholars, Washington, DC, April 30, 2012), <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>.

Brennan emphasized that “there have indeed been occasions when we have decided against conducting a strike in order to avoid the injury or death of innocent civilians.” According to Brennan, “these standards—for identifying a target and avoiding the loss of innocent civilians—exceed what is required as a matter of international law on a typical battlefield.”¹⁵¹

CIA officials say they have declined to conduct strikes out of concern for civilian life. Former director of the CIA, Leon Panetta, said in a September 2011 interview: “[I]f there are any civilians in the shot, you don’t take it.”¹⁵² According to media accounts, the CIA has “repeatedly refrained from launching missiles” at known targets such as a “prominent religious school” due to “concern for civilian casualties” and has hesitated to conduct strikes in populated towns like Miram Shah.¹⁵³

In an August 2011 report, *The New York Times* reported an unnamed US official as recounting a strike aborted due to the risk of civilian deaths:

*In one recent strike, the official said, after the drone operator fired a missile at militants in a car and a noncombatant suddenly appeared nearby, the operator was able to divert the missile harmlessly into open territory, hitting the car minutes later when the civilian was gone.*¹⁵⁴

Reportedly, President Obama and counterterrorism adviser John Brennan demanded the CIA make changes after a spike in civilian casualties in Pakistan during the first half of 2010. An unnamed official told *The Washington Post*: “[Obama and Brennan] demanded that they keep tightening the procedures, so that if there were any doubt, they wouldn’t take the shot...There were flaws, and they fixed them.”¹⁵⁵

US Government Civilian Casualty Claims

According to US officials, covert drone strikes have caused relatively few civilian deaths, and in some periods of time have caused none at all. In numerous leaks to the press, unnamed Obama Administration officials have claimed between just 20 and 50 civilian deaths

151 *ibid.*

152 Leon Panetta, interview by Charlie Rose, Charlie Rose: Leon Panetta, Secretary of Defense, PBS, September 6, 2011, <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4872>.

153 Greg Jaffe and Greg Miller, “Secret US Cable Warned About Pakistani Havens,” *The Washington Post*, February 24, 2012; see also Mark Mazzetti, Scott Shane and Alissa J. Rubin, “Brutal Haqqani Crime Clan Bedevils US in Afghanistan,” *The New York Times*, September 24, 2011, stating that the CIA is “hesitant to carry out drone strikes” in “populated towns like Miram Shah.”

154 Scott Shane, “C.I.A. Is Disputed on Civilian Toll in Drone Strikes,” *The New York Times*, August 11, 2011.

155 Karen DeYoung, “Secrecy Defines Obama’s Drone War,” *The Washington Post*, December 20, 2011.

since 2008.¹⁵⁶ According to one report, US officials claimed there were just 50 civilian deaths over a ten-year period (2001 to 2011) or less than 2.5 percent of deaths from drone strikes overall.¹⁵⁷ In May 2012, *The New York Times* quoted a senior Administration official as stating that civilian casualties from drone strikes in Pakistan under President Obama were in the “single digits,” presumably meaning over the course of one year.¹⁵⁸ Government officials back up these assertions by noting their policy of avoiding strikes that might result in civilian death, and the precision capabilities of drone technology.

In January 2012, President Obama stated:

*As a general proposition...I want to make sure that people understand that actually, drones have not caused a huge number of civilian casualties. For the most part they have been precise, precision strikes against al-Qaeda and their affiliates and we are very careful in terms of how it's been applied.*¹⁵⁹

In 2009, Leon Panetta, then-director of the CIA and current Secretary of Defense, said that airstrikes in Pakistan were “very limited in terms of collateral damage.”¹⁶⁰ (For more example, see chapter *Civilian Protection Limitations*.)

Events following one particular drone strike illustrate the complexities of deciphering an accurate story of civilian harm. On August 23, 2010, a CIA strike reportedly killed at least seven civilians in Pakistan. Unnamed US officials repeatedly told media for a year after this incident that there were no civilian deaths from drone strikes:

-
- 156 Between 2009 and 2011 government officials repeatedly leaked estimates of civilian deaths, dating them to 2008. In these press accounts, the officials are never named:
- December 2009: In the previous two years about 80 drone strikes killed “just over 20” civilian casualties and “more than 400” enemy fighters.
 - May 2010: Thirty civilians had been killed alongside 500 enemy fighters since 2008.
 - June 2010: Fewer than 50 civilians had been killed since 2008.
 - January and February 2011: “[B]y the CIA’s count” a total of 30 civilians have been killed since July 2008.
 - June 2011: Thirty civilian casualties have been killed.
- See Tony Capaccio and Jeff Bliss, “US Said To Reduce Civilian Deaths After Increasing CIA Pakistan Strikes,” Bloomberg News, January 31, 2011, “The CIA since mid-2008 has executed about 200 strikes, killing roughly 1,300 militants and 30 non-combatants, the official said.”; David S. Cloud, “UN Report Faults Prolific Use of Drone Strikes by US,” Los Angeles Times, June 3, 2010, “US officials have said that fewer than 50 civilians have been killed in the strikes since 2008. ‘Not even the terrorists can credibly claim — let alone prove — that they cause large numbers of innocent casualties. They don’t,’ said the US counterterrorism official.”; Ken Dilanian, “C.I.A. Drones May Be Avoiding Pakistani Civilians,” Los Angeles Times, February 22, 2011, “The CIA does not comment on the drone program. US officials say that by the CIA’s count, a total of 30 civilians have been killed since the program was expanded in July 2008, including the wives and children of militants. Officials say that tally is based on video and images of each attack and its aftermath, along with other intelligence.”; Adam Entous, Siobhan Gorman and Matthew Rosenberg, “Drone Attacks Split US Officials,” The Wall Street Journal, June 4, 2011, “There is disagreement over how many civilian bystanders the strikes have killed. The Pakistanis say hundreds of civilians have died in the strikes, which is part of the reason they want them scaled back. The US says 30 civilians have been slain. Both sides agree hundreds of militants have been killed.”; Adam Entous, “Special Report: How the White House Learned To Love the Drone,” Reuters, May 18, 2010, “According to US intelligence estimates, no more than 30 non-combatants were killed alongside the 500 militants [who the CIA believes the drones have killed since the summer of 2008] — the equivalent of a little more than 5 percent, or about one out of every 20. These mainly included family members who live and travel with the CIA’s targets.”; Scott Shane, “C.I.A. to Expand Use of Drones in Pakistan,” The New York Times, December 3, 2009, “About 80 missile attacks from drones in less than two years have killed ‘more than 400’ enemy fighters, the official said, offering a number lower than most estimates but in the same range. His account of collateral damage, however, was strikingly lower than many unofficial counts: ‘We believe the number of civilian casualties is just over 20, and those were people who were either at the side of major terrorists or were at facilities used by terrorists.’”
- 157 Scott Shane, “C.I.A. Is Disputed on Civilian Toll in Drone Strikes,” The New York Times, August 11, 2011, “American officials, who will speak about the classified drone program only on the condition of anonymity, say it has killed more than 2,000 militants and about 50 non-combatants since 2001 — a stunningly low collateral death rate by the standards of traditional airstrikes.”
- 158 See Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” The New York Times, May 29, 2012.
- 159 “Your Interview with the President — 2012.” YouTube video, 26:37, posted by “whitehouse,” January 30, 2012, <http://www.youtube.com/watch?v=eeTj5qMGTAI/>.
- 160 “US Airstrikes in Pakistan Called ‘Very Effective,’” CNN, May 18, 2009. quoting Leon Panetta.

January 2011: According to an unnamed official, “since the drone program accelerated in mid-August [we] have killed several hundred militants without causing any deaths among civilian non-combatants.”¹⁶¹

February 2011: According to an unnamed official, no civilian had been killed in more than 75 strikes in Pakistan’s tribal areas since August 22, 2010.¹⁶²

June 2011: US counterterrorism adviser John Brennan said that “nearly for the past year there hasn’t been a single collateral death because of the exceptional proficiency, precision of the capabilities we’ve been able to develop.”¹⁶³

August 2011: Brennan stated: “Fortunately, for more than a year, due to our discretion and precision, the US government has not found credible evidence of collateral deaths resulting from US counterterrorism operations outside of Afghanistan or Iraq, and we will continue to do our best to keep it that way.”¹⁶⁴

Brennan’s remarks prompted an investigation by the London-based Bureau of Investigative Journalism, which found that media had credibly reported civilian deaths in “more than one in five” of the 116 reported drone strikes during the year in question.¹⁶⁵ Brennan later clarified his previous statements, saying, “what I said was that over a period of time before my public remarks, that we had no information about a single civilian, a noncombatant being killed.”¹⁶⁶ In a public address, Brennan admitted that drone strikes had resulted in civilian deaths, but said it was “exceedingly rare.”¹⁶⁷

US officials have, over time, provided contradictory data on the number of civilian casualties. Most strikingly, US officials estimated in June 2010 that drone strikes had caused 50 civilian casualties to that date, but a half-year later they revised their estimate downward to 30 casualties.¹⁶⁸ We note that many of these leaks refer specifically to CIA drone strikes but do not mention JSOC drone operations—there is no publicly available information about the latter.

There are practical reasons to question official US estimates of low civilian casualties. We note here that we cannot factually dispute statistical claims; rather, we raise practical questions about civilian harm assumptions as they pertain to covert drone strikes.

Military Operations and Persistence of Civilian Casualties

Estimates of extremely low civilian harm would be unprecedented in the history of combat air operations. Current and former US military officials have expressed deep skepticism

161 Tony Capaccio and Jeff Bliss, “US Said To Reduce Civilian Deaths After Increasing CIA Pakistan Strikes,” Bloomberg News, January 31, 2011.

162 Ken Dilanian, “C.I.A. Drones May Be Avoiding Pakistani Civilians,” Los Angeles Times, February 22, 2011, quoting “anonymous US and Pakistani officials.”

163 See Scott Shane, “C.I.A. Is Disputed on Civilian Toll in Drone Strikes,” The New York Times, August 11, 2011.

164 *ibid.*

165 Chris Woods, “US Claims of ‘No Civilian Deaths’ Are Untrue,” Bureau of Investigative Journalism, July 18, 2011.

166 John Brennan, interview by George Stephanopoulos, This Week, ABC, April 29, 2012, transcript on file with Columbia Human Rights Clinic.

167 John Brennan, Assistant to the President for Homeland Security and Counterterrorism, “The Ethics and Efficacy of the President’s Counterterrorism Strategy” (speech, Wilson Center, Washington, DC, April 30, 2012), <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>.

168 Compare David S. Cloud, “UN Report Faults Prolific Use of Drone Strikes by US,” Los Angeles Times, June 3, 2010, suggesting fewer than 50 civilians have been killed in strikes since the summer of 2008; with Ken Dilanian, “C.I.A. Drones May Be Avoiding Pakistani Civilians,” The Los Angeles Times, February 22, 2011, reporting, a few months later, that only 30 civilians had been killed in strikes since June 2008.

about claims that civilian casualties from drone strikes are extremely low or non-existent, notwithstanding advances in technology. As a general matter, Chairman of the US Naval War College Michael Schmitt has warned:

[T]he availability of advanced intelligence, surveillance and reconnaissance assets, especially UAVs and precision weaponry such as the small diameter bomb, has created the false impression that technology makes 'zero collateral damage' attacks possible.¹⁶⁹

In response to low civilian casualty claims, Jeffrey Addicott, former senior legal adviser to the US Army Special Forces, told Reuters that “based on my military experience, there’s simply no way so few civilians have been killed. [F]or one bad guy you kill, you’d expect 1.5 civilian deaths because no matter how good the technology, killing from that high above, there’s always the ‘oops’ factor.”¹⁷⁰

Colonel David M. Sullivan, an experienced Air Force pilot who is currently Director of Operations at the White House Situation Room, likewise emphasized that claims of no civilian casualties are not realistic, noting that “[n]ever in the history of combat operations has every airborne strike been 100 percent successful.”¹⁷¹ Likewise, unnamed senior officials in the US government have told media that they are skeptical that civilian deaths have been as low as the Administration has claimed.¹⁷²

In Afghanistan, drone strikes and targeting operations utilizing drone surveillance have resulted in mistaken targeting, leading to civilian harm in circumstances that are the same or lower-risk to civilians than covert drone strikes by the CIA and JSOC in Pakistan, Yemen, and Somalia.¹⁷³ In Afghanistan, experienced military personnel benefit from a longer-standing US presence and its attendant advantages, including a greater understanding of the local cultural context and the corroboration of intelligence by ground forces. Nevertheless, drone strikes in Afghanistan have caused significant numbers of civilian deaths, sometimes due to mistaken identity.¹⁷⁴ To reduce civilian casualty rates in Afghanistan, US military forces began restricting airstrikes in 2009.¹⁷⁵

Most strikingly, US officials estimated in June 2010 that drone strikes had caused 50 civilian casualties to that date, but a half-year later they revised their estimate downward to 30 casualties.

An Army investigation found that a February 2010 air strike mistakenly targeted vehicles carrying over 30 civilians in Uruzgan Province, noting there were critical failures related to

169 Michael N. Schmitt, “Targeting and International Humanitarian Law in Afghanistan,” *International Legal Studies*, 85, (2009): 307, 324.

170 Adam Entous, “Special Report: How the White House Learned To Love the Drone,” Reuters, May 18, 2010.

171 Scott Shane, “C.I.A. Is Disputed on Civilian Toll in Drone Strikes,” *The New York Times*, August 11, 2011.

172 Adam Entous, Siobhan Gorman and Julian E. Barnes, “US Tightens Drone Rules,” *The Wall Street Journal*, November 4, 2011.

173 See e.g., Maqsood Azizi, “Daily Security Brief: July 17 2011,” *Pajhwok Afghan News*, July 17, 2011, reporting that three civilians were killed by drones; however NATO did not acknowledge civilian casualties; Nick Hopkins, “Afghan Civilians Killed by RAF Drone,” *The Guardian*, July 5, 2011, reporting that a U.K.-owned Reaper drone piloted from a US air force base killed civilians and quoting a U.K. government official as stating, “The attack would not have taken place if we had known that there were civilians in the vehicles as well.”; David Zucchino and David S. Cloud, “US Deaths in Drone Strike Due to Miscommunication, Report Says,” *Los Angeles Times*, October 14, 2011, reporting that a Marine and a Navy medic were killed by a US Predator drone strike in Afghanistan, accidentally targeted after being mistaken for Taliban fighters

174 See Gregory S. McNeal, “US Practice of Collateral Damage Estimation and Mitigation” *Social Science Research Network*, November 9, 2011, finding that in Iraq and Afghanistan, 70 percent of collateral damage resulted from targeting decisions involving mistaken identity, i.e. failed “positive identification.”

175 See “Unclassified Tactical Directive,” NATO/ISAF, July 7, 2009, http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf; “Unclassified Tactical Directive,” NATO/ISAF, August 1, 2010, <http://www.isaf.nato.int/article/isaf-releases/general-petraeus-issues-updated-tactical-directive-emphasizes-disciplined-use-of-force.html>; “COMISAF’s Tactical Directive,” *International Security Assistance Force (ISAF)*, November 30, 2011.

the collection, analysis, and reporting of intelligence gathered by Predator drones.¹⁷⁶ These included “inaccurate reporting from the crew of the unmanned Predator aircraft to the forces on the ground...that the vehicles contained only military aged males,” when in fact they contained children.¹⁷⁷

Furthermore, as we discuss in *Civilian Protection Limitations*, drones used outside of full-scale military operations have inherent limitations with regard to conducting battle damage assessments and investigations in cases of potential civilian harm. For example, a home-bound sick child is unlikely to be noted by surveillance conducted prior to a strike, and may again be overlooked as the drone surveys the damage to a home and those killed post-strike from thousands of feet above.

Assumptions about Identity

US estimates of extremely low or no civilian casualties appear to be based on a narrowed definition of “civilian,” and the presumption that, unless proven otherwise, individuals killed in strikes are militants. In May 2012, *The New York Times* reported that, according to unnamed Obama Administration officials, the US “in effect counts all military-age males in a strike zone as combatants...unless there is explicit intelligence posthumously proving them innocent.”¹⁷⁸ Though one aide to the President called the Times’ characterization a “wild oversimplification,” Administration officials did not deny that they presume unknown individuals killed in a strike are militants.¹⁷⁹ One Administration official told ProPublica that the Times article was “not wrong that if a group of fighting age males are in a home where we know they are constructing explosives or plotting an attack, it’s assumed that all of them are in on that effort.”¹⁸⁰ Another unnamed Administration official sought to diminish the importance of the estimation method, stating that “[t]his story is debating whether there are zero civilian casualties or eight”—in other words, that no matter the counting method, civilian harm from drone strikes is low.¹⁸¹

A presumption that individuals killed in a drone strike zone are militants would cause the US to systematically undercount and overlook civilians harmed by covert drone strikes.¹⁸² Moreover, as we describe in the chapter *Ethical and Legal Implications*, systematic undercounting could lead the US to fail to inculcate learned lessons and institute better precautionary measures against civilian harm in subsequent strikes.

Signature Strikes and the Likelihood of Civilian Casualties

US claims about extremely low civilian casualties are especially implausible with regard to signature strikes, which rely on behavior to identify possible militants. In personality strikes (those focused on previously identified and known individuals), US processes require that, before engagement, operators identify the target with a high level of certainty in reliance on “multiple sources, including imagery, cell phone intercepts and informants on the ground.”¹⁸³ In contrast, US forces can initiate a signature strike after observing certain patterns of

176 While the operation relied on intelligence gathered by Predator drone crews, the strike was conducted by Kiowa helicopters that engaged with Hellfire missiles. See Dexter Filkins, “Operators of Drones Are Faulted in Afghan Deaths,” *The New York Times*, May 29, 2010.

177 “AR 15-6 Investigation: CIVCAS Incident in Uruzgan Province,” Memorandum for Commander, US Forces-Afghanistan and International Security Assistance Force, February 21, 2010.

178 See Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” *The New York Times*, May 29, 2012.

179 James Rosen, “Obama Aides Defend Claim of Low Civilian Casualties After Drone ‘Kill List’ Report,” *FoxNews*, May 30, 2012.

180 Justin Elliott, “Dissecting Obama’s Standard on Drone Strike Deaths,” *ProPublica*, June 5, 2012.

181 James Rosen, “Obama Aides Defend Claim of Low Civilian Casualties After Drone ‘Kill List’ Report,” *FoxNews*, May 30, 2012.

182 See Letter from Elisa Massimino, President, Human Rights First, to Barack Obama, President of the United States, May 29, 2012, <http://www.humanrightsfirst.org/wp-content/uploads/Letter-to-President-Obama-on-Targeted-Killing.pdf>, arguing that “[s]uch a policy permits both the targeting of innocent civilians in violation of international law, and allows the administration to undercount the number of civilian casualties resulting from such strikes.”

183 Greg Miller, “CIA Seeks New Authority To Expand Yemen Drone Campaign,” *The Washington Post*, April 18, 2012.

Signature Strikes

On March 17, 2011, covert forces carried out a signature strike on what they believed to be a heavily armed group with some of its members connected to al-Qaeda and all “acted in a manner consistent with AQ (al-Qaeda)-linked militants.” The US claimed it killed 20 militants. However members of the community and Pakistani officials said the missiles hit a meeting (or jirga) held to resolve a mining dispute, killing four Pakistani Taliban fighters and 38 civilians and tribal police.

behavior. Since their identity is unknown, even during the strike, these targeted individuals may be confused with civilians who cannot be targeted directly as a legal matter, and confirming their identity post-strike is a significant challenge without personnel to investigate. Even current and former government officials have suggested that signature strikes could lead to greater civilian casualties.¹⁸⁴

For example:

We are concerned that the use of such ‘signature’ strikes could raise the risk of killing innocent civilians or individuals who may have no relationship to attacks on the United States.

– Members of the US House of Representatives
in a letter to President Obama¹⁸⁵

In recent weeks, the White House has announced a stepped-up drone campaign in Yemen...missile operators in Yemen are being permitted to fire at targets engaged in activities deemed “suspicious,” even when the target personalities themselves are unknown...I do not claim deep knowledge of developments in Shabwa Province, but when I hear significant numbers of tribal militants being referred to as al-Qaeda operatives, and AQAP, a small organization dominated by non-Yemenis, being alleged to have political control of significant parts of Yemen, I react with some skepticism, and some suspicion.

– Robert Grenier, former Director
CIA Counter-Terrorism Center (2004-2006)¹⁸⁶

Signatures may encompass a wide range of people: men carrying weapons; men in militant compounds; individuals in convoys of vehicles that bear the characteristics of al-Qaeda or Taliban leaders on the run, as well as “signatures” of al-Qaeda activity based on operatives’ vehicles, facilities, communications equipment, and patterns of behavior.¹⁸⁷ The strength of any one signature may be limited. As one Yemeni official said, “Every Yemeni is armed...so how can they differentiate between suspected militants and armed Yemenis?”¹⁸⁸

In anonymous leaks, CIA and Administration officials have touted the agency’s ability to develop accurate “signatures” or patterns of behavior that identify a target. A senior US intelligence official stated that the CIA became so adept at developing telltale signatures of al-Qaeda activity from threads of intelligence in Pakistan that it could tell “what was happening inside an al-Qaeda compound—whether a leader was visiting or explosives were being assembled, for example—based on the location and number of security operatives surrounding the site.”¹⁸⁹

¹⁸⁴ See David Rohde, “The Obama Doctrine: How the President’s Drone War Is Backfiring,” *Foreign Policy*, (March/April 2012): 65.

¹⁸⁵ Letter from 26 Members of Congress to Barack Obama, President of the United States, June 12, 2012, http://kucinich.house.gov/uploadedfiles/combata_drones_061212.pdf; Jeremy Herb, “Lawmakers Want Legal Justification for Drone Strikes,” *The Hill*, June 13, 2012.

¹⁸⁶ Robert Grenier, “Yemen and the US: Down a Familiar Path,” *Al Jazeera*, May 10, 2012.

¹⁸⁷ See Scott Shane, “US Said to Target Rescuers at Drone Strike Sites,” *The New York Times*, February 5, 2012; Eric Schmitt and David E. Sanger, “Pakistan Shift Could Curtail Drone Strikes,” *The New York Times*, February 22, 2008; Greg Miller, “CIA Seeks New Authority To Expand Yemen Drone Campaign,” *The Washington Post*, April 18, 2012.

¹⁸⁸ Adam Entous, Siobhan Gorman and Julian E. Barnes, “US Relaxes Drone Rules: Obama Gives CIA, Military Greater Leeway in Use Against Militants in Yemen,” *The Wall Street Journal*, April 26, 2012.

¹⁸⁹ Greg Miller, “CIA Seeks New Authority To Expand Yemen Drone Campaign,” *The Washington Post*, April 18, 2012.

However, former intelligence analyst Marc Garlasco told the Columbia Human Rights Clinic that it was difficult to develop signatures in Iraq where the US had a military presence on the ground, and argued it is unlikely that the US could develop strong signatures in areas like Pakistan where the US has access to even fewer sources of intelligence.¹⁹⁰

A recent incident in Shiga, Pakistan, demonstrates the potential weakness of the US's current signatures, particularly in avoiding civilian harm. On March 17, 2011, covert forces carried out a signature strike¹⁹¹ on what they believed to be a heavily armed group with some of its members connected to al-Qaeda and all "acted in a manner consistent with AQ (al-Qaeda)-linked militants."¹⁹² The US claimed it killed 20 militants.¹⁹³ However members of the community and Pakistani officials said the missiles hit a meeting (or jirga) held to resolve a mining dispute.¹⁹⁴ They claimed that four Pakistani Taliban fighters and 38 civilians and tribal police were killed.¹⁹⁵ A farmer, Gul Ahmed, explained that "[t]he militants were there because they controlled the area and any decision made would need their approval."¹⁹⁶ Pakistan's Army Chief, General Ashfaq Parvez Kayani, issued a statement saying tribal elders had been "carelessly and callously targeted with complete disregard to human life."¹⁹⁷ These conflicting statements point to the challenges of identifying who has been killed by drone strikes, and call into question the US Administration's creativity in its casualty counts.

190 Columbia Human Rights Clinic telephone interview with Marc Garlasco, former senior intelligence analyst at the Pentagon, New York City, New York, April 11, 2012.

191 Adam Entous, Siobhan Gorman and Julian E. Barnes, "US Tightens Drone Rules," *The Wall Street Journal*, November 4, 2011, describing a signature strike that took place in Pakistan on March 17, 2011.

192 Sebastian Abbott, "AP Impact: New Light on Drone War's Death Toll," Associated Press, February 25, 2012.

193 David Rohde, "The Obama Doctrine: How the President's Drone War Is Backfiring," *Foreign Policy*, (March/April 2012): 65.

194 Sebastian Abbott, "AP Impact: New Light on Drone War's Death Toll," Associated Press, February 25 2012.

195 *ibid.*

196 *ibid.*

197 David Rohde, "The Obama Doctrine: How the President's Drone War Is Backfiring," *Foreign Policy*, (March/April 2012): 65.

Civilian Protection Limitations of Drone Technology in Covert Operations

US intelligence officials tout the drone platform as enabling the most precise and humane targeting program in the history of warfare.¹⁹⁸ President Obama has described drone strikes as “precise, precision strikes against al-Qaeda and their affiliates.”¹⁹⁹ Leon Panetta, Secretary of Defense, has emphasized that drones are “one of the most precise weapons we have in our arsenal,”²⁰⁰ and counterterrorism adviser John Brennan has referred to the “exceptional proficiency, precision of the capabilities we’ve been able to develop.”²⁰¹ Media and mainstream observers have largely repeated these claims with little critical questioning.²⁰² Indeed, former intelligence analyst Matthew M. Aid described drones as the “darling of the American news media.”²⁰³

Claims about minimizing civilian harm ignore many of the operational realities of using drones outside of full-scale military operations, with issues ranging from a weakened ability to develop accurate, reliable, and corroborated intelligence, to the quality of the video feed. In other words, “precision” depends in part on factors independent of the quality or sophistication of the weapons platform itself. Furthermore, enthusiasm for drone technology’s capabilities has led the government to commit to the development, acquisition, and in some cases, deployment of personnel, vehicles, and technologies without proper training and testing. Finally, conducting proper battle damage assessments, investigating claims

198 Adam Entous, “Special Report: How the White House Learned to Love the Drone,” Reuters, May 18, 2010, “US intelligence officials proudly tout the drone campaign as the most precise and possibly humane targeted killing program in the ‘history of warfare’”; see also Declan Walsh, Eric Schmitt and Ihsanullah Tipu Mehsud, “Drones at Issue at US Rebuilds Ties to Pakistan,” *The New York Times*, March 18, 2012, reporting an “official who spoke on the condition of anonymity because of the program’s covert status” as stating: “These efforts have been extremely precise and effective.”

199 See Christi Parsons and Michael A. Memoli, “Obama Opens Up about Drone Strikes in Pakistan,” *Los Angeles Times*, January 31, 2012.

200 See “President Obama’s Difficult, Deadly Decisions on Counter-terrorism in Spotlight,” ABC News, May 29, 2012.

201 See e.g., Scott Shane, “C.I.A. Is Disputed on Civilian Toll in Drone Strikes,” *The New York Times*, August 11, 2011.

202 “Predators and Civilians: An Intelligence Report Shows How Effective Drone Attacks Are,” *The Wall Street Journal*, July 14, 2009, arguing that an intelligence report the Journal saw “corrects” media reports of the level of civilian casualties from drone attacks; “The US Is Right to Strike Hard at Terrorists in Yemen,” *The Washington Post*, May 8, 2012, commending authorization of signature strikes in Yemen; “The C.I.A. and Drone Strikes,” *The New York Times*, August 13, 2011, questioning claims of no civilian casualties and calling for greater transparency, but also stating “It is true that the precision technology and American efforts have kept noncombatant deaths to a minimum.”

203 Matthew M. Aid, *Intel Wars: The Secret History of the Fight Against Terror* (New York: Bloomsbury Press, 2012), 53.

of civilian harm, and making amends to civilians suffering losses are inherently challenged when the US uses drones in places with few boots on the ground.

In this chapter, we begin by detailing civilian harm that can occur due to flawed intelligence sources and analysis specific to the nature of the covert drone program. We then describe the accelerated training of personnel and procurement of drone technology by the US, and highlight the potential risks to civilians of moving too quickly. Finally, we analyze the particular limitations of a covert drone platform in assessing and responding to civilian harm.

As noted in previous chapters, our goal here is not to draw firm conclusions about drone use and civilian harm, but rather to question current assumptions about drones as a panacea for counterterrorism efforts. The US government should address how technological advances can be matched with new processes to prevent and respond to civilian harm, and particularly how to address the below-noted inherent limitations on these issues ascribable to drones used in covert settings.



The home of Gul Nawaz, a Pakistani civilian whose house was destroyed. Eleven members of his family were killed including women and children. Nawaz said, "I blame the government of Pakistan and the USA...they are responsible for destroying my family. We were leading a happy life and I didn't have any links with the Taliban. My family members were innocent...I wonder, why was I victimized?"

Intelligence Sources, Analysis, and Drone Development

US officials have repeatedly emphasized that drone technology can "ensure that the best intelligence is available for planning and carrying out operations" with the result that "the risk of civilian casualties can be minimized or avoided altogether."²⁰⁴ While drones can collect extensive video footage before and after strikes, there may be systematic flaws in the intelligence upon which targeting decisions are based.

The US likely relies on three forms of intelligence in covert drone operations: overhead video, signals intelligence, and human intelligence.²⁰⁵

²⁰⁴ The officials have spoken in nearly verbatim terms. See Eric Holder, Attorney General, Department of Justice, "Attorney General Eric Holder Speaks at Northwestern University School of Law" (speech, Northwestern University School of Law, Chicago, IL, March 5, 2012), <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>, "In fact, the use of advanced weapons may help to ensure that the best intelligence is available for planning and carrying out operations, and that the risk of civilian casualties can be minimized or avoided altogether."; Harold Hongju Koh, Legal Adviser, US Department of State, "Speech at the Annual Meeting of the American Society of International Law" (speech, Annual Meeting of the American Society of International Law, Washington, DC March 25), 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm>, "Indeed, using such advanced technologies can ensure both that the best intelligence is available for planning operations, and that civilian casualties are minimized in carrying out such operations."; Jeh Johnson, General Counsel, Department of Defense, "National Security Law, Lawyers and Lawyering in the Obama Administration," (speech, Yale Law School, New Haven, CT, February 22, 2012), www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school, "Advanced technology can ensure both that the best intelligence is available for planning operations, and that civilian casualties are minimized in carrying out such operations."

²⁰⁵ This is a basic list of intelligence forms. More specifically, drones are "capable of being outfitted with specialized equipment in support of Signals Intelligence (SIGINT), Measurements and Signature Intelligence (MASINT), Imagery Intelligence (IMINT), and Ground Moving Target Indicator (GMTI) collection."; Justin D. Wallestad and Dr. Theodore Karasik, "Drones: A New Chapter in Modern Warfare." Institute for Near East and Gulf Military Analysis, 2011, http://umn.academia.edu/JustinWallestad/Papers/1064415/Drones_A_New_Chapter_in_Modern_Warfare. The CIA has described its use of human and signals intelligence as a general matter. "INTelligence: Human Intelligence," Central Intelligence Agency, October 21, 2010, 11:30AM, <https://www.cia.gov/news-information/featured-story-archive/2010-featured-story-archive/intelligence-human-intelligence.html>; "INTelligence: Human Intelligence," Central Intelligence Agency, August 26, 2010, 11:39 AM, <https://www.cia.gov/news-information/featured-story-archive/2010-featured-story-archive/intelligence-signals-intelligence-1.html>.

Drone Video

Drone sensors can survey potential targets consistently over long periods of time, gathering huge amounts of information.²⁰⁶ However, this drone video footage can miss or fail to delineate key information. Although some drones may be capable of striking “with pinpoint accuracy from an altitude 25,000 feet,” with cameras that can identify details as minute as whether an individual is missing an arm or wearing a hat, drone strikes can still result in mistakes and civilian casualties if the intelligence and underlying analysis is incorrect.²⁰⁷

Drones sometimes collect video footage in situations where civilians and targeted individuals co-mingle, in villages and urban areas.²⁰⁸ Some observers note that drone sensors do not provide a clear enough picture to distinguish individuals in these circumstances. Former CIA officer Bruce Riedel notes, “You can only see so much from 20,000 feet.”²⁰⁹ Former senior intelligence analyst Marc Garlasco told the Columbia Human Rights Clinic that it is difficult to use image intelligence in densely populated areas and in areas like northern Pakistan with thick vegetation.²¹⁰ In April 2011, during a combat engagement involving the Marines and the Taliban in Afghanistan, a Predator was “unable to discriminate the highly distinctive combat outline of two Marines (with full battle equipment) from the irregular enemy.”²¹¹

During the later stages of targeting, drone operators may be hampered by what is known as the “soda straw” effect. As a weaponized drone zooms in to pinpoint the target, it loses a wider picture of the area—like viewing a small amount of liquid through a soda straw, instead of the entire glass.²¹² The soda straw effect creates a risk that civilians may move into the vicinity of the strike without being noticed by drone operators, and therefore without having been considered as part of a targeting analysis. (Some experts said this problem might be mitigated by new technology, by the simultaneous use of surveillance drones with weaponized drones, or by pairing drones with manned vehicles.)

In one account, drone pilot Matt J. Martin describes the targeting of a truck in Afghanistan, apparently full of “insurgents.” Viewed through Predator footage, the truck appeared to be far enough away from surrounding houses and pedestrians to be lethally targeted. The ground commander, who was also monitoring the Predator footage, gave clearance to take the shot. After the missile had been fired, two young boys unexpectedly appeared on the operator’s screen, riding a bicycle. Martin describes his horror as he could do nothing but wait and watch as the missile killed the two boys together with the occupants of the truck.²¹³ With a wider field of view (and accompanying authorization to call off a strike in the presence of civilians, which the CIA and JSOC may maintain), the two boys may have been noted in time to save them.

206 See Eric Schmitt, “Threats and Responses: The Battlefield,” *The New York Times*, November 6, 2002.

207 Matthew M. Aid, *Intel Wars: The Secret History of the Fight Against Terror* (New York: Bloomsbury Press, 2012), 53; See Adam Entous, “Special Report: How the White House Learned to Love the Drone,” *Reuters*, May 18, 2010; Matt J. Martin and Charles W. Sasser, *Predator: The Remote-Control Air War over Iraq and Afghanistan: A Pilot’s Story*, Minneapolis: Zenith Press, 2010.

208 See R. Geiss and M. Siegrist, “Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities,” *International Review of the Red Cross*, (March 2011); 11, 19; C. Christine Fair, Nicholas Howenstein, and J. Alexander Thier, “Troubles on the Pakistan-Afghanistan Border,” *US Institute of Peace*, December 2006, noting that “Taliban and al Qaeda militants have taken refuge in the remote villages” of the tribal areas along the Pakistan-Afghanistan border and that “the commingling with so-called ‘foreigners’ has upended the traditional tribal identification” in these areas.

209 Ken Dilanian, “CIA Drones May Be Avoiding Pakistani Civilians,” *Los Angeles Times*, February 22, 2011, quoting Bruce Riedel

210 Columbia Human Rights Clinic interview with Marc Garlasco, former senior intelligence analyst at the Pentagon, New York City, NY, April 11, 2012.

211 Winslow Wheeler, “Finding the Right Targets,” *Time*, February 29, 2012; Keith Rogers, “Predator Strike that Killed Sailor Angers Father,” *Las Vegas Review-Journal*, April 1, 2012, describing Central Command investigation report the newspaper received through a Freedom of Information Act request.

212 See “Too Much Information: Taming the UAV Data Explosion,” *Defense Industry Daily*, May 16, 2010, “UAV operators compare looking through a UAV camera to looking through a soda straw”; Marc V. Schanz, *The Reaper Harvest*, *Air Force Mag.*, Apr. 2011 (noting that the soda straw effect is “one of the common criticisms” of drones; Marc V. Schanz, “The Reaper Harvest,” *Air Force Magazine*, April 2011; David Axe and Noah Schachtman, “Air Force’s ‘All-Seeing Eye’ Flops Vision Test,” *Wired*, January 24, 2011, <http://www.wired.com/dangerroom/2011/01/air-forces-all-seeing-eye-flops-vision-test/>; Ellen Nakashima and Craig Whitlock, “With Air Force’s Gorgon Drone ‘We Can See Everything,’” *The Washington Post*, January 2, 2011.

213 See Matt J. Martin and Charles W. Sasser, *Predator: The Remote-Control Air War over Iraq and Afghanistan: A Pilot’s Story* (Minneapolis: Zenith Press, 2010), 211-212.

Signals Intelligence

Due to the limitations of video surveillance, corroboration with other sources of intelligence is a greater necessity. In targeting operations generally, including covert drone strikes, the US corroborates video surveillance with signals intelligence, which is information collected through signals transmitted from communication and electronic systems.²¹⁴ However, in the relatively low-technology environments in which US drone strikes have often occurred, signals intelligence is likely limited to intercepting and tracking phones.²¹⁵

The value of phone intercepts is limited by several factors. First, in low-tech environments, it may not be possible to corroborate phone intercepts with other signals intercepts, if they do not exist. Second, phone intercepts are easily subject to manipulation. Members of armed organizations in Afghanistan and Pakistan are reportedly aware that the US relies on phone communications for intelligence, and deliberately mislead US operators.²¹⁶ Where the location of a phone is being used to find a target, individuals can deliberately swap SIM cards or phones.²¹⁷ Third, even absent direct manipulation, the accuracy of signals intelligence is limited. Where the location of a phone is being used to identify a target, the target may not be the person holding the phone at the time of the strike. Accuracy will also be affected by the GPS limitations of the particular phone technology being used, the quality of the network, and whether or not the location can be triangulated—all factors which are limited in northern Pakistan and other regions in which drones operate.²¹⁸

In 2010, based on phone intercepts, US Special Forces came to believe that Taliban deputy governor Muhammad Amin was using the name Zabet Amanullah as an alias. Amanullah was an actual person, a former Taliban fighter who had laid down his arms and become, according to one media account, an advocate of human rights and the US-backed government.²¹⁹ According to an investigation by the Afghanistan Analysts Network (AAN), a US drone strike targeted and killed Amanullah based on the belief he was the same person as Amin, but Amin was alive and seen in Pakistan well after the strike.²²⁰ Nine other men—whom US forces presumed to be militants—were killed in the attack on Amanullah. AAN researcher Kate Clark said of the killings: “If your understanding of Afghanistan—it’s a complex place—is just made up of signals intelligence, and you don’t even have the most basic human intelligence, there is absolutely the opportunity for things to go catastrophically wrong.”²²¹

The same is true of the isolated regions in which drone attacks occur, with the added limitation that there are fewer journalists and foreign analysts to investigate and report on these kinds of mistakes.

Human Intelligence

Drone strikes in Pakistan and Yemen are also based on human intelligence—information gathered from human sources such as covert agents, informants, and foreign government

214 “INTelligence: Human Intelligence,” Central Intelligence Agency, August 26, 2010.

215 Columbia Human Rights Clinic interview with Marc Garlasco, former senior intelligence analyst at the Pentagon, New York City, NY, April 11, 2012.

216 See Joseph Fitsanakis and Ian Allen, “Cell Wars: The Changing Landscape of Communications Intelligence,” Research Institute for European and American Studies, May 2009, http://www.voltairenet.org/IMG/pdf/Cells_War.pdf; Rowan Scarborough, “Taliban Taunts US Eavesdroppers,” Human Events, February 11, 2009, <http://www.humanevents.com/2009/02/11/taliban-taunts-us-eavesdroppers/>.

217 See *ibid*; Columbia Human Rights Clinic interview with Marc Garlasco, former senior intelligence analyst at the Pentagon, New York City, NY, April 11, 2012.

218 *ibid*.

219 Michael Hastings, “The Rise of the Killer Drones: How America Goes to War in Secret,” Rolling Stone, April 16, 2012.

220 See Kate Clark, “The Takhar Attack: Targeted Killings and the Parallel Worlds of US Intelligence and Afghanistan,” Afghan Analysts Network, May, 2011, http://aan-afghanistan.com/uploads/20110511KClark_Takhar-attack_final.pdf; Kate Clark, “Targeted Killings and Two Worlds in Afghanistan: Inside the Takhar Attack,” Foreign Policy, May 11, 2011.

221 Quil Lawrence, “Afghan Raids Common, But What If Target Is Wrong?” NPR, May 12, 2011, quoting Kate Clark.

sources.²²² We know little about the capabilities of covert CIA and JSOC agents operating in Pakistan.²²³ Instead, our focus is on the reliability and vetting of local informants and foreign cooperating government personnel. Eyewitness reports of who is doing what on the ground serve not merely to corroborate, but also as the basis for targeting decisions that may involve civilians.²²⁴

The US frequently relies on human intelligence from direct sources in the communities in which it is conducting operations.²²⁵ There are serious questions about the quality, motivation, and vetting of such sources in the covert drones context. In regions racked by poverty, there are concerns that the reliability of informants may be undermined by cash payments for information.²²⁶ There are reports of informants being paid between \$300 - \$1000 or more.²²⁷ Stories abound in northwest Pakistan of families and rival groups using locator chips to have their enemies targeted and to settle personal vendettas.²²⁸

The use of local informants puts at risk not only the informants themselves, who may be civilian, but entire civilian communities. As we described in the chapter *Civilian Toll*, suspicion of informants has led local armed militant groups to retaliate by torturing and killing local villagers.

Reliance on local informants can divert the US from developing more reliable networks of human intelligence. Joshua Foust, a fellow at the American Security Project, notes that in Afghanistan, “we relied on sketchy local sources instead of doing the hard work to develop thorough human intelligence.” Accordingly, “the result, way too often, is firing blind based on ‘pattern of life’ indicators without direct confirmation that the targets are, in fact, who we think they are—killing innocent people in the process.”²²⁹

Direct confirmation of identity may not be possible in the context of covert drone strikes. In south Yemen, for example, the challenging terrain and ongoing conflict may limit the ability of US intelligence officials to operate—increasing US reliance both on drone surveillance, and on foreign government officials and local informants.²³⁰

Intelligence provided by foreign governments and military officials may also, in certain circumstances, be unreliable. On one hand, relationships with foreign governments are critical to buttressing US intelligence and thus diminishing the likelihood of strikes against civil-

222 See “Counterinsurgency Field Manual, FM 3-24/MCWP 3-33.5,” US Army, US Marine Corps, December 2006; “INTEllIGENCE: Human Intelligence,” Central Intelligence Agency, October 21, 2010.

223 The CIA and JSOC have both had operatives on the ground in Pakistan to gather intelligence and recruit informants. The government cited the CIA’s ground presence in Abbotabad—it rented a house near Osama bin Laden’s compound and ran a fake vaccination campaign to get blood samples in the area—as one of the reasons for its confidence going into the raid that killed Osama bin Laden. The CIA and JSOC’s presence in Pakistan dates back to at least 2005, when an earthquake in Kashmir led to a loosening of travel restrictions and US operatives and contractors entered posing as construction and aid workers. Eric Schmitt and Thom Shanker, *Counterstrike: The Untold Story of America’s Secret Campaign Against Al Qaeda*, (New York: Times Books, 2011), 257-58; Karin Brulliard, “CIA Vaccine Program Used in bin Laden Hunt in Pakistan Sparks Criticism,” *The Washington Post*, July 21, 2011; Marc Ambinder and D.B. Grady, *The Command: Deep Inside the President’s Secret Army*, (Amazon Digital Services, 2012). Kindle edition.

224 See Ellen Nakashima and Craig Whitlock, “With Air Force’s Gorgon Drone ‘We Can See Everything,’” *The Washington Post*, January 2, 2011, “Officials also acknowledge that Gorgon Stare is of limited value unless they can match it with improved human intelligence - eyewitness reports of who is doing what on the ground.”

225 Nicholas Mumm, “Crowdsourcing: A New Perspective on Human Intelligence Collection in a Counterinsurgency,” *Small Wars Journal*, January 3, 2012. Human intelligence may also be sourced and gathered by private security companies and passed on to US forces, or gathered by Pakistani contractors and directly delivered to US agents. See Scott Horton, “The Trouble with Drones,” *Harpers*, May 3, 2010; Jeremy Scahill, “The Secret US War in Pakistan,” *The Nation*, December 7, 2009.

226 See “Civilians in Armed Conflict: Civilian Harm and Conflict in Northwest Pakistan,” Center for Civilians in Conflict, 2010, 22; see Alex Rodriguez, “Pakistani Death Squads Go After Informants to US Drone Program,” *Los Angeles Times*, December 28, 2011; Jane Mayer, “The Predator War: What Are the Risks of the CIA’s Covert Drone Program?” *The New Yorker*, October 26, 2009; Shuja Nawaz, “Drone Attacks Inside Pakistan: Wayang or Willing Suspension of Disbelief?” *Georgetown Journal of International Affairs*, (Summer/Fall 2011): 79, 83.

227 Alex Rodriguez, “Pakistani death squads go after informants to US drone program,” *Los Angeles Times*, December 28, 2011.

228 See “Civilians in Armed Conflict: Civilian Harm and Conflict in Northwest Pakistan,” Center for Civilians in Conflict, (2010), 61.

229 Joshua Foust, “Unaccountable Killing Machines: The True Cost of US Drones,” *The Atlantic*, December 30, 2011.

230 See Anirudh Sivaram and Dr. Theodore Karasik, “The Drone Doctrine in Yemen,” *Institute for Near East and Gulf Military Analysis*, 2012.

ians. On the other hand, intelligence from foreign governments may seek to divert the US to target their own enemies, without due regard for civilians who may be at risk. It remains unclear what procedures the CIA and JSOC use for vetting foreign intelligence against US civilian protection criteria; the criteria itself is also unknown.

Some US officials believe the US was manipulated by the Yemeni regime in 2010 when it conducted a drone strike based on local intelligence which killed Jabir Shabwani: a political rival of the then President Abdullah Saleh.²³¹ According to *The Wall Street Journal*, officials in the Obama Administration had rejected calls to expand the drone campaign in Yemen until recently, due partly to fears that the US could be manipulated by Yemeni intelligence sources.²³²

Even where intelligence sources provide reliable material, targeting mistakes can result if analysis is flawed. Below, we describe how drone-targeting analysis based on videos and signals intelligence can be hampered by an overload of data and undercut by deficient cultural and situational understanding, and by poor training of personnel. Our purpose is not to show that drone technology has led to widespread civilian harm; rather, we identify the limitations of drone technology in enabling “precision” strikes and avoiding mistaken killing of civilians.

“Data crush” and Skills Lag

Surveillance and weaponized drone development has far outpaced analysis and personnel capabilities, risking mistakes in targeting and, ultimately, civilian casualties.

Drone sensors capture far more data than operators can process and analyze, a problem that is only increasing as drone technology’s capabilities advance and its use proliferates. The problem of informational overload, or “data crush,” is not unique to drones, but the increasing use has worsened the problem. According to a currently serving US Air Force intelligence officer:

*[T]he air force pushed into operation a sexy new piece of high-tech spy gear without giving much thought to the human dimension...how much data these new machines were going to produce and how many people were going to be needed to process and analyze the data...We put the cart before the horse again.*²³³

Although the focus of our report is covert drone strikes conducted by the CIA and JSOC, the candor with which the conventional military forces acknowledge the problem underscores its gravity. In April 2012, Secretary of the Air Force Michael Donley said that it would be “years” before Air Force personnel would be able to sift through the “unsustainable” amounts of video and still imagery collected by its drones.²³⁴ Likewise, the US Army has acknowledged taking more surveillance and storing more data than it has the capacity to properly analyze.²³⁵ The military is pursuing solutions that would speed up data analysis

231 See Adam Entous and Julian E. Barnes, “US Doubts Intelligence that Led to Yemen Strike,” *The Wall Street Journal*, December 29, 2011.

232 *ibid.*

233 Matthew M. Aid, *Intel Wars: The Secret History of the Fight Against Terror* (New York: Bloomsbury Press, 2012), 55.

234 Spencer Ackerman, “Air Force Chief: It’ll Be ‘Years’ Before We Catch Up on Drone Data,” *Wired*, April 5, 2012; Matthew M. Aid, *Intel Wars: The Secret History of the Fight Against Terror* (New York: Bloomsbury Press, 2012), 55.

235 See “US Army Unmanned Aircraft Systems: Changing Modern Warfare,” *Torchbearer National Security Report*, July 2010, <http://www.ausa.org/publications/ilw/Documents/TB-US%20Army%20Unmanned.pdf>; Spencer Ackerman, “Congress Funds Killer Drones the Air Force Says It Can’t Handle,” *Wired*, May 7, 2012.

and processing, including automating drone cameras to send pre-selected data to imagery analysts.²³⁶ The Air Force has even asked to scale back plans to acquire more drones until it has enough human resources to properly operate the machines and analyze the waves of footage.²³⁷ CIA capacity to handle drone surveillance is unknown, however, with the number of strikes occurring in Pakistan alone, one can assume the data load is also significant.

“Data crush” may result in mistaken targeting of civilians, if analysts and decision-makers miss an important detail that is obscured by the flood of information. For example, a US investigation cited information overload as one reason for mistakes in a US military targeting operation against a convoy in Afghanistan, which left 23 civilians dead. Solid reports that children were present in the targeted convoy were lost amidst the vast swirl of data coming in from drones overhead.²³⁸

Proper analysis of the vast wealth of data collected by drones may worsen as drone technology development accelerates.²³⁹ The newly developed “Gorgon Stare” surveillance system, for example, will be mounted with at least nine cameras, and will be capable of transmitting live video images of the physical movement of an entire small town.²⁴⁰ It is not immediately clear how US personnel will keep pace with so much data, though experts we spoke to noted information sorting technologies under development—in sum, an effort to match technology with technology.

The technology exists to program drones to track and analyze themselves, but government officials have repeatedly emphasized that trigger authority will remain with humans, and will not be delegated to drones.²⁴¹

Limited Situational Awareness and Cultural Intelligence

Analysis based on incorrect assumptions or limited understanding of local dynamics may lead to mistakes—including the mistaken targeting of civilians. This is especially a problem in signature strikes, where the US targets individuals based on behavior, i.e. a tall man driving a blue car. The risk of erroneous signature-creation and analysis is higher when, as in the covert drone strike context, US personnel cannot consistently engage with the population, and thus have little organic understanding of the context in which said tall man is driving said blue car. Drone operators may identify what appears to be suspicious behavior, but may lack the contextual and cultural understanding necessary to properly analyze that behavior or recognize evidence of innocence.

Video footage cannot capture the power dynamics responsible for the behavior of civilians which might appear suspicious and result in targeting. For example, some residents of North Waziristan have told Center for Civilians in Conflict that they feel either forced or

236 Spencer Ackerman, “Air Force Chief: It’ll Be “Years” Before We Catch Up on Drone Data,” *Wired*, April 5, 2012.

237 Spencer Ackerman, “Congress Funds Killer Drones the Air Force Says It Can’t Handle,” *Wired*, May 7, 2012.

238 See Thom Shanker and Matt Richtel, “In New Military, Data Overload Can Be Deadly,” *The New York Times*, January 16, 2011; see also “Executive Summary for AR 15-6 Investigation, 21 February 2010 CIVCAS incident in Uruzgan Province,” United States Forces – Afghanistan, Kabul Afghanistan, <http://www.isaf.nato.int/images/stories/File/April2010-Dari/May2010Revised/Uruzgan%20Investigation%20Findings.pdf>.

239 See Christopher Drew, “Drone Flights Leave Military Awash in Data,” *The New York Times*, January 11, 2010, noting that Reaper drones, which are newer and larger than Predators, will be able to record video in 10 directions at once, with plans to increase this to 30 in 2011 and as many as 65 after that.

240 See Craig Whitlock, “Gorgon Stare Surveillance System Gazes over Afghan War Zone,” *The Washington Post*, April 29, 2011; but see Colin Clark, “Gorgon Stare Blinks a Lot; Testers Say Don’t Field Til Fixed,” *DoDBuzz*, January 24, 2011, <http://www.dodbuzz.com/2011/01/24/gordon-stare-blinks-a-lot-testers-say-dont-field-til-fixed/>, describing several problems that led Air Force testers to conclude the Gorgon Stare is “not operationally suitable” yet.

241 See Shane Harris, “Out of the Loop: A Human-free of Unmanned Aerial Vehicles,” *Hoover Institution*, 4, http://media.hoover.org/sites/default/files/documents/EmergingThreats_Harris.pdf.

culturally beholden to provide food and shelter to militants.²⁴² Yet it appears that civilians may have been mistakenly targeted in signature strikes for exactly this behavior. Consider Daud Khan, whom the Center interviewed:

Daud Khan, from North Waziristan, was at his home with his 10 year-old son when a drone missile struck. He says, “The day before some Taliban had come to the house and asked for lunch. I feared them and was unable to stop them because all the local people must offer them food. They stayed for about one hour and then left. The very next day our house was hit... My only son Khaliq was killed. I saw his body, completely burned.”²⁴³

US experiences in Afghanistan illustrate the risks of targeting with limited cultural and contextual awareness. On February 21, 2010, a large group of men set out to travel in convoy. They had various destinations, but as they had to pass through the insurgent stronghold of Uruzgan province, they decided to travel together so that if one vehicle broke down, the others could help. From the surveillance of a Predator, US forces came to believe that the group was Taliban. As described by an Army officer who was involved: “We all had it in our head, ‘Hey, why do you have 20 military age males at 5 a.m. collecting each other?’... There can be only one reason, and that’s because we’ve put [US troops] in the area.” The US forces proceeded to interpret the unfolding events in accordance with their belief that the convoy was full of insurgents. Evidence of the presence of children became evidence of “adolescents,” unconfirmed suspicions of the presence of weapons turned into an assumption of their presence. The US fired on the convoy, killing 23 people.²⁴⁴

This mistake took place in the context of Afghanistan—a country in which US forces have been operating for over a decade and where US personnel are living on the ground. An incident of this type may be more likely in a place such as Somalia, where there are fewer boots on the ground and fewer interactions with the local population.

Lack of Proper and Comprehensive Training

Weapons, however sophisticated, are limited by the skill of the person operating them. There is little publicly available information on the level of training required for pilots and sensor operators for CIA and JSOC drone operations. Some studies suggest that high demand for drone pilots and operators may override the need for being fully trained on civilian protection best practices, distinction, and cultural sensitivities.

For example, the Air Force, responding to exponentially increasing demand for Reaper and Predator pilots, has developed accelerated training programs; a drone pilot can now be trained in less than two years, without undergoing traditional pilot training first or undergoing a tour of duty, as the Air Force had previously required.²⁴⁵ The CIA has neither officially provided nor leaked information about the training of drone operators in its program, but

²⁴² “Civilian Harm and Conflict in Northwest Pakistan,” Center for Civilians in Conflict, 2010, 22.

²⁴³ *ibid.*, 61.

²⁴⁴ See David S. Cloud, “Anatomy of an Afghan War Tragedy,” Los Angeles Times, April 10, 2011; “Executive Summary for AR 15-6 Investigation, 21 February 2010 CIVCAS incident in Uruzgan Province,” United States Forces – Afghanistan, Kabul Afghanistan, <http://www.isaf.nato.int/images/stories/File/April2010-Dari/May2010Revised/Uruzgan%20investigation%20findings.pdf>.

²⁴⁵ See Mark Mazzetti, “The Drone Zone,” The New York Times, July 6, 2012. As of 2005, the Air Force only allowed pilots trained to operate B-52s and F-15s to operate Predator drones. Three years later, the Air Force reportedly dropped its requirement that pilots serve a tour of duty prior to joining the drone program. The Air Force launched two accelerated drone training programs: a four-to-six-week program for pilots who had completed flight training but had no experience and a nine-month program designed for captains with four to six years of experience in the Air Force who had previously received no flight training. See Noah Shachtman, “Attack of the Drones,” Wired, June 2005; Lolita C. Baldor, “Air Force Creates New Pilot Programs for Drones,” Associated Press, October 24, 2008; Eric Hagerman, “Point. Click. Kill: Inside The Air Force’s Frantic Unmanned Reinvention,” *Popsci*, August 18, 2009.

there are reports that the CIA uses Air Force pilots. JSOC's pilots and operators may be drawn from Air Force Special Operations, and reportedly undergo specialized and additional training.²⁴⁶

Some observers have questioned the adequacy of drone pilot training, pointing to the incidence of drone crashes—at least 12 in 2011 and eight in 2010.²⁴⁷ A 2004 study of US Army drone accidents found that four of the 56 accidents studied were caused by training failure.²⁴⁸ We surveyed all public reports on the issue and did not find that, considered cumulatively, they establish that poor pilot training is frequently causing drone crashes or that drone crashes have put civilian lives at risk. However, the reports suggest the need for a thorough assessment of whether acceleration of drone pilot training programs is appropriate.

Demand for drone pilots and other personnel will only increase as the US continues to rely on this technology; indeed, in 2011 the demand reportedly prompted the Air Force to consider having pilots control four planes at once.²⁴⁹

Rapid Procurement of Drone Technology

Increasing demand has led to rapid procurement of drone technology, in some cases with limited testing and inadequate assessments of the weaknesses. Leading defense analyst Winslow Wheeler argues:

*The proclamation of drones, such as Reaper, to be the future of warfare, a revolutionary transformation, is an empty, data-free proclamation. The MQ-9 [Reaper] neither saves money nor improves performance compared to analogous, even primitive, aircraft.*²⁵⁰

In March 2004, the US General Accounting Office warned that the Department of Defense was entering into buying commitments before complete testing.²⁵¹ In March 2010, the Government Accountability Office concluded that some drone systems have been rushed into combat operations, leading to performance issues and delays in development, operational testing and verification.²⁵²

According to Lt. Gen. David Deptula, former Air Force deputy chief of staff for intelligence: "Some of the [drones] that we have today, you put in a high-threat environment, and they'll

246 See Marc Ambinder and D.B. Grady, *The Command: Deep Inside the President's Secret Army*, (Amazon Digital Services, 2012). Kindle edition; Oliver North and Chuck Holton, *American Heroes in Special Operations*, (New York: Fidelis Books, 2011), 9, noting that JSOC includes the Air Force's 24th Special Tactics Squadron.

247 See Mark Mazzetti, "The Drone Zone," *The New York Times*, July 6, 2012; "United States Air Force Class A Aerospace Mishaps Fiscal Year 2011," United States Air Force Judge Advocate General's Corps, accessed September 14, 2012, <http://usaf.aib.law.af.mil/indexFY11.html>; "The Drone Wars UK Drone Crash Database," *The Drone Wars UK*, accessed September 14, 2012, <http://dronewarsuk.wordpress.com/drone-crash-database/>; "United States Air Force Class A Aerospace Mishaps Fiscal Year 2010," United States Air Force Judge Advocate General's Corps, accessed September 14, 2012, <http://usaf.aib.law.af.mil/indexFY10.html>.

248 Sharon D. Manning et al., "The Role of Human Causal Factors in US Army Unmanned Aerial Vehicle Accidents," *US Army Aeromedical Research Laboratory*, 2004, <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA421592>.

249 Andrea Shalal-Esa and Tim Hopher, "Future Drone Pilots May Fly Four Warplanes at Once," *Reuters*, December 23, 2011; "Flight of the Drones," *The Economist*, October 8, 2011.

250 Winslow Wheeler, "MQ-9 Reaper: Not the 'Revolution in Warfare' You've Been Told," *Common Defense Quarterly*, Summer 2012.

251 US General Accounting Office, "Force Structure: Improved Strategic Planning Can Enhance DOD's Unmanned Aerial Vehicles Efforts," (Report to the Chairman, Subcommittee on Tactical Air and Land Forces, Committee on Armed Services, House of Representatives, March 2004), 5-7, <http://www.fas.org/irp/gao/gao-04-342.pdf>.

252 See US Government Accountability Office, "Defense Acquisitions: DOD Could Achieve Greater Commonality and Efficiencies among its Unmanned Aircraft Systems," (testimony, Subcommittee on National Security and Foreign Affairs, Committee on Oversight and Government Reform, House of Representatives, March 23, 2010), 2, <http://www.gao.gov/assets/130/124311.pdf>.

start falling from the sky like rain.”²⁵³ It remains unclear whether such gaps in testing and verification of proper function could lead directly to civilian deaths; however, they certainly provide reason for a closer watch on rapid government procurement and use of lethal drones.

The development of drone software and coding is of similar concern. In litigation between two technology companies, Netezza Corporation and Intelligent Integration Systems Inc. (IISi). IISi alleged that Netezza had reverse-engineered its software coding and sold it to the CIA for use with Predator drones, although IISi’s coding was not designed for Netezza’s system and did not work on it.²⁵⁴ IISi’s Chief Technology Officer Richard Zimmerman said: “My reaction was one of stun, amazement that they want to kill people with my software that doesn’t work.” He expressed concern about potential liability “in case that code kills people.”²⁵⁵

CIVILIAN CASUALTY MITIGATION FOR THE US ARMY

The US Army Manual on Civilian Casualty Mitigation describes six simultaneous steps for integrating civilian casualty mitigation efforts into operations.

1. **PREPARE** long- and short-term at all levels of Command to ensure units can respond to civilian casualty incidents.
2. **PLAN** to ensure that civilian protection concerns are integrated into planning, decision-making and orders development.
3. **EMPLOY** practical and tangible steps to mitigate civilian harm.
4. **ASSESS** incidents by ensuring accurate and timely reporting and assessments, and investigations when civilian casualties result.
5. **RESPOND** to allegations and actual incidents of civilian casualties in a professional and appropriate manner.
6. **LEARN** by ensuring that civilian casualty analysis translates into operations, doctrine and training.

Assessing & Responding to Civilian Harm

Assessing and responding to civilian harm caused by drone strikes is one of the most significant limitations of this weapons platform when used outside a traditional combat theater. In conventional US military operations, an analysis called a battle damage assessment is conducted following any lethal operation to assess the outcome of the engagement and any civilian harm that may have occurred. If civilian harm is either known or alleged, an investigation will be conducted to verify losses, learn lessons to prevent future harm, and, in many cases, dignify losses with monetary payments or other assistance. In Afghanistan, where drones are operated in concert with boots on the ground and with access to the civilian population, these steps have become standard.²⁵⁶

Taking these steps is important for several reasons. First, recognizing civilian harm sends a meaningful signal that the US stands by its stated commitments to human dignity and human life. Second, from a strategic standpoint, post-strike data and investigations offer a counter to false allegations of civilian harm and are an important maker of operational effectiveness. Third, post-strike analysis and investigations can be used to learn lessons

253 Micah Zenko, “Ten Things You Didn’t Know About Drones,” *Foreign Policy*, March/April 2012; Noah Shachtman, “US Drone Goes Down over Pakistan Again,” *Wired*, January 25, 2010.

254 See *Netezza Corp. v. Intelligent Integration System*, CA No. 09-4961-BLS, Affidavit of Richard Zimmerman, September 7, 2010, and Affidavit of Christian Hicks, September 6, 2010 (on file with Columbia Human Rights Clinic).

255 *ibid*; Video Deposition of Richard Zimmerman, Apr. 12, 2010, at 179-185 (on file with Columbia Human Rights Clinic); see also Jeff Stein, “CIA Mum on Lawsuit Alleging Drone Targeting Errors,” *The Washington Post*, October 4, 2010.

256 Battle damage assessments are often mandated as a matter of policy or regulation, but are not a legal obligation. US military manuals indicate that assessment is an integral part of the targeting cycle; see “Joint Targeting,” Joint Publication 3-60, (April 13, 2007); “COMISAF’s Tactical Directive,” International Security Assistance Force (ISAF), November 30, 2011, describing a tactical directive issued by Gen. John Allen that requires “ground battle damage assessments in all situations where there is a potential loss of life or injury to insurgents or Afghan civilians, except when an assessment would put ISAF personnel at greater risk.”

and prevent future harm to civilians.²⁵⁷ Finally, there are legal obligations to investigate war crimes and serious violations of the laws of war. This onus remains regardless of a weapon's precision.

Post-strike Analysis and Investigations Into Civilian Harm

When a state uses force, there are legal obligations to investigate civilian harm that potentially violates international law. There are also moral and strategic imperatives to assess and investigate civilian harm that may not violate international law—in an armed conflict framework, the so-called “collateral damage.”

As a previous Columbia Human Rights Clinic study explains, although US officials have described legal principles that apply to US targeting operations, there remain unanswered questions about what legal framework the government applies to its covert drone program.²⁵⁸ Important debates about US legal obligations in covert targeting operations, including the application of international human rights law and the laws of war, are not the focus of this report—although we discuss broader questions in the chapter *Ethical and Legal Implications*.

With regard to possible war crimes, governments have broadly recognized a duty to investigate and the International Committee of the Red Cross (ICRC) regards it as customary law, binding all states.²⁵⁹ (The sources and scope of the duty are a matter of debate.)²⁶⁰ Basic standards include that investigations are timely or conducted with reasonable speed, they bring about an elucidation of the facts by, for example, collecting relevant witness statements and forensic evidence, and they should be conducted with impartiality and independence.²⁶¹

Echoing these principles to an extent, the Department of Defense requires that “all reportable incidents committed by or against US personnel, enemy persons, or any other indi-

257 See Brendan Groves, “Civil-Military Cooperation in Civilian Casualty Investigations: Lessons Learned from the Azizabad Attack,” *Air Force Law Review*, 2010, citing “Report on the Understanding Collateral Damage Workshop,” Carr Center for Human Rights Policy, Harvard University, June 4-5 2002.

258 See “Targeting Operations with Drone Technology: Humanitarian Law Implications,” Human Rights Institute, Columbia Law School, 2011, http://www.law.columbia.edu/ipimages/Human_Rights_Institute/BackgroundNoteASILColumbia.pdf.

259 See “Rule 158: Prosecution of War Crimes,” International Committee of the Red Cross, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule158; see also United Nations General Assembly, Resolution 60/147, “UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” December 16, 2005, <http://www2.ohchr.org/english/law/remedy.htm>.

260 The duty to investigate derives from the obligations to suppress violations of the Conventions, to search for any person accused of violating the Conventions and to impose effective penal sanctions. International Committee of the Red Cross, 6 UST. 3114, 75 UNT.S. 31, “Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,” art. 49, August 12, 1949. [hereinafter Geneva Convention I]; International Committee for the Red Cross, 6 UST. 3217, 75 UNT.S. 85, “Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea,” art. 50, August 12, 1949. [hereinafter Geneva Convention II]; International Committee of the Red Cross, 6 UST. 3316, 75 UNT.S. 135, “Geneva Convention Relative to the Treatment of Prisoners of War,” art. 129, August 12, 1949. [hereinafter Geneva Convention III]; International Committee of the Red Cross, 6 UST. 3516, 75 UNT.S. 287, “Geneva Convention Relative to the Protection of Civilian Persons in Time of War,” art. 146, August 12, 1949. [hereinafter Geneva Convention IV]. These treaty provisions apply to international armed conflict, rather than non-international armed conflict; the US government claims that its operations against al-Qaeda and associated forces take place in the latter. Scholars disagree about whether the customary norm regarding investigation applies to non-international armed conflict. They also disagree about whether the norm requires investigation of war crimes alone, or of other serious violations of the laws of war in addition. Compare Michael N. Schmitt, “Investigating Violations of International Law in Armed Conflict,” *Harvard National Security Journal* 2 (2011): 39, 47, emphasizing that “war crime is the condition precedent to activation of the duty”; with Amichai Cohen and Yuval Shany, “Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts,” *Research Paper No. 02-12, Yearbook of International Humanitarian Law*, January 2012, arguing the duty is broader, since it derives from the obligation to suppress all violations of the Geneva Conventions, the command responsibility doctrine, and the precautionary obligations of the parties to the conflict.

261 Columbia Human Rights Clinic interview with Daniel Cahen, legal advisor, ICRC Regional Delegation for the US and Canada, Washington, DC, February 13, 2012; see also “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” United Nations, December 16, 2005, <http://www2.ohchr.org/english/law/remedy.htm>, requiring states to “[i]nvestigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law.”

vidual are reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action.”²⁶² Although these requirements apply only to law of war violations, multiple military lawyers told the Clinic that the ethos of the requirement remains, regardless of the categorization of civilian harm—lawful or unlawful.

While there is no legal duty to investigate civilian harm deemed “lawful” in an armed conflict context, there are significant moral and strategic reasons to do so. Assessing civilian harm is an important marker of operational effectiveness, as no party using force can know if it was accurate, precise, or proportionate unless it has data about the impact of that force. Without proper post-strike assessment, it would be near impossible to make an accurate statement about the amount of civilian harm caused in any particular operation.

Failure to engage with local communities about civilian harm can increase resentment and distrust. In Iraq and Afghanistan, the US found that immediately denying civilian harm before a proper investigation further incited local anger—public discontent insurgent groups took advantage of, including by making false accusations of civilian casualties. As a result, the US adopted a policy of immediately investigating any potential incident of civilian harm.²⁶³

Investigations, particularly where they are conducted with a degree of transparency, send a meaningful signal to foreign publics that the US is committed to human dignity and human life. They would offer the US government opportunities to address allegations that it has targeted civilians and civilian objects, such as mosques and schools—allegations that gravely undermine relations with partner governments and drive anti-US public sentiment.

It is unclear whether US procedures for military investigations apply to covert drone operations conducted under CIA authority. Furthermore, while Department of Defense directives do not distinguish between commands, we could not gain clarity on whether operations by JSOC are subject to the same kinds of investigation and reporting requirements as other military operations (see chapter *CIA and JSOC*).²⁶⁴ Administration statements and Clinic interviews with government officials suggest that the Administration believes it is meaningfully addressing the possibility of civilian casualties on the “front end” of drone strikes, i.e., through precision targeting, but has not planned for “back-end” assessment of civilian deaths. The Clinic requested information regarding post-drone strike investigation procedures from the Department of Defense but received no reply.²⁶⁵

Reports suggest US personnel sometimes attempt to confirm the identity of those killed by covert drone strikes with physical evidence, but more often rely on intercepts of phone calls

262 “Directive 2311.01E,” Department of Defense, May 9, 2006, <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf>; “Chairman of the Joint Chiefs of Staff Instruction 5810.01D: Implementation of the DoD Law of War Program,” Joint Chiefs of Staff, April, 30 2010; see also “Operational Law Handbook,” Judge Advocate General’s Legal Center and School, US Army, 2012, http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf, defining a “reportable incident” as a “possible, suspected or alleged violation of the [laws of war] for which there is credible information” and emphasizing “WHEN IN DOUBT, REPORT.”

263 “Tactical Directive,” NATO/ISAF, December 30, 2008, para. 6.

264 See e.g., “Directive 2311.01E,” Department of Defense, May 9, 2006, <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf>, applying to “the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense.” (emphasis added)

265 In April 2012, the Columbia Human Rights Clinic requested information from the Department of Defense Office of General Counsel regarding post-strike investigation systems specifically for drone strikes, and had received no response as of publication.

and emails discussing who was killed.²⁶⁶ In the case of high profile strikes, US officials have described near certainty about the identity of individuals killed. Congressman Adam Schiff, who was interviewed shortly after the reported killing of Anwar al-Awlaki in 2011, stated:

We want to make sure that we can make positive identification. It's no good to us if we don't know whether we have killed the right person. So that may take the form of having DNA that we can match. It may take the form of having dental records or other proof of....suffice to say that there's a high level of confidence that the ID is correct here....On the basis of what I heard, yes, and you wouldn't have high-ranked people in the administration expressing such confidence about it unless they had pretty rock solid proof.²⁶⁷

However, there are no reports that the US collects physical evidence to determine the identity of individuals killed in routine operations. Comprehensive battle damage assessments and investigations, as occur in combat theaters, require skilled personnel working on the ground to analyze the results of an operation and note any possible civilian harm.

US Counterterrorism Adviser John Brennan was one of the first to publicly address the issue in his April 2012 remarks. He stated:

In the wake of a strike, we harness the full range of our intelligence capabilities to assess whether the mission in fact achieved its objective. We try to determine whether there was any collateral damage, including civilian deaths.²⁶⁸

Brennan conceded there had been “exceedingly rare” instances of civilian death and injury. He described what the US does in those cases:

[T]here have indeed been instances when—despite the extraordinary precautions we take—civilians have been accidentally injured, or worse, killed in these strikes....And when this happens we take it seriously. We go back and review our actions. We examine our practices. And we constantly work to improve and refine our efforts so that we are doing everything in our power to prevent the loss of innocent life.²⁶⁹

While Brennan's acknowledgement of the importance of assessing practices in light of civilian death is assuring, it is difficult to know how the US can effectively investigate in countries where it has little on-the-ground presence. Intelligence agents or Special Forces do not often operate in public view, and are unlikely to have the investigatory skills required to assess civilian harm. Furthermore, numerous media reports of drone strikes suggest that

266 See Aki Peritz and Eric Rosenbach, *Find, Fix, Finish: Inside the Counterterrorism Campaigns that Killed bin Laden and Devastated Al Qaeda* (Philadelphia: PublicAffairs Books: 2012), 153, noting that after a strike targeting Abu Hamza, US officials “refused to confirm Abu Hamza’s death without physical evidence” but US intelligence “subsequently overheard lamentations shared between militants that seemed to confirm he was indeed dead.”; Mark Mazzetti and Eric Schmitt, “C.I.A. Missile Strike May Have Killed Pakistan’s Taliban Leader, Officials Say,” *The New York Times*, August 7, 2009, reporting that in the wake of a CIA strike aimed at Baitullah Mehsud, American officials were “scrambling to make sense of communications intercepts and other intelligence that seemed to indicate that Mr. Mehsud might have been killed in the strike” and that “they may never gain access to the remote location in South Waziristan to perform DNA tests.”; Scott Shane, “C.I.A. Is Disputed on Civilian Toll in Drone Strikes,” *The New York Times*, August 11, 2011, reporting that “[t]he C.I.A. and National Security Agency intercept cellphone calls and e-mails discussing who was killed.”

267 Adam Schiff, member of the House Appropriations subcommittee on State, Foreign Operations, and Related Programs, interview by John King, CNN, September 30, 2011.

268 John Brennan, Assistant to the President for Homeland Security and Counterterrorism, “The Ethics and Efficacy of the President’s Counterterrorism Strategy” (speech, Wilson Center, Washington, DC, April 30, 2012), <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>.

269 *ibid.*

soon after drone attacks, armed groups recover dead bodies and shift them to unknown areas, which would impede collection of forensic evidence and identification of those killed.²⁷⁰

In the covert drone context, the assessments to which Brennan referred are likely to include how many people were killed and, possibly, the identity of who was killed.²⁷¹ The CIA reportedly collects “extensive data on each strike in Pakistan.”²⁷² The range of “intelligence capabilities” Brennan mentioned likely involves information from covert agents, including Special Operations Forces and CIA personnel, though their ability to collect information in Pakistan and Yemen is unclear.²⁷³ The US may also rely on local paid informants²⁷⁴ and cooperating governments—though partnerships may deteriorate or improve depending on political situations.

US officials have suggested that US “intelligence capabilities” can satisfy the duty to investigate war crimes or serious law of war violations. While it is true that drone imagery and video can aid an investigation into civilian harm, to meet basic standards for investigative effectiveness, US personnel would need to go beyond an analysis of drone video footage or intercepted phone calls. Former CIA officer Bruce Riedel notes that drone video does not always offer a clear picture of casualties—as belied by the few al-Qaeda members believed killed in drone attacks who have later turned up alive—and argues that with a limited ability to interview witnesses, “casualty reports are incredibly dubious.”²⁷⁵

Furthermore, relying solely on local informants would be inappropriate in covert drone strikes because it would expose such individuals to the real risk of retaliation from local armed groups. Motivated by US payments, informants might not be independent. The same is true of private contractors who conduct investigations. Foreign militaries that conduct investigations might have incentive to cover up the identities of individuals killed, especially if they are enemies of the foreign military, but not of the United States.

The limitations of a drone platform for effective investigations—including the kind that have become standard in other contexts and reflect widely applicable US rules and procedures—indicates either that covert drone strikes are counter to US policy and norms, or that they cannot be responsibly utilized without personnel on the ground to assess and respond to potential civilian harm.

Responding to Civilian Harm

Properly responding to civilian harm caused by its combat operations overseas reflects the US’s stated commitment to humanity even in times of war. In recent years in Afghanistan, the US military and its allies have maintained a policy of promptly responding to known

270 See e.g., “North Waziristan Agency: Eight Militants Killed in Drone Attacks,” *The Express Tribune*, May 28, 2012.

271 Many news and book accounts contain references to drone operators “counting bodies” after drone strikes. See e.g., Daniel Klaidman, “Daniel Klaidman on the Mind of a Drone Operator,” *The Daily Beast*, June 9, 2012, describing a conversation between State Department Legal Adviser Harold Koh and a drone operator in which the latter describes counting bodies and “watch[ing] the funerals” after strikes.

272 “Covert US strikes in Pakistan, Yemen and Somalia – Our Methodology,” *Bureau of Investigative Journalism*, August 10, 2011, “Although the CIA is understood to have extensive data on each strike in Pakistan, that information is not made available publicly.”; see also Eric Schmitt and Mark Mazzetti, “US Resumes Surveillance Flights Over Pakistan,” *The New York Times*, June 30, 2009, reporting Pakistani officials’ “frustration” that the CIA does not share its post-strike assessments.

273 See Schmitt and Shanker, *Counterstrike*, 244, describing CIA security contractors and other personnel working in Pakistan.

274 “The video is supplemented, officials say, by informants on the ground who sometimes plant homing devices at a compound or a car.” Scott Shane, “C.I.A. Is Disputed on Civilian Toll in Drone Strikes,” *The New York Times*, August 11, 2011; see also Eric Schmitt, “New CIA Drone Attack Draws Rebuke From Pakistan,” *The New York Times*, April 13, 2011, (“the C.I.A. has developed its own network of covert Pakistani sources to help identify targets for drone strikes and no longer relies on the ISI for that type of assistance, American officials said.”)

275 Ken Dilanian, “CIA Drones May Be Avoiding Pakistani Civilians,” *Los Angeles Times*, February 22, 2011, quoting Bruce Riedel.

civilian losses through the media, in consultation with village elders, and by making amends to civilians themselves through apologies, explanations and sometimes monetary payments. In fact, in armed conflicts from Korea, Grenada, and Vietnam to Iraq and Afghanistan, the United States military has offered, on an ex-gratia and ad hoc basis, amends to civilians for lawfully caused harm. Additional US-financed programs in Iraq and Afghanistan have assisted families and communities that have suffered losses from US military activity since 2003.²⁷⁶ US policymakers consistently note that offering such amends is not a legal requirement, but draws from national principles of human dignity.²⁷⁷

We are not aware of any cases in Pakistan or Yemen where drone strike civilians have received apologies, explanations or monetary payments as amends from the US Government.

Center for Civilians in Conflict's research among conflict victims in Iraq, Afghanistan, and Pakistan shows that more than money, most victims want to know why they were harmed. It goes without saying that nothing can bring back or adequately compensate the death of a loved one. However, acknowledgement dignifies the loss of victims, their families, and communities. When done responsibly, including through local officials, it can help clear a family's name of suspicion.

The lack of an overt ground presence in countries like Pakistan and Yemen should not prevent the US from establishing mechanisms to investigate and, where appropriate, recognize and assist civilian victims of drone strikes. Options include initiating a liaison and claims process through civilian staff on the ground. In NATO's 2011 air campaign in Libya, though the US had limited "boots on the ground," it nevertheless had sufficient ground presence to be able to begin building small embassies immediately after Muammar Qaddafi's regime fell. The US could ensure assistance to civilians through USAID, where it was possible to operate, or through cooperation with local governments.

New technologies can aid efforts to make amends for civilian harm. Cell phones are being used as a way to exchange money in parts of Africa; such technology could be used to assist families suffering losses, though any effort of this nature must be carefully assessed to protect civilians from further harm.

²⁷⁶ See "Legal Foundations for "Making Amends" to Civilians Harmed by Armed Conflict," Human Rights Program at Harvard Law School, February 2012.

²⁷⁷ For a discussion of the relationship between international human rights law and humanitarian law principles to the principle of making amends, see *ibid.*

CIA and JSOC Roles in Covert Drone Strikes: Implications for Accountability and Civilian Harm

Across political and ideological spectrums, observers of covert drone strikes have expressed concern that the CIA is evading US and international law, as well as oversight by Congress and accountability to the courts. They point to the CIA's history of overreach and abuse of power. Some experts and human rights groups have called on the government to transfer command of drone strikes from the CIA to the military. However, as we described in previous chapters, the CIA and the military organization JSOC substantially co-mingle in drone operations, so much so that at times even higher-level policymakers do not know whether drone operations are conducted by CIA or JSOC personnel, and JSOC operations may be no more accountable than those of the CIA. Accordingly, it is unclear what transfer of command to the military would mean in practice, or what it would accomplish in terms of ensuring compliance with the law and limiting harm to civilians. Moreover, as we describe below, government oversight mechanisms set up to constrain the CIA, although flawed in operation, are generally stronger than those monitoring JSOC.

The impulse behind the call to transfer command of drone strikes to the military is nevertheless understandable: there is a profound difference in institutional culture between the CIA and JSOC on the one hand, and conventional US military forces on the other. While the CIA and JSOC have often set out to evade public scrutiny, conventional military forces have been transformed by it, establishing mechanisms to mitigate, assess, and respond to civilian harm.

By contrast, CIA efforts to respond to public pressure appear calculated at gaining official sanction or formalistically satisfying the outer limits of US law; there are few indications that the agency has internalized the norms and values associated with accountability. JSOC, while a component of the military that presumably must follow military rules, is differentiated by the fact that it enjoys significant, if not complete, freedom from public scrutiny. It may

also sometimes evade congressional scrutiny by operating under CIA authority. Although the CIA and JSOC may have adopted procedures and practices in relation to civilian harm that are comparable to the conventional military's, the secrecy surrounding covert drone strikes makes any accountability mechanisms impossible to assess or verify.

In this chapter, we describe the histories and traditions of the CIA and JSOC, and assess their institutional suitability for complying with the law and limiting harm to civilians. Our evaluations are circumscribed by the secrecy with which both organizations guard their role, and the substantial convergence between them in covert drone operations. We begin by describing, as a reference point, the evolution of conventional military forces in terms of legal compliance and civilian harm, and the kinds of processes and mechanisms they have developed.

The secrecy surrounding covert drone strikes makes any accountability mechanisms impossible to assess or verify.

With limited information, we cannot conclude that either the CIA or JSOC is inherently unsuitable to conduct drone strikes, although we have concerns based on their past practices. It is incumbent upon policymakers with access to more information—particularly members of Congress—to scrutinize and inform public debate on the suitability of the CIA and JSOC.

Conventional Military Forces' Relationship to the Law, the Public and, Civilian Harm

The conventional military forces' relationship to the law, the public, and the issue of civilian harm is a useful baseline for judging the CIA and JSOC. Their structures and processes reflect an interest in engaging with complex legal and ethical issues, instilling respect for the law in personnel, and taking extra steps—beyond legal requirements—to reduce and respond to civilian harm. We note that these efforts do not negate human rights concerns with regard to US military operations.

The 1968 My Lai massacre was a watershed event for the US military.²⁷⁸ Chilling accounts of the deliberate and sustained killings of an estimated 500 unarmed men, women, and children over the course of four hours in a small Vietnamese village put in focus serious problems with the military's adherence to international laws forbidding the targeting of civilians.²⁷⁹ As military leaders and policymakers evaluated what went wrong at My Lai and in other incidents, they identified troops' respect for the law as a foremost problem. Enemy fighters in the Viet Cong were not only "indistinguishable from the local population, but also refused to abide by the established principles of the laws of war"—circumstances that led troops to view the law as irrelevant.²⁸⁰ "This is the first lesson of My Lai; soldiers not only must know the law of war, but also must be able to understand the necessity and rationale for having a law of war," wrote two judge advocates on the occasion of the 25th anniversary of My Lai in 1993.²⁸¹

After My Lai, the Department of Defense designed a comprehensive program to effectively implement the laws of armed conflict (alternatively called International Humanitarian Law and henceforth "laws of war") and change the relationship of its armed forces to the law from one of reluctant tolerance to engagement and internalization. In 1974, the Department promulgated a directive mandating that every member of the military be trained in the laws of war, and assigning primary responsibility for training and law compliance to unit com-

278 W. Hays Parks, "The United States and the Law of War: Inculcating an Ethos," *Social Research*, 69.4 (Winter 2002): 981, 985.

279 See Douglas Linder, "The My Lai Massacre Trial," *Jurist*, (March 2000).

280 Maj. Jeffrey F. Addicott and Maj. William A. Hudson, Jr., "Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons," *Military Law Review*, 139 (1993):153, 165.

281 *ibid.*

manders. The directive mandated the reporting of war crimes, and timely and proper investigations.²⁸² A version of the 1974 directive is in place today. It unequivocally requires that all Department of Defense organizations comply with the laws of war during all armed conflicts and “in all other military operations.”²⁸³

Post-Vietnam law of war training emphasized the rationales and underpinnings of the laws of war. W. Hays Park, former chief of the Law of War branch of the Navy’s Office of Judge Advocate, has described post-Vietnam training on the law as “marrying” law of war obligations “to military effectiveness, professionalism and good leadership.”²⁸⁴ Implementation of the laws of war, according to Hays: “... requires an ethos. It requires comprehensive implementation, in peace and war, at all levels of armed forces.”²⁸⁵ Today, there are dozens of rules, mechanisms, and official guidance’s that motivate legal compliance and integrate law of war norms into the ethos of the armed services. Indeed, several of the services explicitly describe law of war compliance as part of the “warrior ethos”: having “the honor to comply with the Laws of War, the courage to report all violations, and the commitment to discipline the violators.”²⁸⁶

When abuses against detainees occurred during military operations in Iraq and Afghanistan, military personnel themselves took a lead role in reporting them up the chain of command and to the media—even though they risked retaliation from other soldiers, disciplinary action, and prosecution as whistleblowers.²⁸⁷ Some military practitioners and scholars viewed abuses at Abu Ghraib prison in Iraq not merely as violations committed by a few individuals that damaged the Army’s reputation, but as violations of the Army’s ethos that undermined the institution. As one military scholar noted:

*Army ethos requires the strict adherence to all laws governing the conduct of war. And since the Army ethos is a fundamental attribute of Army professionalism, if [sic] follows that the abuses that occurred at Abu Ghraib directly undermined the foundations of Army professionalism.*²⁸⁸

Another result of the post-My Lai transformation of the military was the creation of institutions to foster understanding of the law’s application. For example, judge advocates undertake law of war training at the Judge Advocate General’s Legal Center and School or programs administered by the Navy and Air Force.²⁸⁹ In 1988, the US Army established the Center for Law and Military Operations, which publishes the *Law of War Deskbook*, a da-

“...Soldiers not only must know the law of war, but also must be able to understand the necessity and rationale for having a law of war.”

—Two judge advocates on the anniversary of My Lai

282 See “Directive 5100.77,” Department of Defense, November 5, 1974.

283 See “Directive 2311.01E: DoD Law of War Program,” Department of Defense, May 9, 2006, §4.1, <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf>.

284 W. Hays Parks, “The United States and the Law of War: Inculcating an Ethos,” *Social Research*, 69.4 (Winter 2002): 981, 987.

285 *ibid.*, 988.

286 See “War Crimes: MCRP 4-11.8B,” United States Marine Corps, September 5, 2005, <http://www.marines.mil/news/publications/Documents/MCRP%204-11.8B%20War%20Crimes.pdf>, (“America is trusted by the world to do the right thing, and so must be the United States Marines. Following the rules, including the rules in warfare, must be a part of our warrior ethos. The application of honor, courage, and commitment in the conduct of military operations means: the honor to comply with the Laws of War, the courage to report all violations, and the commitment to discipline the violators.”; see “Field Manual 3-21.75,” United States Army, January 2008, §1-5, in section on “Warrior Ethos,” noting “[e]very Soldier adheres to these laws, and ensures that his subordinates adhere to them as well, during the conduct of their duties. Soldiers must also seek clarification from their superiors of any unclear or apparently illegal order.”)

287 See e.g., “No Blood, No Foul” Soldiers’ Accounts of Detainee Abuse in Iraq,” Human Rights Watch, July 25, 2006, noting that the report is based primarily on “firsthand accounts by military personnel stationed in Iraq...from soldiers who witnessed and in some cases participated in abuses; Joshua E.S. Phillips, “Inside the Detainee Abuse Task Force,” *The Nation*, May 13, 2011, reporting that military whistleblowers faced retaliation from fellow soldiers and internal discipline, factors which can deter them from reporting violations.

288 Lt. Col. Dean Bland, “The Abu Ghraib Scandal: Impact on the Army Profession and the Intelligence Process,” Strategy Research Project 8, United States Army War College, March 18, 2005, <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA434475>.

289 See Judge Advocate General’s Legal Center and School, accessed August 29, 2012, <https://www.jagcnet.army.mil/8525736A005BC8F9>; Naval Justice School, http://www.jag.navy.mil/njs_curriculum.htm; “Naval Justice School Curriculum,” US Navy Judge Advocate General’s Corps, accessed August 29, 2012, <http://www.afjag.af.mil/library/index.asp>.

tabase for judge advocates around the world.²⁹⁰ Judge advocates are actively involved in practical training operations at four Combat Training Centers, where training units engage in simulated combat and peace operations.²⁹¹

This system of teaching and practical application of the laws of war has also led to the emergence of a culture of critique and debate around difficult legal and moral questions. For example, members of the armed forces have published critiques of the effectiveness of military systems for investigating civilian deaths, and of the battle damage assessments undertaken after targeting.²⁹² The Naval War College annually hosts a symposium on international law that brings together leading military practitioners, scholars, human rights lawyers, and government lawyers from the US and other countries to debate and consider emerging issues.²⁹³ At outside conferences on international law, military lawyers and scholars regularly organize lectures and debates, and engage with outsiders who may disagree with their stance.

Recently developed military rules and procedures sometimes reflect not only the strict and uncontroversial requirements of the law, but an interest in going beyond the law to mitigate civilian harm. Rules of engagement in Afghanistan have, for example, restricted the number of civilian casualties that are acceptable in targeting operations beyond what might be required by international law.²⁹⁴ For some operations, the military uses a collateral damage estimates (CDEs) to assess likely civilian harm from an operation and consider ways to reduce it. CDEs are reportedly based on “empirical data, probability, historical observations from the battlefield, and physics-based computerized models.”²⁹⁵ CDEs reportedly draw from frequently updated reference tables that are subject to “physics-based computer modeling” and “supplemented by weapons testing data and direct combat observations.”²⁹⁶

These processes have a cultural effect. For example, according to a 2010 government study, directives focused on mitigating civilian harm in Afghanistan bolstered the ability of Air Force pilots “not to engage because they perceived risks of civilian casualties.”²⁹⁷ Conventional military forces also sometimes conduct “battle damage assessments” after strikes and, when civilian harm has occurred, have in some cases provided medical aid or initiated a process of amends for losses.²⁹⁸ We discuss these procedures in more detail in the chapter *Civilian Protection Limitations*.

Recently developed military rules and procedures sometimes reflect not only the strict and uncontroversial requirements of the law, but an interest in going beyond the law to mitigate civilian harm.

290 See W. Hays Parks, “The United States and the Law of War: Inculcating an Ethos,” *Social Research*, 69.4 (Winter 2002): 981, 994-95.

291 *ibid.*, 995.

292 See e.g., Brendan Groves, *Civil-Military Cooperation in Civilian Casualty Investigations: Lessons Learned from the Azizabad Attack*, 65 *A.F. L. Rev.* 1, 33 (2010); James G. Diehl & Charles E. Sloan, “Battle Damage Assessment: The Ground Truth,” *Joint Force Quarterly*, 37 (April 2005): 59, 63.

293 See “Past Conferences and Workshops,” Naval War College International Law Department, accessed June 1, 2012, <http://www.usnwc.edu/Research---Gaming/International-Law/Past-Conferences-and-Workshops.aspx>.

294 Rules of Engagement (ROE) are directives issued by a competent military authority that delineate the circumstances and limitations under which US forces will initiate and/or continue combat engagement with other forces encountered. They differ according to the conflict. There are standing rules of engagement that are adapted by Combatant Commanders for particular wars. ROE are the most specific sort of instruction for troops, and are based on the broader instruction given in tactical directives. “Operational Law Handbook,” International and Operational Law Department, The Judge Advocate General’s Legal Center and School, US Army, 2011, 77-78.

295 See Gregory S. McNeal, “US Practice of Collateral Damage Estimation and Mitigation,” *Social Science Research Center*, November 9, 2011.

296 See *ibid.*, 14-15.

297 See *ibid.*, citing “Joint Civilian Casualty Study,” Joint Center for Operational Analysis, (August 31, 2010).

298 Battle damage assessments are often mandated as a matter of policy or regulation, but are not a legal obligation. US military manuals indicate that assessment is an integral part of the targeting cycle. See “Joint Publication 3-60: Joint Targeting,” April 13, 2007, [http://www.bits.de/NRANEU/others/jp-doctrine/jp3_60\(07\).pdf](http://www.bits.de/NRANEU/others/jp-doctrine/jp3_60(07).pdf); “COMISAF’s Tactical Directive,” International Security Assistance Force, November 30, 2011, describing a tactical directive issued by Gen. John Allen that requires “ground battle damage assessments in all situations where there is a potential loss of life or injury to insurgents or Afghan civilians, except when an assessment would put ISAF personnel at greater risk.”

These progressive policies and practices are motivated not only by the internalization of norms described above, but by public pressure in foreign countries and at home—including the high visibility of civilian casualties in an era of 24/7 news, cell phone cameras, and YouTube. As Jack Goldsmith has noted, the growth of global television and the Internet have “made war observable anywhere, practically in real time.”²⁹⁹ In Afghanistan, new procedures are also motivated by a counterinsurgency strategy that requires the military to “win hearts and minds.” A 2010 tactical directive issued by General David Petraeus emphasizes: “Every Afghan civilian death diminishes our cause.”³⁰⁰

The first US Army manual on civilian casualty mitigation, published in July 2012, emphasizes that even unavoidable or lawful civilian casualties “will be publicized by the news media and critically viewed by the American people, the local population, and the international community.” It cautions that “operations against insurgents may have to be postponed or modified if [civilian casualties] and other collateral damage would undercut mission goals or political support.”³⁰¹ While the procedures and engagement with the public we have described do not immunize conventional military forces from committing abuses, they significantly contrast with the CIA and JSOC’s secrecy and failure to publicly signal a commitment to reducing civilian harm.

The CIA’s Relationship to the Law and Civilian Harm

As the CIA’s role in drone strikes has gained increasing prominence and notoriety, CIA and Obama Administration officials have repeatedly offered assurances that the agency complies with the law and seeks to avoid civilian casualties in drone strikes (see *The Civilian Toll*). While we cannot prove and do not necessarily believe that the CIA routinely and knowingly violates US law or disregards civilian life—to the contrary, it may have set up procedures and rules related to civilian harm—the CIA does not have an ethos or culture that promotes substantial engagement with legal questions or larger discussions of civilian protection. Moreover, while the threat of public or congressional scrutiny would traditionally provide the CIA incentive to act with caution about the law, in the context of covert drone strikes these incentives are substantially reduced or altogether absent.

The most generous interpretation of the CIA’s relationship to the law is that it is formalistic: the agency may conform to the strictures of the law, but there is no indication that the CIA has developed an ethos that would independently motivate adherence to the norms and values underlying the law, including those that motivate steps to reduce civilian harm. In a series of addresses in 2011 and 2012, CIA General Counsel Stephen Preston described the agency’s relationship to the law as like that of a tightly regulated business.³⁰² At the American Bar Association Preston explained:

299 Jack Goldsmith, *Power and Constraint: The Accountable Presidency*, (New York: W.W. Norton and Company, 2012).

300 See “General Petraeus Issues Updated Tactical Directive: Emphasized ‘Disciplined Use of Force,’” International Security Assistance Force, August 4, 2010, accessed September 16, 2012, <http://www.isaf.nato.int/article/isaf-releases/general-petraeus-issues-updated-tactical-directive-emphasizes-disciplined-use-of-force.html>. A Counterinsurgency Guidance released at the same time adopts similar reasoning: “[I]f we kill civilians or damage their property in the course of our operations, we will create more enemies than our operations eliminate.” “Counterinsurgency Guidance,” COMISAF, August, 1 2010. This policy has continued since General John Allen took command of the International Security and Assistance Force (ISAF). In a letter to the troops dated 18 July 2011, General John Allen stated: “[W]e are here to protect the population as we subdue the insurgency, and I expect every member of ISAF to be seized with the intent to eliminate civilian casualties caused by ISAF.” Letter from General John R. Allen, COMISAF, to the Troops, July 18, 2011, <http://www.isaf.nato.int/images/stories/File/COMISAF-Guidance/2011-07-18%20COMISAF%20Ltr%20to%20Troops%20Upon%20Taking%20Command.pdf>; General McChrystal’s 2009 Tactical Directive stated: “[T]here is a struggle for support and will of the population. Gaining and maintaining that support must be our overriding operational imperative – and the ultimate objective of every action we take.” “Unclassified Tactical Directive,” NATO/ISAF, July 6, 2009.

301 See “ATTP 3-37.31: Civilian Casualty Mitigation,” Department of the Army, July 2012, 1-5.

302 Preston gave similar addresses at Columbia Law School, the American Bar Association and Harvard Law School. See Stephen Preston, CIA General Counsel, “The CIA: Lawless Rogue or Regulated Business?” (lecture, Columbia Law School, October 4, 2011); Stephen Preston, CIA General Counsel, “CIA and the Rule of Law” (lecture, Harvard Law School, April 10, 2012); Stephen Preston, CIA General Counsel, “21st Annual Review of the Field of National Security Law,” (lecture, Ritz-Carlton Hotel, Washington, DC, – Panel I: Executive Update on Developments in National Security Law, December 1, 2011), http://www.americanbar.org/content/dam/aba/multimedia/law_national_security/panel_1.authcheckdam.mp3.

*All intelligence activities of the Agency must be properly authorized pursuant to and conducted in accordance with the full body of national security law that has been put in place over the six plus decades since the Agency was founded. All such activities are also subject to strict internal and external scrutiny. In short, the Agency is at least as rule-bound and closely watched as businesses in the most heavily regulated industries.*³⁰³

Although intended to provide assurance, the analogy to business regulation is disconcerting. It suggests that rather than seeing itself as duty-bound to the law and culturally invested in its rationales, the agency relates to the law as a constraint that may undermine the agency's goals if not carefully managed, and perhaps, in some cases, circumvented.

Even in accounts favorable to the CIA, the CIA's relationship to the law is discussed only in terms of avoiding liability and political fall-out for actions that might, if revealed, be perceived as illegal even if technically legal. There is no allusion to a concern for whether actions, though technically legal, might offend the purposes and values of the law, or brush up too closely to their limits to be appropriate.

For example, Jack Goldsmith, former lawyer in the Bush administration, writes that the CIA's 150 or so lawyers "help operators sort through the cognitive dissonance that arises from the twin injunctions to violate some laws and norms but not others." According to Goldsmith, these lawyers "provide comfort that whatever other fallout might occur from their CIA activities, operators needn't worry about violating what to them often felt like bewildering US legal restrictions." In any event, "everyone in the CIA knows that trouble follows from violating US law" and people "are watching for violations and can impose various types of legal or political punishment if they find one."³⁰⁴ Likewise, former CIA lawyer Afsheen John Radsan conjectures that the CIA has sought legal approval for its drone strikes because "[t]he CIA, we know is accustomed to checking off the boxes in its paperwork" and is "[m]indful of their potential legal exposure on targeted killing."³⁰⁵

To be sure, recent accounts of the CIA's torture and secret detention programs under the Bush administration reflect that CIA personnel are deeply concerned with liability and public perception. CIA personnel aggressively sought clearance from agency lawyers and others in the Bush administration for the detention and torture programs—and, for the most part, received approval. John Rizzo, a leading CIA lawyer at the time, reportedly advised the CIA to tell as many people as possible about the programs to minimize political fall-out and maximize political support.³⁰⁶ In internal debates at the CIA, Rizzo notes: "I never heard—and I think I would have heard—any dissent, any moral objection," to the programs.³⁰⁷

The CIA's concern with legal liability and exposure is unsurprising given the agency's history as a covert spy agency. But it contrasts with the military's engagement with complex legal questions and outsider perspectives that we previously discussed. If CIA lawyers

303 Stephen Preston, CIA General Counsel, "21st Annual Review of the Field of National Security Law," (lecture, Ritz-Carlton Hotel, Washington, DC, – Panel I: Executive Update on Developments in National Security Law, December 1, 2011), http://www.americanbar.org/content/dam/aba/multimedia/law_national_security/panel_1.authcheckdam.mp3, stating "I did not believe then that the Agency was the lawless rogue that it was made out to be, and after two-plus years in the belly of the beast, I am here literally to say that the CIA does not operate outside the law. To the contrary, I submit that the CIA is more in the nature of a regulated business, and a heavily regulated and closely overseen regulated business at that."

304 Jack Goldsmith, *Power and Constraint: The Accountable Presidency*, (New York: W.W. Norton and Company, 2012), 93, 95.

305 See Richard W. Murphy and Afsheen John Radsan, "Measure Twice, Shoot Once: Higher Care for CIA Targeting," (William Mitchell Legal Studies Research Paper No. 2010-14, Texas Tech Law School, Research Paper No. 2010-25, June 6, 2010).

306 See "John Rizzo: The Lawyer Who Approved CIA's Most Controversial Programs," PBS Frontline, September 6, 2011.

307 *ibid*,

sometimes push the agency to grapple with humanitarian and ethical norms underlying the law, they have provided no inkling of that to the public. They do not engage with outside experts or academics; top CIA lawyer Stephen Preston's speeches, noted above, are the only exceptions of which we are aware.

International law—particularly the laws of war—would require the CIA to take steps to reduce civilian harm in using force, but observers debate whether the CIA sees itself as bound by it. The statements of government officials have been ambiguous.³⁰⁸ In a major address, Preston described the CIA's compliance with international law "principles"—as opposed to "rules" or treaty provisions. (To be fair, the same can be said of remarks by his counterparts at other agencies.³⁰⁹) Some observers speculate that the CIA interprets statutory provision 50 USC section 413b(a)(5)—which prohibits the president from authorizing "any action that would violate the Constitution or any statute of the United States"—as freeing the CIA from international law obligations, since it omits mention of them.³¹⁰ A US Army colonel notes that the Department of Defense "is legally bound to execute its military operations in accordance with the laws of armed conflict"; "the CIA, however, is under no similar requirement regarding international law."³¹¹

Accounts of the CIA's lawyering practices describe adherence to US law, but seldom mention international law. According to Goldsmith:

*These operators spend their days and nights on deceptive and deceitful tasks that violate foreign and some international laws as well as everyday ethics. They are constantly reminded that whatever other rules and laws they must violate in their work, they must not violate US law.*³¹²

Beyond the question of obligation to abide by international laws, the agency does not have an institutional history of engaging in a process that military lawyers and scholars refer to as "operationalizing" the law. The process includes applying treaty provisions and rules applicable to a given situation even when, as a technical matter, they do not unambiguously apply.³¹³ It involves an understanding and appreciation of underlying norms and values, and cognizance of a range of sources—such as military handbooks, rules of engagement, and

308 In 2012, Director of National Intelligence James Clapper testified that Legal Adviser Harold Koh's March 2010 speech affirming the applicability of international humanitarian law to US targeting also applied to the intelligence community's "counterterrorism" activities; See Transcript, Senate Select Intelligence Committee Hearing on Worldwide Threats, January 31, 2012, <http://www.dia.mil/public-affairs/testimonies/2012-01-31.html>, discussing Harold Koh, Legal Adviser, US Department of State, Speech at the Annual Meeting of the American Society of International Law, Mar. 25, 2010.

309 See Stephen Preston, CIA General Counsel, "CIA and the Rule of Law" (lecture, Harvard Law School, April 10, 2012). Likewise, in March 2010 State Department Legal Adviser Harold Koh noted: "[T]his Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principle." See Harold Koh, Legal Adviser, US Department of State, "Annual Meeting of the American Society of International Law" (speech, Annual Meeting of the American Society of International Law, Washington, DC, March 25, 2010). Attorney General Eric Holder also spoke of ensuring that "lethal force by the United States will comply with the four fundamental law of war principles governing the use of force." See Eric Holder, Attorney General, Dep't of Justice, "Attorney General Eric Holder Speaks at Northwestern University School of Law" (speech, Northwestern University, Evanston, IL, March 5, 2012). Jeh Johnson, General Counsel at the Department of Defense, specifically described "applicable provisions of the Geneva Conventions and customary international law" in his remarks about US targeting operations, but his remarks did not address questions about US standards related to the principle of distinction as applied to non-state actors. See Jeh Johnson, General Counsel Department of Defense, "National Security Law, Lawyers and Lawyering in the Obama Administration" (speech, Yale Law School, New Haven, CT, February 22, 2012).

310 See e.g., Robert Chesney, "The CIA, Executive Power, and International Law: Reflections on Yesterday's Speech", *Lawfare*, April 11, 2012, <http://www.lawfareblog.com/2012/04/the-cia-executive-power-and-international-law-reflections-on-yesterdays-speech/>.

311 Colonel Kathryn Stone, "All Necessary Means" – Employing CIA Operatives in a Warfighting Roles Alongside Special Operations Forces," (Strategic Research Project 16, US Army War College, 2003), www.fas.org/irp/eprint/stone.pdf.

312 Jack Goldsmith, *Power and Constraint: The Accountable Presidency*, (New York: WW. Norton and Company, 2012), 93.

313 See W. Hays Parks, "The United States and the Law of War: Inculcating an Ethos," *Social Research*, 69.4 (Winter 2002): 981, 1002, noting that "a problem with many war: They cannot think outside the box" and believe "that if a law of war treaty technically does not apply, there is no applicable law..."

the best practices of militaries over time. Operationalizing the law is not merely a matter of following clear rules; this is especially true in the context of US operations aimed at al-Qaeda and its affiliates, which call for commanders to apply “traditional legal concepts to complex and ever-changing circumstances.”³¹⁴ The covert drone strikes context compounds the complexity.

The CIA is a relative novice in the field of the laws of war. According to former CIA lawyer Afsheen John Radsan: “On 9/11, there were far more lawyers who knew the details of the Geneva conventions at the defence department (and at the state department) than at CIA.”³¹⁵ Whereas conventional military forces benefit from extensive Judge Advocate General training programs and established international law departments like the Naval War College’s, the CIA General Counsel’s office does not appear to benefit from similar structures—unless such institutions exist secretly. Nor do CIA lawyers benefit from open debate or engagement with academic communities or civil society.

Given the rapid expansion of CIA involvement in drone strikes, some observers speculate that the CIA may consult the military on its targeting procedures, and the Department of Defense and the State Department about international law application generally.³¹⁶ Yet the CIA’s relative inexperience with targeting decisions and international law questions cannot completely be compensated for by borrowing lawyers and protocols. In complex and uncertain situations where time is of the essence, decision-makers must fall back on their experience and specific training, as well as the sophisticated analysis provided by seasoned lawyers.

CIA lawyers working alongside drone operators have no doubt acquired considerable on-the-job experience, but this is not assuring in the absence of any disclosure about their training, understanding of the laws of war or independence. In contrast, uniformed military lawyers “describe a strong sense of commitment to [law of war] rules and the values that underlie them”³¹⁷ and are part of an independent chain of command, bolstering their objectivity and ability to adhere to the law without prejudice.³¹⁸ As one judge advocate put it, the military lawyer’s role is “not like an inspector general but rather an internal conscience.”³¹⁹ While CIA lawyers may be effective at describing law of war constraints to CIA decision-makers, we do not know whether they have internalized the rules and perceive a duty to ensure that operations conform with the law’s underlying values in situations where the law is not technically applicable. In light of the legal complexity of the covert drone context, there is a risk that decision-makers at the CIA might conduct strikes relying on a gap or ambiguity in the law, with CIA lawyers unable or unwilling to exert countervailing pressure. Again, our concern is rooted in the CIA’s secrecy, including its failure to make public key manuals and guidances on law of war application, as the military has often done.

314 Laurie Blank and Amos Guiora, “Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare,” *Harvard National Security Journal*, 1.45 (2010).

315 Pratap Chatterjee, “How lawyers sign off on drone attacks,” *The Guardian*, June 15, 2011, quoting John Radsan, former CIA official, “On 9/11, there were far more lawyers who knew the details of the Geneva conventions at the defence department (and at the state department) than at CIA,” Radsan wrote in an email to me. ‘Before the drone era, [the Pentagon] had far more experience in targeting and killing.’”

316 See e.g., Richard W. Murphy and Afsheen John Radsan, “Measure Twice, Shoot Once: Higher Care for CIA Targeting,” (William Mitchell Legal Studies Research Paper No. 2010-14, Texas Tech Law School, Research Paper No. 2010-25, June 6, 2010), noting the possibility that “the CIA has actually learned from the military’s extensive experience”; see also Gregory S. McNeal, “US Practice of Collateral Damage Estimation and Mitigation,” *Social Science Research Network*, November 9, 2011, noting that the former director of the CIA’s operation in Afghanistan told an audience at the University of Texas that the CIA had subjected air strikes to oversight and legal approval by the military’s theater commander.

317 Laura A. Dickinson, “Military Lawyers, Private Contractors, and the Problem of International Law Compliance,” *International Law and Politics*, 42, (2010): 355, 361.

318 *ibid.*, 367-70.

319 *ibid.*, 367.

CIA Selective Disclosure & Congressional Oversight

We have described the CIA as motivated by a fear of scandal or legal liability. In the covert drone strikes context, these pressures to minimize civilian harm and ensure accountability are lacking, particularly because of significant public and congressional support for the program.

The CIA portrays itself—rightly or wrongly—as fully capable and expert at fulfilling its drone strikes mission, but claims secrecy is necessary to protect national security. The agency’s refusal to share information forecloses effective litigation and prevents informed public debate.³²⁰ Instead, the CIA has fended off criticism through anonymous leaks to the press—a forum in which its claims cannot be actively questioned. In leaks, the CIA has not only pressed its claim that drone strikes are “extremely precise and effective,”³²¹ it has also sought to discredit some journalists and human rights advocates who have documented civilian deaths, suggesting they are complicit in an effort to “help al-Qaeda succeed” or that they “unwittingly draw on false propaganda claims by militants.”³²² Taken together, this disclosure/non-disclosure has allowed the CIA to put forward its claims without having to engage meaningfully with criticism.³²³

Congressional oversight could theoretically exert pressure on the CIA to be abundantly cautious about complying with the law and ensuring the least possible civilian harm from drone strikes. The CIA, however, has effectively insulated itself from hard congressional scrutiny—especially damaging because, in the context of covert strikes, Congress is uniquely positioned to get answers and generate informed public debate.

The CIA is subject to oversight by congressional committees: the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence. Extensive authorization and reporting requirements, including that the CIA keep the committees “fully and currently informed,” were formulated in response to successive scandals over CIA abuses, including the plotting of a coup against Chilean President Salvador Allende in 1970, domestic spying of antiwar activists that was revealed in 1974, and the Iran-Contra Affair.³²⁴ Congressional intelligence oversight has long been criticized as incomplete and ineffective, with the 9/11 Commission describing it as “dysfunctional” and listing it as one of the top problems in US national security.³²⁵

320 See supra note 2, noting ongoing Freedom of Information Act litigation; see also Philip Alston, “The CIA and Targeted Killings Beyond Borders,” (Public Law & Legal Theory Research Paper Series, Working Paper No. 11-64, September 2011), 78-86, describing barrier to judicial review of drone strikes and the CIA’s actions generally.

321 See Declan Walsh, Eric Schmitt and Ihsanullah Tipu Mehsud, “Drones at Issue at US Rebuilds Ties to Pakistan,” *The New York Times*, March 18, 2012, reporting an “official who spoke on the condition of anonymity because of the program’s covert status” as stating: “These efforts have been extremely precise and effective.”

322 In February 2012, unnamed officials responded to a report of CIA strikes targeting funeral-goers and other civilians by stating: “One must wonder why an effort that has so carefully gone after terrorists who plot to kill civilians has been subjected to so much misinformation. Let’s be under no illusions — there are a number of elements who would like nothing more than to malign these efforts and help Al Qaeda succeed.” See Scott Shane, “US Said to Target Rescuers at Drone Strikes Sites,” *The New York Times*, February 5, 2012, More explicitly, in May 2012, the *New York Times* reported an unnamed senior official as stating that reports of civilian deaths “unwittingly draw on false propaganda claims by militants.”; Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” *The New York Times*, May 29, 2012.

323 See Naureen Shah, “The CIA’s unchecked quasi-military role,” *Politico*, May 10, 2012; see also Philip Alston, “The CIA and Targeted Killings Beyond Borders,” (Public Law & Legal Theory Research Paper Series, Working Paper No. 11-64, September 2011), noting that the CIA’s “self-serving leaks to journalists” have the result that “while the government can deny the accuracy of any given leak, it can also rely generally upon those sources to ensure that sufficient information makes its way into the public domain in order to placate those who would otherwise be concerned that such program were being run in complete secrecy and in order to counter the spread of false information.”

324 In 1974, a *New York Times* article revealed the CIA’s domestic spying on antiwar activists. The revelation, made post-Watergate, during a time of immense distrust of the government, prompted expansive congressional investigations into the oversight failures that had allowed the CIA to carry out this surveillance unchecked. President Jimmy Carter issued an executive order in 1978 requiring that the intelligence community keep the committees “fully and currently informed.” Executive Order 12,036, 3 C.F.R. 112 (1979).

325 See “The 9/11 Commission Report,” National Commission on Terrorist Attacks upon the United States, 2004, 419-422.

Though hampered in many ways, the oversight committees have sufficient authority to impact the CIA's activities. Congress controls the CIA's budget and can thus influence programs, seek changes, or get answers to inquiries.³²⁶ One study found that every staffer surveyed recalled at least one instance when an intelligence committee member "threatened to statutorily withhold funding as a lever for sharing of information that would not otherwise have been forthcoming."³²⁷ Congressional staffers can also visit CIA stations and other sites to get facts on the ground, though whether this is possible with regard to the drone program is unknown.

Congress controls the CIA's budget and can thus influence programs, seek changes, or get answers to inquiries.

Some information about CIA activities is provided only to congressional leaders who are part of the "Gang of Eight"³²⁸—leading members of the House and Senate. Many individuals, including members of Congress, have criticized this practice as preventing the intelligence committees from exercising effective oversight.³²⁹

Congressional oversight committees reportedly receive extensive briefings from the CIA. According to Senator Diane Feinstein, chair of the Senate Select Intelligence Committee:

We receive notification with key details shortly after every strike, and we hold regular briefings and hearings on these operations. Committee staff has held 28 monthly in-depth oversight meetings to review strike records and question every aspect of the program including legality, effectiveness, precision, foreign policy implications and the care taken to minimize noncombatant casualties.³³⁰

House and Senate intelligence committee staff reportedly travel monthly to CIA headquarters in Virginia to review drone video and intelligence used to justify strikes.³³¹ Asked about drone strikes in January 2012, Feinstein stated: "[T]here's no issue that receives more attention and oversight from this committee...than counterterrorism operations in Afghanistan and Pakistan."³³²

The CIA's disclosures to the congressional oversight committees have the perverse effect of insulating the agency from public scrutiny. When members of the committees—particularly members of the Gang of Eight—are briefed by CIA, they can actively question the agency's claims about the precision of drone strikes and seek answers about reports of civilian casualties. Unfortunately, there are few political incentives for members to do so or to publicly raise alarms in response to what they learn. Drone strikes are so widely consid-

326 See Robert Chesney, "Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate," *Journal of National Security Law and Policy*, 42 (2012).

327 Denis McDonough et al., "No Mere Oversight: Congressional Oversight of Intelligence is Broken," *Center for American Progress*, 2006, 25.

328 The Gang of Eight procedure allows notification of covert actions to be limited to "chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and such other member or members of the congressional leadership as may be included by the President." 50 USC § 413b(c)(2).

329 See e.g., Nancy Pelosi, "The Gap in Intelligence Oversight," *The Washington Post*, January 15, 2006, arguing that "[u]nless the entire committee has access to the same information, under tight confidentiality rules, Congress cannot respond legislatively to intelligence activity by the executive branch."; Kathleen Clark, "A New Era of Openness? Disclosing Intelligence to Congress Under Obama," *Constitutional Commentary*, 26.3 (2010): 328.

330 Senator Dianne Feinstein, letter to the editor, *Los Angeles Times*, May 17, 2012. This account corresponds with the *Washington Post's* reporting in December 2011 that "[w]ithin 24 hours of every CIA drone strike, a classified fax machine lights up in the secure spaces of the Senate intelligence committee, spitting out a report on the location, target and result."; Greg Miller, "Under Obama, an Emerging Global Apparatus for Drone Killing," *The Washington Post*, December 27, 2011.

331 See Ken Dilanian, "Congress keeps closer watch on CIA drone strikes," *Los Angeles Times*, June 25, 2012.

332 See Senate Select Intelligence Committee, "Hearing: Worldwide Threats," Jan. 31, 2012, <http://www.dia.mil/public-affairs/testimonies/2012-01-31.html>.

ered to be effective in fighting terrorism without sacrificing American service members' lives that questioning the way drone strikes are conducted, or under what legal authority they continue, is unlikely to bestow electoral benefits.³³³ Moreover, as commentator Kathleen Clark notes: "'Gang of Eight' notification inoculates the executive branch from later political backlash, because the executive branch can—and does—point to Congress's inaction as congressional endorsement of the covert action."³³⁴

The CIA is well-aware that providing information to congressional committees can stem hard congressional scrutiny. Jack Goldsmith notes: "Contrary to conventional wisdom, CIA management loves to report to the committees because it wants buy-in for its politically risky actions."³³⁵ Indeed, former CIA officials have lamented that their mistake with the torture and secret detention programs was notifying only the Gang of Eight members, rather than the full intelligence committees.³³⁶ According to former CIA General Counsel John Rizzo: "[W]hat CIA needed above all from Congress was stalwart, bipartisan cover—for their understanding and acquiescence that the continuing al-Qaeda threat required unprecedented measures."³³⁷ Rizzo argues that the agency should have provided intelligence committees "all the details all along the way" to "compel them, really—to take a stand on the merits to either endorse the program or stop it in its tracks."³³⁸

As watchdogs in the form of journalists and human rights organizations struggle to garner factual information in the relatively inaccessible areas where covert drones strikes occur, the public is especially reliant on Congress to take the lead in scrutinizing the CIA's actions. Yet Congress's obligation extends further: to contribute to public debate. As former CIA lawyer and minority staff director for the House intelligence committee Suzanne Spaulding emphasizes, Congress has the responsibility "to inform and lead public discussion and debate" particularly "about how best to address the long term threat of terrorism."³³⁹ There are established procedures for Congress to declassify and publicize previously secret information, but these procedures have reportedly never been employed, and certainly not with regard to covert drone strikes.³⁴⁰

The Transparency Imperative

In light of news reports that drone strikes are turning public opinion in Pakistan and Yemen against the United States, there may be internal pressure at the CIA to establish mechanisms related to civilian harm, notwithstanding the lack of hard external scrutiny we have described. CIA analysts have sometimes shown strategic concern for reducing civilian harm where it would undermine the mission or US security generally.³⁴¹

In 2012, Counterterrorism Advisor John Brennan alluded to procedures that seem akin to a military battle damage assessment (see chapter *The Civilian Toll*). With the political fall-out

333 See Goldsmith, *Power and Constraint*, 91, noting that members of the intelligence committees "receive few electoral benefits from time spent in secret oversight of intelligence because they cannot dole out intelligence goodies to wealthy donors and they cannot talk in public about most of what they learn and do"

334 Kathleen Clark, "A New Era of Openness? Disclosing Intelligence to Congress Under Obama," *Constitutional Commentary* 3 (2010): 328..

335 Goldsmith, *Power and Constraint*, 90.

336 Some members of Congress dispute that they were fully briefed on the use of waterboarding and other uses of torture in interrogation. See Sam Stein, "Waterboarding Not Discussed at CIA Briefings, Congressional Aide Says," *Huffington Post*, June 8, 2009.

337 John Rizzo, "9/11: Three Major Mistakes," *Defining Ideas: A Hoover Institution Journal*, September 8, 2011, accessed September 16, 2012, <http://www.hoover.org/publications/defining-ideas/article/91992>.

338 *ibid.*

339 Suzanne E. Spaulding, "Building Checks and Balances for National Security Policy: The Role of Congress," *Journal of the ACS Issue Groups*, (Fall 2008): 74- 75.

340 See Kathleen Clark, "Congress's Right to Counsel in Intelligence Oversight," *University of Illinois Law Review*,(2011), 915, 939-40.

341 Human Rights Clinic phone interview with Afsheen John Radsan, August 8, 2012.

from its detention and torture programs a fresh memory, some CIA officials may be motivated to disclose more. However, the CIA itself has not come forward with information about any existing assessment, investigation, or amends procedures. Transparency about policy and procedures in relation to civilian harm does not require disclosure of sensitive sources and methods; while not without fault, the military's disclosure—in partially unclassified tactical directives and manuals, and through engagement with outside experts and scholars—shows that greater transparency is feasible and practical.

JSOC's Relationship to the Law and Civilian Harm

Though JSOC is a military organization that ought to benefit from the conventional military's traditional engagement on the law and issue of civilian harm, it operates with a level of secrecy and freedom from scrutiny that matches, and in some cases exceeds, that of the CIA.

JSOC “camouflages itself with cover names, black budget mechanisms, and bureaucratic parlor tricks” to maintain its secrecy.³⁴² Indeed, the official description of JSOC is confusing, mentioning a host of roles: “to study Special Operations requirements, ensure...interoperability and equipment standardization, develop...joint Special Operations plans and tactics, and conduct...joint Special Operations exercises and training.” These descriptions make no mention of JSOC's targeting or drone operations.³⁴³

The entirety of JSOC's relationship to the conventional military forces and its rules is unknown. As a general matter, US Special Operations Command (SOCOM) provides special forces units to geographic commands. “Once those forces are in a geographic combatant commander's area of responsibility, they work for that commander...under the same rules as other forces,” a SOCOM officer told the Columbia Human Rights Clinic by email.³⁴⁴ However, there are indications that JSOC operates independently of the conventional military forces' geographic combatant commands and that it has its own rules of engagement.³⁴⁵

As previously described (see *Background*), JSOC's targeting operations are sometimes conducted under the CIA's legal authority. These joint operations have been characterized as “Title 50” operations,³⁴⁶ referring to the section of the US Code that governs the CIA. The government may not consider them “military operations,” and accordingly, they may not be covered by Department of Defense directives on civilian protection or law of war compliance.³⁴⁷ To add to the confusion, while it is possible that joint JSOC-CIA operations are governed by the military's rules and procedures, it is also possible that these joint operations are governed by the CIA's operating procedures, or some set of procedures established specifically for such joint operations. One account suggests that Department of Defense General Counsel Jeh Johnson has questioned the legality of some JSOC drone strikes in Somalia and Yemen, and effectively prevented them in the past.³⁴⁸

342 See Marc Ambinder and D. B. Grady, *The Command: Deep Inside the President's Secret Army* (Kindle Edition 2012); see also Klaidman, *Kill or Capture*, 205, noting JSOC “operated in a culture of near-total secrecy.”

343 For official description of JSOC, “Factbook 2012,” US Special Operations Command, 22, http://www.socom.mil/News/Documents/USSOCOM_Fact_Book_2012.pdf. However, the Factbook does list the MQ-1 Predator and MQ-9 Reaper drones as Special Forces “inventory.” See *ibid.*, 29.

344 Kenneth S. McGraw, Deputy Public Affairs Officer, US Special Operations Command, email message to Columbia Human Rights Law Clinic, March 26, 2012, (on file with Columbia Human Rights Clinic).

345 See “Chapter 1: Background,” (describing reports that the al-Qaeda ExOrd sets rules of engagement for JSOC).

346 For example, in the raid killing Osama bin Laden, JSOC operators were reportedly tasked to “work under CIA direction, which under US law allowed them to pursue covert actions within Pakistan.” Peretz and Rosenbach, *Find, Fix, Finish*, 215.

347 See “Directive 2311.01E: DoD Law of War Program,” Department of Defense, May 9, 2006, §4.1, <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf>.

348 See Klaidman, *Kill or Capture*, 213.

In light of the secrecy regarding JSOC operations, we cannot draw hard and fast conclusions about its practices; however, the information we have leads us to call for greater scrutiny of the organization's participation in covert drone operations. Accounts of JSOC describe the organization as independent and sometimes not subject to the processes or scrutiny of regional military commands. JSOC's missions are highly classified and compartmentalized, and some observers report that JSOC operators have conducted operations without informing regional combatant commanders of their presence.³⁴⁹

In Afghanistan, JSOC does not appear to be formally bound by rules of regional command. JSOC is primarily responsible for nighttime kill and capture operations that increased dramatically in 2009 and 2010, to an average of 19 raids per night.³⁵⁰ International Security Assistance Force (ISAF) tactical directives set strict limits to reduce civilian harm, as we noted above, and with regard to nighttime raids specifically. Because of JSOC's command structure, it is unclear whether these directives apply.³⁵¹

In Iraq, JSOC apparently operated according to procedures and rules unique from the rest of the military, and abuses sometimes resulted. According to one account, JSOC "[u]nlike other military groups" was "authorized to work from raw intelligence and did not need to wait for authorization for follow-on strikes based on the acquired information"; it conducted lethal operations "without consulting higher-ranking officials, a circumvention of the chain of command authority."³⁵²

The entirety of JSOC's relationship to the conventional military forces and its rules is unknown.

Commentators have heralded JSOC's lethal operations in Iraq as critical to reducing violence there, but JSOC's interrogation and detention of prisoners in Iraq reportedly led to multiple cases of torture and inhumane treatment of detainees.³⁵³ At Camp Nama, a site run jointly by the CIA and JSOC's Task Force 6-26 at Baghdad International Airport, a poster advised "NO BLOOD NO FOUL" and the slogan reportedly reflected an adage adopted by JSOC's task force: "If you don't make them bleed, they can't prosecute for it."³⁵⁴ Problems were so severe that the CIA and FBI barred their own personnel from participating in JSOC interrogations, and the Defense Intelligence Agency withdrew its personnel from a JSOC-run detention site.³⁵⁵

While JSOC was subject to military investigation and public scrutiny for its conduct in Iraq, it succeeded in keeping details about its abuses and responses secret. Some abuses resulted in a military investigation, but the results are classified.³⁵⁶ According to journalist Marc Ambinder, about 30 people were disciplined, with some kicked out of the military or transferred to other units.³⁵⁷ General Stanley McChrystal reportedly initiated reforms that required JSOC to use the rules for interrogation laid out in the Army Field Manual in Iraq.

349 See Jeremy Scahill, "Osama's Assassins," *The Nation*, May 4, 2011; Klaidman, *Kill or Capture*, 205.

350 See "The Cost of Kill/Capture: The Impact of the Night Raid Surge on Afghan Civilians," Open Society Foundation, 2011.

351 See *ibid.*, reporting that "[d]espite repeated inquiries, international military officials were not able to confirm that the ISAF tactical directives applied to these forces, given their different command structure" though "ISAF officials noted that these forces follow all of the tactical directives in practice, including reporting incidents like suspected civilian casualties immediately."

352 See *ibid.* Peretz and Rosenbach, *Find, Fix, Finish*, 128.

353 JSOC stationed task forces in Iraq that were responsible for detention, sometimes in joint operations with the CIA. See Human Rights Watch, "'No Blood, No Foul' Soldiers' Accounts of Detainee Abuse in Iraq," July 2006.; Tim Heffernan, "Who the Hell is Stanley McChrystal," *Esquire*, May 19, 2006.

354 See Eric Schmitt and Carolyn Marshall, "In Secret Unit's 'Black Room,' A Grim Portrait of US Abuse," *The New York Times*, March 19, 2006.

355 See Dana Priest and William Arkin, *Top Secret America: The Rise of the New American Security State*, (New York: Hachette Book Group, 2011), 247-249; Schmitt and Shanker, *Counterstrike*, 71.

356 See Josh White, "US Generals in Iraq Were Told of Abuse Early, Inquiry Finds," *The Washington Post*, December 1, 2004.

357 See Spencer Ackerman, "How the Pentagon's Top Killers Became (Unaccountable) Spies," *Wired*, February 13, 2012.

Even after reforms, JSOC interrogators were still allowed to hold detainees for up to 90 days without seeking approval from superiors or Department of Defense lawyers.³⁵⁸ According to Human Rights Watch, abuses continued to occur after a 2003 military investigation.³⁵⁹ Media report that General Stanley McChrystal ordered that JSOC-CIA prison Camp Nama would not provide access to the International Committee of the Red Cross for inspection—in contravention of the laws of war.³⁶⁰

Unfortunately, there is so much secrecy about JSOC's operations that it is difficult to evaluate whether, and to what extent, JSOC's relationship to the law and mechanisms to reduce civilian harm continues to be problematic. This lack of transparency is compounded by JSOC's relative freedom from congressional scrutiny. As journalist March Ambinder notes, "many in Congress who'd be very sensitive to CIA operations almost treat JSOC as an entity that doesn't have to submit to oversight."³⁶¹

Congressional Oversight

JSOC is relatively new and accordingly is not encumbered by the kinds of oversight processes and reporting requirements that developed over time for the CIA and conventional military forces. The result is that policymakers are relatively uninformed about JSOC. Many US intelligence officials, for example, did not learn of JSOC's new intelligence fusion center in Washington DC until the Associated Press revealed its existence in a 2011 article.³⁶²

After 9/11, the Bush Administration provided JSOC expansive authority to conduct operations outside of Iraq and Afghanistan through an executive order (see *Background*), and under General McChrystal's command, JSOC sought "to slip out of the grip" of Washington bureaucracy.³⁶³ As retired General Barry McCaffrey testified to Congress, JSOC has "run [as] a parallel universe" that "[p]ublicly we don't talk too much about."³⁶⁴

JSOC's operations under CIA authority create additional obstacles to oversight. While some commentators suggest that joint CIA-military operations are subject to double scrutiny—meaning they report to both the congressional oversight committees that oversee the CIA and those that oversee the military³⁶⁵—members of those committees themselves have voiced concerns. The House Permanent Select Committee on Intelligence has criticized the Pentagon's tendency to classify its clandestine intelligence gathering activities such that they "often escape the scrutiny of the intelligence committees" since "the congressional defense committees cannot be expected to exercise oversight outside of their jurisdiction."³⁶⁶

358 Priest and Arkin, *Top Secret America*, 249.

359 Human Rights Watch, "No Blood, No Foul' Soldiers' Accounts of Detainee Abuse in Iraq," July 2006.

360 See Tim Heffernan, "Who the Hell is Stanley McChrystal," *Esquire*, May 19, 2006; The ICRC's right to visit combatants captured in international armed conflicts derives from the Geneva Conventions of 1949. Common Article 3 of the four Geneva Conventions also gives the ICRC the right to access to persons detained in non-international armed conflicts. For a discussion of the legal framework for ICRC access, Alain Aeschlimann, "Protection of detainees: ICRC action behind bars," *International Review of the Red Cross*, 87:857, (March 2005).

361 See Spencer Ackerman, "How the Pentagon's Top Killers Became (Unaccountable) Spies," *Wired*, February 13, 2012.

362 See Ambinder and Grady, *The Command: Deep Inside the President's Secret Army*, ("At the time when McRaven christened the center, its existence was a secret to many U.S intelligence officials, who learned about it by way of an Associated Press newsbreak in early 2011."); Kimberly Dozier, "Building a Network To Hit Militants," *Associated Press*, January 6, 2011.

363 Priest and Arkin, *Top Secret America*, 238.

364 General Barry McCaffrey, USA (Ret.), "Afghanistan and Iraq: Perspectives on US Strategy, Part 1," (statement, House Hearing of the Committee on Armed Services, Oversight and Investigations Subcommittee, House Armed Services Committee No. 111-103, October 22, 2009), 2.

365 See Andru E. Wall, "Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities and Covert Action," *Harvard National Security Journal*, 3, (2011): 86, 103.

366 The committee did not take any legislative action to rectify the situation, relying instead on discussions it had with the Pentagon. It did, however, issue an ultimatum, stating "if DOD does not meet its obligations to inform the Committee of intelligence activities, the Committee will consider legislative action clarifying the Department's obligation to do so." House of Representatives No. 111-186, (2009), 49.

During a March 2012 hearing, Representative Hank Johnson, a member of the House Armed Services Committee, noted that although the Committee has budgetary authority over SOCOM, when Special Operations Forces act under CIA authority, the Pentagon is not required to report back about its activities.³⁶⁷ A response from the committee chair noting that he and the ranking minority member do receive information on these activities and offering to discuss the matter further in a closed session suggests that the Pentagon may have adopted reporting procedures akin to the CIA's "Gang of Eight" notifications to the intelligence committees.

Even when the CIA reports to the intelligence committees and JSOC to the committees on armed services, "no committee has a complete, unobstructed view" of the full campaign, as one account notes.³⁶⁸ Hearing only part of the story does not allow for effective congressional oversight and could deter committees from taking responsibility to regulate the drone program.

Even as congressional oversight of JSOC has been frustrated, the organization enjoys wide political support. In congressional hearings, JSOC has been credited with several successes,³⁶⁹ including eradicating al-Qaeda Iraq in urban Baghdad,³⁷⁰ and the killing of Osama bin Laden.³⁷¹ Congressional committees have praised JSOC's flexibility and "unique interagency authorities" as an example for other military forces.³⁷² The Senate Armed Services Committee has praised and encouraged the spread of JSOC "man-hunting" tactics to other branches of the military.³⁷³ Congressional enthusiasm can be traced to JSOC's 2006 killing of Abu Musab al-Zarqawi, after which Senator Evan Bayh of Indiana reportedly requested and received "an unprecedented (and secret) billion-dollar earmark for intelligence, surveillance, and reconnaissance assets on the basis of a battlefield conversation" with JSOC personnel.³⁷⁴

Congress has a crucial role to play in off-setting the secrecy of JSOC's operations.

Political support threatens to obscure the need for scrutiny of JSOC's record on legal compliance and steps to prevent or reduce civilian harm. Congress has a crucial role to play in off-setting the secrecy of JSOC's operations. As scholar Bobby Chesney notes, congressional oversight is crucial to "reconcile the need for secrecy and discretion in the pursuit of national security aims, on the one hand, with the need to subject the resulting powers as much as possible to mechanisms that enhance accountability and compliance with the rule

367 Hearing Before the House Armed Services Committee on Central-Special Operations-Transportation Command's Budget, 112th Congress (2012).

368 Greg Miller, "Under Obama, an Emerging Global Apparatus for Drone Killing," *The Washington Post*, December 27, 2011.

369 See Honorable Adam Smith, "Lessons for Countering Al Qaeda and the Way Ahead," (opening statement, House Hearing of the Committee on Armed Services, Unconventional Threats and Capabilities Subcommittee, H.A.S.C. No. 111-114, September 18, 2008), 1-2.

370 Gen. Barry McCaffrey, USA (Ret.), "Iraq After the Surge," (prepared statement, Senate Hearing before the Foreign Relations Committee, S. HRG. 110-757, April 2, 2008); Gen. Barry McCaffrey, USA (Ret.), "A Continuing Dialogue: Post-Surge Alternatives for Iraq (Part 1 and 2)," (prepared statement, House Hearing before the Committee on Armed Services, Oversight and Investigations Committee, H.A.S.C. 110-106, January 16, 2008), 9.

371 Following the Osama bin Laden killing, the House proposed a resolution commending the men and women of the military and intelligence agencies, and explicitly named JSOC House Resolution. United States House of Representatives, Resolution 240, "Commending President Barack Obama and the men and women of the military and intelligence agencies," May 2, 2011.

372 The House Committee on Armed Services has urged the USSOCOM Commander to "utilize to the fullest extent the unique interagency authorities available to the Joint Special Operations Command (JSOC) and incorporate guidance and direction from the Director, Center for Special Operations (CSO), in relation to interagency matters and concerns." House of Representatives 111-166, House Report of the Committee on Armed Services, "To accompany H.R. 2647, National Defense Authorization Act for Fiscal Year 2010," June 18, 2009; Honorable Adam Smith, House Hearing of the Committee on Armed Services, "Irregular Warfare and Stability Operations: Approaches to Interagency Integration," (statement, Unconventional Threats and Capabilities Subcommittee, H.A.S.C. No. 111-118, February 26, 2008).

373 United States Senate, Senate Report 110-335, Senate Report of the Committee on Armed Services, "To accompany S. 3001, National Defense Authorization Act for Fiscal Year 2009," May 12, 2008.

374 See Ambinder and Grady, *The Command: Deep Inside the President's Secret Army*.

of law, on the other.”³⁷⁵ The gaps and ambiguity in congressional oversight jurisdiction over joint CIA and JSOC operations may require changes to governing US law on oversight.³⁷⁶

If bolstered, congressional scrutiny could serve the crucial function of clarifying basic details about JSOC’s operations, including whether it is appropriate to attribute civilian casualties to JSOC, as opposed to the CIA. An unidentified military intelligence source told a reporter in 2009 that “when you see some of these hits [that are attributed to the CIA], especially the ones with high civilian casualties, those are almost always JSOC strikes.”³⁷⁷ CIA-JSOC convergence creates the potential for misattribution and misdirection of reform efforts.

Moreover, JSOC should clarify whether rules and procedures that are a matter of Department of Defense-wide policy also apply to its operations, particularly joint CIA-JSOC operations. The concerns we have raised about JSOC’s past practices and ambiguity regarding its compliance with the law may be inappropriate in light of its current practices; however, secrecy about JSOC operations makes it impossible to judge. As JSOC plays a growing role in drone operations, the organization should shift from its secrecy posture and account to Congress and the public about its practices and procedures, particularly in relation to civilian protection.

375 See Chesney, “The Law of Title 10/Title 50 Debate,” 629.

376 *ibid.*; Jennifer D. Kibbe, “Conducting Shadow Wars,” *Journal of National Security Law & Policy*, 5 (2012): 373.

377 See Jeremy Scahill, “The Secret US War in Pakistan,” *The Nation*, November 23, 2009.

Ethical and Legal Implications

Despite the precision capabilities of weaponized drone technology, targeting operations invariably put civilian lives at risk. As with any weapon or weapons platform, there are legal, moral, and strategic reasons to explore alternatives to lethal targeting, and if targeting does take place, to take precautionary measures and other actions to mitigate the risk of harming civilians. With the proliferation of covert drone operations outside of traditional armed conflict theaters, however, we are concerned that policymakers are overlooking the need to take civilian-protection measures and consider alternative approaches to lethal drone strikes in counterterrorism strategy.

Our objective in this chapter is not to document and prove legal violations, but to identify concerns at the juncture of ethics and the law. We use law of war principles and their underlying norms as a framework for some of our concerns, as US officials have repeatedly invoked them when describing the limits of US targeting.³⁷⁸ We note that the complex legal issues raised by covert drone strikes cannot be resolved solely by reference to the laws of war. Other bodies of law place significant limits on targeting operations, and there are

³⁷⁸ See Harold Koh, Legal Adviser, US Department of State, (speech, Annual Meeting of the American Society of International Law, March 25, 2010), describing principles of distinction and proportionality and stating: “[i]n US operations against al-Qaeda and its associated forces—including lethal operations conducted with the use of unmanned aerial vehicles—great care is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.”; John Brennan, Assistant to the President for Homeland Security and Counterterrorism, “Strengthening our Security by Adhering to our Values and Laws,” (speech, Harvard Law School, Cambridge, MA, September 16, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>, (“International legal principles, including respect for a state’s sovereignty and the laws of war, impose important constraints on our ability to act unilaterally—and on the way in which we can use force—in foreign territories.”; Jeh Johnson, General Counsel, Department of Defense, “National security law, lawyers and lawyering in the Obama Administration,” (lecture, Yale Law School, New Haven, CT, Feb. 22, 2012), www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/, (“[w]e must apply, and we have applied, the law of armed conflict, including applicable provisions of the Geneva Conventions and customary international law, core principles of distinction and proportionality, historic precedent, and traditional principles of statutory construction.”; Eric Holder, Attorney General, (speech, Northwestern University School of Law, Evanston, IL, March 5, 2012), <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>, stating: “use of lethal force by the United States will comply with the four fundamental law of war principles governing the use of force” and naming the principles of necessity, distinction, proportionality and humanity.

important debates about, for instance, the applicability of international human rights law and the laws of war. We do not address them here; instead, our analysis is confined to key ethical and legal implications of covert drone policy that we believe are too often obscured.

Public Acceptance of Drones

US use of drones outside traditional combat zones has had the unforeseen consequence of reducing political and public interest in demanding alternatives to lethal targeting, or steps to mitigate civilian harm. In the absence of an outcry—indeed, with broad public and political support—drone strikes have become the policy norm and displaced alternative approaches that could be more protective of civilian life, in both the short- and long-term.

Public pressure over the last few decades has often motivated the US government and military forces to adopt measures to protect civilian life, but it is significantly absent in the covert drone warfare context. The development of legal and humanitarian norms promoting protection of civilian life happens both over time, and in the midst of crisis. As Dinah PoKempner, a lawyer at Human Rights Watch, describes:

*[J]udgments are formed through the public description of controversial incidents...[For example] [h]owever attacking a civilian radio/television broadcasting station was understood before the attack on Serbian RTV, following the public outcry against NATO there are added inhibiting factors against including such an installation on a future target list. Such public interpretations have an influence on the law, sometimes through changing political judgments...It is worth underscoring that the norms on collateral damage are not static, and that public understandings, translated into political expectations, impel their evolution as much as any other factor.*³⁷⁹

In contrast, covert drone strikes have a peculiar kind of public visibility. Media frequently report on drone strikes, particularly the CIA's involvement, and debate has escalated among scholars and human rights advocates; meanwhile, the public largely accepts and supports the program, despite the informational black hole that surrounds it.³⁸⁰ Accordingly, the public does not exert pressure on the US government to be accountable for potential civilian harm.

Compared to media coverage of the wars in Afghanistan and Iraq at their height—with disturbing photos of both torture and ill-treatment at Abu Ghraib, and the returning coffins of US servicemen and women—the coverage of drone strikes ordinarily carries no images that would make concrete the toll of strikes. To the contrary, as many observers have noted, media coverage of drone strikes in the United States frames their impact in sanitized terms—militants, compounds, convoys—with only the accompanying image of a Predator or Reaper on the tarmac.³⁸¹ The public has no visual cues about the short- or longer-term impact of covert drone operations.

Moreover, while drone strikes are frequently in the news, the light footprint of drone technology enables the government to escape public scrutiny over its decisions to expand counterterrorism operations across the globe. Deploying US troops to another combat zone would trigger the public's concern about another costly and long war, and might prompt US

379 Dina PoKempner, "Collateral Damage: Assessing Violations from the Outside," (working paper, June 4-5, 2002), http://www.hks.harvard.edu/cchrp/Use%20of%20Force/June%202002/PoKempner_final.pdf.

380 A February 2012 poll found that 83 percent of Americans approved of drone policy. Scott Wilson and Jon Cohen, "Poll finds broad support for Obama's counterterrorism policies," *The Washington Post*, February 8, 2012.

381 See e.g., "Killer Drones: Counting the Human Costs," *Asia Pacific Forum*, mp3, March 28, 2011, http://www.asiapacificforum.org/downloads/audio/APF20110328_621_KillerDron.mp3; Muhammad Idrees Ahmad, "Gunboats and gurdhas in the American Imperium," *Al Jazeera*, July 14, 2012.

officials to publicly and clearly explain why force is justified. In contrast, “floating a drone casually and quietly over a border, might go under the radar screen both literally and metaphorically,” as one expert notes.³⁸² Indeed, as the Obama Administration has continued to expand drone operations beyond Pakistan, to Yemen and Somalia, it has not faced public demands to justify these decisions, nor has it been at pains to qualify this expansion in order to appease public or political concerns.

In the relative absence of public pressure, many policymakers might nevertheless seek to limit the drone program for strategic reasons. As we describe below, however, drone targeting outside combat theaters is increasingly becoming a policy and tactical norm, rather than a novel tactic that draws cautious scrutiny—including concerns regarding the impact on civilian life—before deployment.

Drone Strikes as the Norm

If US use of force through drone strikes becomes unexceptional, it risks displacing alternative and non-lethal approaches to counterterrorism, such as intelligence-gathering and investigation, detention by the US or partner governments, and preventive measures to stem extremism and militancy.

Covert drone strikes enjoy wide political support as an attractive alternative to counterinsurgency strategies that cost significant US blood and treasure in Iraq and Afghanistan.³⁸³ As the Administration seeks to counter a growing number of groups it describes as al-Qaeda affiliates in a growing number of places around the globe, it may view strikes as an alternative to adding multiple new land-war fronts in the Middle East and Africa. Policymakers appear comfortable and confident that “surgical” drone strikes conducted by the CIA and JSOC will disrupt militant groups and prevent terrorist plots, and increasingly favor this strategy over alternative means to establish security or set conditions for peace.³⁸⁴

Covert drone strikes enjoy wide political support as an attractive alternative to counterinsurgency strategies that cost US blood & treasure.

From this perspective, drone strikes are, as former director of National Intelligence Dennis Blair noted, “the politically advantageous thing to do—low cost, no US casualties, gives the appearance of toughness.”³⁸⁵ Furthermore, the precision capabilities of the technology—and the Administration’s references to its internal deliberations and processes for deciding who may be killed—provide seeming assurance that, as the US expands drone operations, the strikes are nevertheless limited.³⁸⁶ Administration officials have repeatedly emphasized that drone strikes are surgically calibrated to remove the “cancer” of al-Qaeda without affecting the surrounding “tissue” of civilians in the area.³⁸⁷ (These assurances elide concerns that drone strikes have a significant toll on civilians, see chapter *The Civilian Toll*.)

382 See Philip Alston, “The CIA and Targeted Killings Beyond Borders,” *Harvard National Security Journal*, 2 (2011): 283, 326.

383 See David E. Sanger, “Charting Obama’s Journey to a Shift on Afghanistan,” *The New York Times*, May 19, 2012, describing President Obama’s “‘light footprint strategy,’ in which the United States strikes from a distance but does not engage in ears-long, enervating occupations.”; Jim Michaels and Tom Vanden Brook, “Precision strikes are new weapon of choice,” *USA Today*, October 1, 2011, quoting former CIA official Bruce Reidel: “This administration has made a very conscious decision that it wants to get out of large conventional-warfare solutions and wants to emphasize counterterrorism and a lighter footprint on the ground.”.

384 See Bill Roggio and Alexander Mayer, “Analysis: US air campaign in Pakistan heats up,” *The Long War Journal*, (January 5, 2010); The Obama administration’s ultimate goals are more expansive: “disrupting, dismantling and defeating al-Qa’ida and its affiliates and adherents while protecting the American people.” See “National Security Strategy for Counterterrorism,” White House, June 2011, 1.

385 See Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” *The New York Times*, May 29, 2012, quoting Blair.

386 Advanced technology can provide policymakers “erroneous feelings of control and understanding, leading to misjudgments that may increase their willingness to become involved” in conflicts. Jack M. Beard, “Law and War in the Virtual Era,” *American Journal of International Law*, 103:167 (2009): 409 (citing Thomas X. Hammes, *The Sling and the Stone: On War in the 21st Century*, (Minneapolis: Zenith Press, 2006), 194..

387 See John Brennan, “The Ethics and Efficacy of the President’s Counterterrorism Strategy” (speech, Wilson Center, Washington, DC, April 30, 2012), “It’s this surgical precision—the ability, with laser-like focus, to eliminate the cancerous tumor called an al-Qa’ida terrorist while limiting damage to the tissue around it—that makes this counterterrorism tool so essential.”

Approaches to counterterrorism that yield less concrete and identifiable gains—such as diplomacy, prevention of “radicalization,” intelligence-gathering, and detention—are losing salience among policymakers, although they are inherently less threatening to civilian life than drone strikes since they do not involve lethal targeting. (Some of these approaches also carry the risk of human rights abuses, but they are not inherently or directly life-threatening.)

In May 2012, *The New York Times* reported that some Obama Administration officials worry drone strikes are “crowding out consideration of a broader strategy against radicalization.” Secretary of State Hilary Clinton reportedly complained of a “drones-only approach at Situation Room meetings, in which discussion would focus exclusively on the pros, cons, and timing of particular strikes.”³⁸⁸ *The New York Times* journalists Eric Schmitt and Thom Shanker provide a candid account by former national counterterrorism center director, Michael Leiter, concerning the Administration’s internal debate about its gravitation toward lethal targeting of members of the Somali group al-Shabaab:

‘When we kill somebody, there is going to be someone else to take their place,’ said [National Counterterrorism Center official] Leiter. ‘And it is relatively easy to take someone off the battlefield. But there is something that is less satisfying about starting a program that engages young Somalis to prevent radicalization; that is softer and mushier, and to many is less interesting conversation.’

Leiter described how, in interagency meetings, a discussion of hunting terrorists is immediately relevant and exciting for many participants. Bureaucratic battles and the lack of progress seen when attempting to formulate policies to prevent terrorism are less exciting, as the results are hard to discern and quantify. Officials “celebrate the elimination of each terrorist even though he may be rapidly replaced, but those are the victories you can measure.”³⁸⁹

Politicians increasingly describe lethal targeting and drone strikes as the norm and standard for justice. In May 2011, when President Obama described the raid that killed Osama bin Laden, he declared, “justice has been done.”³⁹⁰ As many commentators noted, the pronouncement implied that “real justice—arrest, trial, and sentence would have been too difficult in the case of Bin Laden,” and perhaps unnecessary.³⁹¹ Indeed, in television coverage of drone strikes, pundits and anchors ordinarily presume the need to “use force and only use force,” and, as one observer noted, “[s]ocioeconomic remedies to terrorism...are not part of the conversation.”³⁹²

Over time, these trends may erode policymakers’ commitments to assess and weigh the impact that drone strikes have on local civilian populations. Policymakers may assume the precision capabilities of drone technology forestall civilian harm. However, even when drone strikes do not result in civilian death, they have a profound impact on local communities (see chapter *The Civilian Toll*). Non-lethal alternatives can also negatively impact civilian populations, but these are benefits and costs to any action that should be carefully assessed by US policymakers; we are concerned policymakers are not sufficiently weighing the options.

388 Jo Becker and Eric Schmitt, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” *The New York Times*, May 29, 2012.

389 Schmitt and Shanker, *Counterstrike*, 235.

390 Barack Obama, President of the United States, “Remarks by the President on Osama bin Laden,” (remarks, White House, Washington, DC, May 2, 2011), <http://www.whitehouse.gov/the-press-office/2011/05/02/remarks-president-osama-bin-laden>.

391 Geoffrey Robertson, “Why it’s absurd to claim that justice has been done,” *The Independent*, May 3, 2011.

392 Kevin Gosztoła, “The Media on Obama’s ‘Kill List,’” *The Dissenter*, June 1, 2012.

The CIA and JSOC's focus on lethal operations may trade off with their expertise and competency with non-lethal approaches. According to retired Special Forces officer Mark Haselton:

If we spend the rest of our lives 'capturing and killing' terrorists at the expense of those [Special Forces] missions that are more important—gaining access to the local population, training indigenous forces, providing expertise, and expanding capacity—we're doomed to failure.³⁹³

Likewise, the CIA's focus on drone strikes diminishes the agency's capacity for intelligence-gathering and analysis. Center for New American Security fellow Andrew Exum argues that policymakers should "be asking whether or not CIA tradecraft has eroded over the past decade as the agency has chased the bright shiny ball we'll call 'drone-strikes-in-Pakistan.'" According to Exum: "It's great to have an intelligence agency with a knife in its teeth, but the primary mission of an intelligence organization is to gather and analyze intelligence, not to thwack bad guys."³⁹⁴

Alternative Approaches

While there are a range of steps the US government can take to make drone strikes more compatible with the principle of protecting civilian life—many of which we describe in this report—we are concerned about the normalization of drone targeting because this method is more threatening to civilian life relative to alternative approaches. Drone strikes, by virtue of the remote control technology involved and the circumstance of limited or no supporting boots on the ground, inherently deny targeted individuals any chance to surrender. While interrogation and detention, as recent history shows all too well, carry their own risks of human rights abuses, these non-lethal approaches at least provide the opportunity for an assessment of whether targeted individuals in fact pose a threat to US interests—an opportunity eliminated by drone strikes.

The Obama Administration has recognized the importance of pursuing alternatives to lethal targeting, as reflected in its repeatedly stated preference against killing in favor of capture operations.³⁹⁵ In an April 2012 speech, counterterrorism adviser John Brennan emphasized that the Administration prefers capture because it "allows us to gather valuable intelligence" and carries the potential to prosecute detainees in federal courts or military commissions.³⁹⁶ Moreover, Attorney General Eric Holder has described the preference for capture where feasible as—at least for US citizens—a matter of due process and legal requirement.³⁹⁷ Conflictingly, in leaks, some Administration officials have noted that capture is not feasible because there is "nowhere to put them"—that in practice, there is no detention option.³⁹⁸

393 Sean Naylor, "More than Door Kickers," *Armed Forces Journal*, March 2006, <http://www.armedforcesjournal.com/2006/03/1813956/>, quoting Mark Haselton in Tim Heffernan, "Who the Hell Is Stanley McChrystal?" *Esquire*, May 19, 2006

394 Andrew Exum, "What You Need to Know About the CIA Getting Rolled Up in Lebanon. That, and Larry Munson," Center for New American Security, November 21, 2011, <http://www.cnas.org/blogs/abumuqawama/2011/11/what-you-need-know-about-cia-getting-rolled-lebanon-and-larry-munson-updat>.

395 Obama Administration officials explicitly emphasize a preference to "capture suspected terrorists whenever feasible," rather than kill them; John Brennan, "The Ethics and Efficacy of the President's Counterterrorism Strategy" (speech, Wilson Center, Washington, DC, April 30, 2012); Eric Holder, Attorney General, (speech, Northwestern University School of Law, Chicago, IL, March 5, 2012); Jeh Johnson, General Counsel, Department of Defense, "National security law, lawyers and lawyering in the Obama Administration," (lecture, Yale Law School, New Haven, CT, February 22, 2012); Adam Entous, "Special Report: How the White House learned to love the drone," *Reuters*, May 18, 2010, quoting a senior US official: "[a]ny comment along the lines of 'there is nowhere to put captured militants' would be flat wrong. Over the past 16 months, the US has worked closely with its counterterrorism partners in South Asia and around the world to capture, detain, and interrogate hundreds of militants and terrorists."

396 See John Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, "The Ethics and Efficacy of the President's Counterterrorism Strategy," (speech, Wilson Center, Washington, DC, April 30, 2012).

397 See Eric Holder, Attorney General, (speech, Northwestern University School of Law, Chicago, IL, March 5, 2012).

398 Adam Entous, "Special Report: How the White House learned to love the drone," *Reuters*, May 18, 2010, quoting an unnamed Administration official; Priest and Arkin, *Top Secret America*, 211, arguing that drone strikes became "popular" because "there was really nowhere to put captives if the CIA didn't want to hand them over to the military and if the military didn't want to keep them in the politically unpopular prison on Guantanamo in Cuba."

The stated US preference against lethal targeting is consonant with the principle of humanity, a requirement of the laws of war. The principle of humanity does not expressly require capture attempts, but involves a “complex assessment” of whether “the precise amount of force” used causes “no more death, injury, or destruction be caused than is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.”³⁹⁹ The aim of the principle of humanity is “to avoid error, arbitrariness, and abuse.”⁴⁰⁰ In this sense, the principle of humanity is a corollary of human rights principles that deprivation of the right to life must not be arbitrary: that there must be a valid reason for using force, and that it must not be greater than absolutely necessary.⁴⁰¹

Despite the avowed preference against lethal targeting, US captures outside Afghanistan have been “exceedingly rare,” according to US counterterrorism adviser John Brennan. Speaking in April 2012, Brennan attributed this “reality” to several factors, including that “terrorists are skilled at seeking remote, inhospitable terrain—places where the United States and our partners simply do not have the ability to arrest or capture them,” and that capture attempts might “[put] the lives of our personnel at too great a risk” or “subject civilians to unacceptable risks.”⁴⁰² US capture/kill operations by ground forces have also resulted in many deaths—in Afghanistan and, more notoriously, in the raid that killed Osama bin Laden in May 2011.⁴⁰³ As conservative commentator Marc Thiessen notes: “Unfortunately, in virtually every case where the Obama administration has located senior al-Qaeda leaders in the past three years, the president has chosen targeted killings over live captures.”⁴⁰⁴

The greater frequency of killing over capture is worrisome from the perspective of civilian harm. The use of lethal force, in this case through drone strikes, puts civilians at risk of being caught in the crossfire or mistakenly targeted, with no chance to prove their civilian status. Moreover, as we describe in the chapter *Civilian Protection Limitations*, the current methods and procedures related to covert drone strikes may involve fewer precautionary measures to mitigate civilian harm than US forces would take in other kinds of operations.

Ensuring Drone Strikes Include Precautionary Measures to Mitigate Civilian Harm

The use of weaponized drone platforms does not preclude the US from taking precautionary measures to mitigate civilian harm, such as the measures it takes when using alternative weapons and weapons platforms in other operations.⁴⁰⁵ In fact, drone technology has the potential to heighten the precautions that the US government takes. Jakob Kellenberg,

399 Nils Melzer, “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,” International Committee of the Red Cross, 2009, 80; see also “Operational Law Handbook,” International & Operational Law Department, The Judge Advocate General’s Legal Center and School, US Army, 2012, 13–14, describing the “Principle of Unnecessary Suffering” as requiring US forces to “avoid inflicting gratuitous violence on the enemy” and as “counterbalance to the principle of military necessity.”

400 Nils Melzer, “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,” International Committee of the Red Cross, 2009, 80.

401 See Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* 189 (2011).

402 See John Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, “The Ethics and Efficacy of the President’s Counterterrorism Strategy,” (speech, Wilson Center, Washington, DC, April 30, 2012).

403 See generally “The Cost of Kill/Capture: The Impact of the Night Raid Surge on Afghan Civilians,” Open Society Foundations, 2011, 2.

404 Marc Thiessen, “Mr. President, please don’t kill this terrorist,” *The Washington Post*, May 15, 2012.

405 Under the laws of war, the principle of precautionary measures requires warring parties to take “[a]ll feasible precautions” to “avoid and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.” This includes steps to “verify that the objectives to be attacked are legitimate military objectives.” See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), art 57(1) (applying to international armed conflicts) [hereinafter Additional Protocol I]. See also Additional Protocol II, art. 13(1) (stating “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations”) (applying to non-international armed conflicts); See International Committee of the Red Cross, Customary International Humanitarian Law Database, Rule 15, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule15 (describing Additional Protocol, art. 57 as customary international law applicable in international and non-international armed conflicts). US military manuals reflect the requirement to take “all reasonable precautions.” See e.g., Department of the Navy, *The Commander’s Handbook on the Law of Naval Operations* para. 8.3.1 (2007); Judge Advocate General’s School, US Air Force, *Air Force Operations and Law* 249 (2d ed. 2009).

president of the ICRC, notes that one of the arguments for greater investment in drones is that they have “enhanced real-time aerial surveillance possibilities, thereby allowing belligerents to carry out their attacks more precisely against military objectives and thus reduce civilian casualties and damage to civilian objects—in other words, to exercise greater precaution in attack.”⁴⁰⁶ In sum, drone surveillance capability has the potential to raise the bar on civilian protection.⁴⁰⁷ There are, however, indications that US forces are failing to take precautionary measures in drone strikes that they would in other contexts.

Administration officials have recognized the importance of taking precautionary measures, and emphasized that the US does not authorize strikes against particular individuals on a kill list unless “we have a high degree of confidence that the individual being targeted is indeed the terrorist we are pursuing.”⁴⁰⁸ Moreover, the US will only authorize such a strike “if we have a high degree of confidence that innocent civilians will not be injured or killed, except in the rarest of circumstances.”⁴⁰⁹ (For further discussion, see chapters *The Civilian Toll* and *Civilian Protection Limitations*.)

In practice, however, such precautions are only relevant if the US applies the status of “civilian” to unidentified individuals. A 2012 US military manual emphasizes that “[i]f there is any doubt, [US] forces consider a person to be a civilian.”⁴¹⁰ However, a May 2012 *The New York Times* report suggests that in the covert drone strikes context, the government presumes that unidentified individuals killed in strikes are militants, since they are present in a strike zone (see chapter *The Civilian Toll*). Thus, while the US government states that it does not conduct strikes against a particular individual unless it has a high degree of certainty that the high-value target is present and that civilians are not, it appears the US often presumes that persons in geographic proximity to targeted individuals can also be directly and intentionally targeted.

In other contexts, the military has procedures to ensure that targets are positively identified before conducting a strike, a safeguard that systematically diminishes the risk of killing civilians mistaken for intended targets. The US military’s “Collateral Damage Estimation Methodology” (CDM) applies to pre-planned targeting operations.⁴¹¹ To ensure compliance with the principle of distinction, the CDM requires all personnel to “[e]stablish Positive Identification (PID) and to accurately locate targets consistent with current military objectives and mission specific Rules of Engagement.”⁴¹² The Positive Identification standard is defined as the “reasonable certainty that a functionally and geospatially defined object of attack is a legitimate military target in accordance with the Law of War and applicable Rules of Engagement.”⁴¹³ Whether such precautionary measures are used in covert drone strikes is unknown, and should be publicly disclosed in order to inform public debate on drone strikes.

406 Dr. Jakob Kellenberger, President, International Committee of the Red Cross, “International Humanitarian Law and New Weapon Technologies,” (keynote address, 34th Round Table on Current Issues of International Humanitarian Law, September 8, 2012), <http://www.icrc.org/eng/resources/documents/statement/new-weapon-technologies-statement-2011-09-08.htm>.

407 See Jack M. Beard, “Law and War in the Virtual Era,” *American Journal of International Law* 103 (2009): 409, 440-444, noting that “less developed states can argue that richer countries with extensive, widely deployed and sophisticated virtual surveillance capabilities and unprecedented access to once-unimaginable levels of ISR information are subject to a higher standard of care in verifying targets as military objectives and taking other precautionary measures.”

408 John Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, “The Ethics and Efficacy of the President’s Counterterrorism Strategy,” (speech, Wilson Center, Washington, DC, April 30, 2012).

409 *ibid.*

410 See “ATTP 3-37.31: Civilian Casualty Mitigation,” Headquarters, Department of Army, (2012), para. 1-2, <http://www.fas.org/irp/doddir/army/attp3-37-31.pdf>.

411 See “Joint Targeting Cycle and Collateral Damage Estimation Methodology (CDM),” General Counsel to the Chairman of the Joint Chiefs of Staff, November 10, 2009, 26, available in Declaration of Jonathon Manes, *The Joint Targeting Definitions and Process, Nasser Al-Aulaqi v. Obama*, No. p10-cv-1469 (JBD) 2010; see also “CJCSI Instruction 3160.01: No Strike and the Collateral Damage Methodology,” 2009, www.aclu.org/files/dronefoia/dod/drone_dod_3160_01.pdf.

412 “Joint Targeting Cycle and Collateral Damage Estimation Methodology (CDM),” General Counsel to the Chairman of the Joint Chiefs of Staff, November 10, 2009, 26.

413 *ibid.*, 26.

Indeed, reports of civilian deaths caused by drone strikes suggest the US does not positively identify targets in follow-up attacks—those occurring after the initial strike to ensure that all those present in a “kill box,” or designated area, are killed—based on the presumption that those present were militants rather than civilians.⁴¹⁴ There are numerous reports of follow-up attacks and some accounts suggest they have the result of killing rescuers who come to the scene to aid wounded individuals.⁴¹⁵ In February 2012, the *Bureau of Investigative Journalism* reported that at least 50 individuals were killed in follow-up drone strikes in Pakistan when they had gone to help victims killed in initial strikes.⁴¹⁶ There are also reports of strikes killing rescuers in Yemen.⁴¹⁷

These incidents may suggest that the US is not taking steps to continuously assess targeting intelligence. In other contexts, to mitigate harm to civilians US military forces commonly subject targeting intelligence to “continuous testing of validity and reliability.”⁴¹⁸ This includes reporting to commanders the assumptions and uncertainties of the operation, including the time-sensitive intelligence being relied upon.⁴¹⁹ This continuous evaluation can systematically reduce the risk of mistakes arising from “fog of war” biases. According to a director of combat operations in the Combined Air Operations Center during Operation Anaconda: “[t]he ROE was not there to go out and do a conventional fight. Under the rules of engagement for Operation Enduring Freedom, pre-planned strikes, interdiction targets and time-sensitive targets all had to be approved by US CENTCOM; and for the most part, the US CENTCOM/J-2 and legal advisors...drove what we did and did not target.”⁴²⁰

In other contexts, conventional military forces benefit from standardized processes for estimating likely collateral damage and related mitigation procedures.⁴²¹ These processes establish the levels of command clearance for assessment of collateral damage and execution of strikes based on pre-determined cut-off values for likely civilian casualties.⁴²² While there are reports that the CIA has declined to conduct strikes based on the presence of civilians in an area (see *The Civilian Toll*), it is unclear whether CIA operators benefit from standardized procedures and cut-off values, which they could reference in arguing against strikes within an agency culture that may increasingly promote them.

414 For a discussion of military doctrine related to “kill boxes”: “Bringing the Box into Doctrine: Joint Doctrine and the Kill Box,” School of Advanced Military Studies, US Army Command and General Staff College, Rep. No. ATZL-SWV, 2004.

415 See Peter Matulich, “Why COIN Principles Don’t Fly with Drones,” *Small War Journal*, 8.2 (February 24, 2012), describing “kill-boxes follow-up attacks [that] often occur after the initial strike” where “rescuers are targeted in an attempt to score a windfall of extra militants killed.”; see also “US drone strike ‘kills 15’ in Pakistan,” *BBC News*, June 4, 2012, reporting a “second missile killed 12 more militants who arrived at the scene.”; “Within 24 Hours: Three suspected militants killed in drone attacks,” *The Express Tribune*, May 29, 2012, reporting successive strikes within an hour period.

416 Chris Woods and Christina Lamb, “Obama terror drones: CIA tactics in Pakistan include targeting rescuers and funerals,” *The Bureau of Investigative Journalism*, February 4, 2012.

417 See e.g., Hakim Almasmari, “Two suspected US drone strikes reported in Yemen,” *CNN*, May 15, 2012, reporting that “Jaar district residents said civilians were killed after they rushed to the site of the first strike.”.

418 Gregory S. McNeal, “The US Practice of Collateral Damage Estimation and Mitigation,” (unpublished dissertation, Pepperdine University, November 9, 2011), 10–13, noting also that “target lists must be re-examined periodically to ensure those objects have retained the characteristics that rendered them lawful military objectives initially.”.

419 *ibid.*

420 Michael N. Schmitt, “Targeting and International Humanitarian Law in Afghanistan,” *Israel Yearbook on Human Rights*, 39 (2009): 321.

421 *ibid.*, 17, noting that the mitigation process involves 5 levels of tests based “on a progressively refined analysis of available analysis of available intelligence, weapon type and effect, the physical environment, target characteristics and delivery scenarios keyed to risk thresholds established by the Secretary of Defense and the President of the United States.”; see “Joint Targeting Cycle and Collateral Damage Estimation Methodology (CDM),” General Counsel to the Chairman of the Joint Chiefs of Staff, November 10, 2009, 30-36.

422 Aaron M. Drake Aaron, “Current US Air Force Drone Operations and Their Conduct in Compliance With International Humanitarian Law: An Overview,” *Denver Journal of International Law and Policy* 39 (2011): 629, 643, noting that RPA operations conducted by the US Air Force that the Air Force “ROE take into account that operators at lower levels, including RPA operators, might not be in a position to determine the excessiveness of collateral damage relative to the direct military advantage anticipated from a strike.”; See also Gregory S. McNeal, “The US Practice of Collateral Damage Estimation and Mitigation,” discussing the ‘Non-Combatant Casualty Cut-Off Value (NCV): operations involving estimates of civilian casualties below the NCV as contained in the ROE can be authorized by the senior commander; however, “[i]f the estimate exceeds the NCV military commanders must analyze the target using the Sensitive Target Approval and Review Process (STAR) and must submit the target for approval by the President of the United States of Secretary of Defense.”; See also “Joint Targeting Cycle and Collateral Damage Estimation Methodology (CDM),” General Counsel to the Chairman of the Joint Chiefs of Staff, November 10, 2009, 38.

Drone Strikes' Expansion of Who May Be Targeted

As covert drone strikes become the norm, actions or conduct by individuals that, in other circumstances, would lead to investigation or detention are increasingly blurring into a basis for lethal targeting. The result is that an ever-greater number of individuals are vulnerable to lethal targeting, and accordingly a larger number of civilians are at risk of either being killed or harmed as a result of collateral damage, or due to mistaken beliefs about their identity or associations.

The increasing use of weaponized drone technology in areas outside traditional armed conflict has corresponded with an expansion in the scope of individuals the US claims legal authority to target. While drone technology does not uniquely enable this expansion—it may have occurred regardless—the development of drones has played an important role. It has enabled the US to surveil a large array of individuals for long periods of time: not just militant leaders, but low-level fighters and individuals who engage in activity that may appear to be supportive of the aims of militant groups, but that, on closer inspection by ground forces, would be disproven. Individuals who in other circumstances might be detained for some period, interrogated, and released might—as a result of drone strikes—instead be summarily killed. Moreover, because the US government views these individuals as targetable, the civilians living with them, or in geographic proximity to them, are vulnerable to being harmed in a strike.

Although US officials have declined to define particular legal standards, they have described a broad category of individuals who the US may lethally target—deviating from conventional interpretations of civilian status, and heightening the risk of killing civilians collaterally, or as the result of mistaken assumptions about their identity.

In particular, US forces appear to rely on geographic proximity and the provision of support to militant groups as justification for direct targeting, putting at risk civilians who deserve protection from direct attack. As noted above, the US government reportedly counts unidentified individuals present in drone strike zones as militants who may be directly targeted, so long as they are “military-age males.” This assumption may not be unique to the drones context. When Afghanistan Analysts Network (AAN) investigated a targeting operation in Afghanistan aimed at insurgent leader Muhammad Amin that killed civilians based on mistaken identity, the organization found that US Special Forces used proximity to determine whether a person was lawfully targetable. One officer told AAN: “If someone is a targeted individual or someone is with that person, they are unlawful combatants.” Another officer said: “If we think it is Muhammad Amin and he has a PSD (Personal Security Detail), if we decide he’s a bad person, the people with him are also bad.”⁴²³

This presumption suggests a blurring of categories: the universe of individuals who may have some association or provide some support to militant groups, with the smaller category of individuals who may be directly targeted under the laws of war. Indeed, US officials have described large numbers of individuals the US may directly target. In his April 2012

As covert drone strikes become the norm, actions or conduct by individuals that, in other circumstances, would lead to investigation or detention are increasingly blurring into a basis for lethal targeting.

⁴²³ “The Takhar Attack: Targeted killings and the parallel worlds of US intelligence and Afghanistan,” Afghanistan Analysts Network, 30, (2011), documenting evidence that shows that the man who was targeted and killed was a civilian named Zabet Amanullah and arguing that nine other civilians killed were targeted because of their proximity to the intended target.

remarks, counterterrorism adviser John Brennan described the “outer limits” of legal targeting authority as including “literally thousands of individuals who are part of al-Qaeda, the Taliban, or associated forces.”⁴²⁴

Under the laws of war, warring parties must distinguish between combatants and civilians.⁴²⁵ The circumstances under which civilians lose protection under the laws of war and become subject to direct attack is a matter of hotly contested debate among lawyers and scholars in the US as well as in international fora; we do not attempt to do justice to them here since others have explored them extensively.⁴²⁶ Our concern is that under any conventional interpretation of the laws of war, lethal targeting cannot be justified merely by geographic proximity to individuals identified as members of an organized armed group, or based on presumed association. Rather, in cases of doubt individuals should be presumed civilians.⁴²⁷ Indeed, the US Army’s law manual emphasizes a “case-by-case approach.”⁴²⁸

Instead, targeting based on geographic proximity presumes that anyone present is associated with individuals identified as militants, and that association or limited support is the same as being “part of” an al-Qaeda affiliate. This presumption is untested—particularly in parts of the world where US forces have limited experience and understanding of local and cultural dynamics. As Center for Civilians in Conflict previously reported, in Pakistan “many fighters live with their families—often 30 or 40 people in joint-family homes—and strong traditions of hospitality, tribal and familial allegiances mean food, water, and protection are given to guests.”⁴²⁹ Targeting based on association also puts at risk individuals who are providing support to militant groups under duress. In Pakistan, the Center documented cases where civilians were targeted after being forced to provide food and shelter to militants in their homes.

Finally, US government targeting standards, while ambiguous, appear to justify lethally targeting individuals who, under conventional interpretations of the laws of war, could be detained but not targeted. Under the laws of war, providing services or support is not sufficient to justify lethal targeting. Individuals who are cooks, doctors, or financiers aiding al-Qaeda or associated forces cannot legally be killed based solely on their membership,

424 John Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, “The Ethics and Efficacy of the President’s Counterterrorism Strategy,” (speech, Wilson Center, Washington, DC, April 30, 2012).

425 The international humanitarian law principle of distinction requires parties to a conflict to distinguish in attack between combatants, as defined in Article 4 of the Third Geneva Convention, and civilians. In an international armed conflict, individuals who are not members of the armed forces are civilians and are entitled to protection against direct attack. In a non-international armed conflict, a customary rule of distinction applies, which is formulated in similar terms. See Geneva Convention III (defining “combatant”); Additional Protocol I, art. 50-51; Rules 1 and 3, Int’l Comm. of the Red Cross, Customary Int’l Humanitarian Law Database, Rule 1, 3, <http://www.icrc.org/customary-ihl/eng/docs/home> [hereinafter ICRC, Customary Law Database]. The US is not party to Additional Protocol I, but regards some of its provisions as customary law. In this report, we refer to customary law as recognized by ICRC’s study on customary law, although its views do not always reflect those of the US government.

426 Among the areas of debate, two of the most highly contested issues are: (1) who may be targeted as “directly participating in hostilities” and for how long; and (2) who may be targeted as fulfilling a “continuous combatant function,” a status by which members of organized armed groups cease to be civilians and lose protection against direct attack. For a brief summary of positions and controversies; “Targeting Operations with Drone Technology: Humanitarian Law Implications,” Human Rights Institute, Columbia Law School, (2011): 15–23, http://www.law.columbia.edu/ipimages/Human_Rights_Institute/Background-NoteASILColumbia.pdf, citing and referencing inter alia Michael Schmitt, “Deconstructing Direct Participation in Hostilities: The Constitutive Elements,” *New York University Journal of International Law and Policy*, 42 (2010): 697, 699; Ryan Goodman and Derek Jinks, “The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: an Introduction to the Forum,” *New York University Journal of International Law and Policy*, 42, (2010): 637, 640; Kenneth Watkin, “Opportunity lost: organized armed groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance,” *New York University Journal of International Law and Policy*, 42, (2010): 640, 692; Nils Melzer, “Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques on the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities,” *New York University Journal of International Law and Policy*, 42, (2010): 831, 833.

427 Article 50(f) of Additional Protocol I provides: “In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” The ICRC regards this provision as customary international law. See “Customary International Humanitarian Law Database, Rule 6(D),” International Committee of the Red Cross, accessed September 16, 2012, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule6; See “ATTP 3-37.31: Civilian Casualty Mitigation,” Headquarters, Department of Army, (2012), para. 1-2, <http://www.fas.org/irp/doddir/army/attp3-37-31.pdf>, (“[i]f there is any doubt, Army forces consider a person to be a civilian.” f.

428 See “Operational Law Handbook,” International and Operational Law Department, The Judge Advocate General’s Legal Center and School, US Army, (2012), 21.

429 “Civilians in Armed Conflict: Civilian Harm and Conflict in Northwest Pakistan,” Center for Civilians in Conflict, 2010, 22.

association, or geographic proximity.⁴³⁰ Targeting such individuals not only denies them protection as civilians, but also puts at risk civilians who may live or be near them when a strike occurs. When the scope of who may be targeted enlarges, the chance that civilians will be caught in the crossfire increases.

It is worrisome that Obama Administration officials sometimes fuse standards for who may be targeted with standards for who may be detained, repeatedly referring to US court jurisprudence interpreting the Authorization of the Use of Military Force (AUMF) in the detention context when defining US targeting standards.⁴³¹ In the detention cases, US courts have considered a range of factors to be indicators of membership in al-Qaeda:⁴³² staying at guesthouses run by or associated with al-Qaeda;⁴³³ receiving military training at an al-Qaeda training camp;⁴³⁴ associating with other al-Qaeda members;⁴³⁵ attending religious schools where others were recruited to fight for al-Qaeda;⁴³⁶ traveling to Afghanistan along a distinctive path used by al-Qaeda members.⁴³⁷ This jurisprudence should not be imported as the standards for covert drone operations without critical examination and assessment of the legal and humanitarian implications. Some acts that may justify detention and criminal prosecution, such as financially supporting an armed group or providing general propaganda, may not be legally sufficient to justify lethal targeting, and in any event, may not warrant killing from a humanitarian perspective.⁴³⁸

430 See letter from Elisa Massimino, President Human Rights First, to Barack Obama, President of the United States, May 29, 2012.

431 See "Authorization for the Use of Military Force: Pub. L. 107-40," 15 Stat. 224 (2001); In Department of Defense General Counsel Jeh Johnson's remarks on targeting Yale, he described the AUMF as the "bedrock" of the military's domestic legal authority and noted that the Obama administration has, in the detention context, interpreted it to include "those persons who were part of, or substantially supported, Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners"—an interpretation that "has been adopted by the courts in the habeas cases brought by Guantanamo detainees." See Jeh Johnson, General Counsel, Department of Defense, "National security law, lawyers and lawyering in the Obama Administration," (lecture, Yale Law School, New Haven, CT, Feb. 22, 2012); Likewise, in describing the Administration's assessment of whether an individual is a "legitimate target under the law," Brennan noted in his April 2012 remarks that "the use of force against members of al-Qaida is authorized under both international and US law, including both the inherent right of national self-defense and the 2001 Authorization for Use of Military Force, which courts have held extends to those who are part of al-Qaida, the Taliban, and associated forces." See John Brennan, "The Ethics and Efficacy of the President's Counterterrorism Strategy" (speech, Wilson Center, Washington, DC, April 30, 2012); see also Klaidman, Kill or Capture, 208–209, discussing Administration deliberations over standards for detention and reporting that "[e]veryone in the room knew there was much more at stake: the same legal arguments that applied to the question of who could be detained without trial directly implicated who could be targeted for death."

432 These indicia have been held to have differing probative value as evidence of membership, by the courts.

433 See e.g., *Uthman v. Obama*, 637 F.3d 400, 406 (D.C. Cir. 2011).

434 See e.g., *Esmail v. Obama*, 639 F.3d 1075, 1076 (D.C. Cir. 2011).

435 See e.g., *Esmail*, 639 F.3d at 1076-77.

436 See e.g., *Uthman*, 637 F.3d at 405.

437 See e.g., *Al Odah v. Obama*, 611 F.3d 8, 16 (D.C. Cir. 2010).

438 See Ramin Mahnad, "Targeting Versus Deprivation of Liberty Under the International Law of Armed Conflict," *American Society of International Legal Insights*, 15.28, (November 1, 2011), <http://www.asil.org/pdfs/insights/insight111101.pdf>, noting that, under humanitarian law, the differing standards for detention and targeting "reflect a careful balance between what is militarily necessary and what is required by the dictates of humanity [and that] the rules differ depending on the severity of action to be taken against an individual."

