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**America's Shadow Warriors:
Legal Dimensions of Special Forces and
the Targeted Warfare**

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“America’s Shadow Warriors: Legal Dimensions of Special Forces and the Targeted Warfare”

By Tara McKelvey

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Abstract

President Barack Obama is escalating an ambitious, U.S.-directed covert war, relying on Special Forces and high-tech strikes in Yemen, Pakistan, Afghanistan, and other countries to track down and eliminate Al Qaeda leaders and militants around the world. Meanwhile, administration officials in Washington are attempting to create a legal framework for the expansion of this form of targeted warfare. This paper will argue that the administration officials, the media, and the American public know too little about the success of these clandestine operation and their consequences, particularly the unintended ones, to make an informed decision about whether or not the benefits of these wide-scale, covert actions outweigh their costs.

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Rather than conduct multiple full-scale, overt wars against terrorists, President Barack Obama has instead embarked on a shadowy campaign against Al Qaeda, the Taliban, and other extremist groups around the world through the use of the military's Special Operations. This new type of warfare employs a range of weapons, such as helicopter gunships and cruise missiles, as well as the distribution of propaganda, or psychological operations, and is being conducted in Pakistan, Somalia, Saudi Arabia, Yemen, and more than fifty other countries around the world. The most dramatic, and controversial, divisions of the program are "direct action," as the military describes the units that focus on killing terrorism suspects and militant leaders, and they are also among the fastest growing divisions.

Yet nearly two years after the Obama administration began ramping up its stealth forces and dispatching teams of special operators abroad, questions remain unanswered: Are these operations killing enough Al Qaeda leaders to destabilize the terrorist organizations? Or are these operations inadvertently helping Al Qaeda build a cadre of suicide bombers who will pose an even greater threat to U.S. peace and security? This paper will examine new data about Special Operations and other forms of U.S.-directed clandestine warfare in order to shed light on whether these operations reduce the chances of conflict between the U.S and non-state actors such as Al Qaeda or increase the likelihood that Al Qaeda or another terrorist group will inflict massive violence against this country.

The increasing reliance on Special Operations and other forms of targeted warfare has occurred gradually over the past nine years; the Bush administration began to ramp up the use of targeted warfare after the September 2001 terrorist attacks, and President Obama relied even more heavily on these operations after he took office. Overall funding for Special Forces has more than doubled over the past nine years, from approximately \$3.8 billion in fiscal year 2001

to more than \$9.8 billion requested for fiscal year 2011; during this period of time, U.S. Special Operations personnel expanded by twenty-eight percent, increasing from 45,655 to 58,657 men and women.¹

President Obama may have displayed a more subtle approach to foreign policy and national security than President Bush in his public announcements and speeches. President Obama has eschewed the use of inflammatory language about terrorist groups and has also displayed a different philosophical approach to national security; indeed, the shift in President Obama's public rhetoric has reflected a profound change in the administration's fundamental thinking about how terrorist organizations and militants around the world should be combated. Rather than attempting to launch a broad-scale, highly charged, emotional campaign against Al Qaeda and other extremists – the Global War on Terror, as it was previously known – the Obama administration has rejected patriotic rhetoric in discussions about national security.

President Obama has instead been more circumspect in his approach to the deployment of troops and in his strategy toward combating terrorist groups. As Stephen Holmes, the Walter E. Meyer Professor of Law at New York University, explained, President Obama is more realistic about his ability to face threats to the United States and “doesn't think he can replace foreign policy with exorcism, ending all the tyranny in the world and so on.”² The rhetoric is toned down, but nevertheless, as New York University's Stephen Holmes has explained, President Obama initiated a more aggressive military campaign of targeted warfare against terrorist groups than his predecessor; after taking office in 2009, President Obama decided that the United States

¹ Michele L. Malvesti, “To Serve the Nation: U.S. Special Operations Forces in an Era of Persistent Conflict,” Center for a New American Security, Washington, June 2010.

² Stephen Holmes, the Walter E. Meyer Professor of Law at New York University, Seventh Annual Global Security Forum, April 30 to May 1, 2010, Center on Law and Security, New York University School of Law, New York.

would expand the number of terrorism suspects who are targeted for death in countries around the world and that U.S. special operators would carry out missions to eliminate them. Despite the differences in style and philosophy of President Bush and President Obama, their approaches to counterterrorism are remarkably similar.

President Obama has not publicly expressed a philosophical or moral basis for a global campaign against terrorists, as his predecessor once did, nor does President Obama appear to believe in a worldwide battle against evil, but as a practical matter he has continued his predecessor's counterterrorism strategy, based on lethal strikes against militants and Al Qaeda leaders, and indeed President Obama has expanded the role of Special Forces and military units that specialize in direct action. Overall, President Obama's counterterrorism strategy is consistent with that of his predecessor, particularly in the administration's legal approach to the issues of combating terrorism.³

Shortly after the presidential election in 2008, President-elect Obama and his deputies who specialize in national-security issues were informed of their predecessors' approach to fighting terrorism, including an expansion of authority for the U.S. government to carry out deadly missions against Al Qaeda and other terrorists that had been approved near the end of President Bush's term.⁴ President Obama and current administration officials embraced this approach and welcomed the enhanced powers of the government. The expansion of authority meant, for example, that the government could kill terrorism suspects when their names were not known to the U.S. officials; in other words, lethal strikes could be carried out against individuals who appeared to be caught up in terrorist activities in places around the world, even when little

³ February 15, 2010, The New Yorker, "The Trial," by Jane Mayer.

⁴ May 5, 2010, The Los Angeles Times. "CIA Drones Have Broader List of Targets," by David S. Cloud.

else was known about them. In these instances, the officials were relying on so-called “pattern of life” analysis that was based on observation of the suspects with the help of surveillance devices, bolstered by information provided by individuals who were familiar with the daily activities of the suspects.

Critics of both the current and former administrations believe that this expansion of authority for the government, and the increased allowances for the elimination of terrorism suspects, escalates the chances that U.S. special operators will make mistakes in their targeting of suspects overseas and that they will accidentally kill the wrong people. President Obama and his deputies did not appear to be overly concerned about these human-rights issues, however, and when there were differences between their counterterrorism strategy and that of their predecessors, President Obama’s approach to eliminating terrorists has been more expansive, and increasingly zealous, in its application.

The clandestine programs of targeted strikes, or assaults by bands of special forces and helicopter gunships and unnamed aerial vehicles, as well as those of training and equipping foreign forces, have been ramped up dramatically under President Obama: The administration lobbied to increase funding for a counterinsurgency fund for Pakistan, for example, by expanding its budget from \$700 million in 2009 and 2010 to nearly twice that amount, or \$1.2 billion, in 2011, so that the U.S. Special Forces could build on their capacity to train Pakistani Frontier Corps and to assist in their efforts to fight against the Al Qaeda and the Pakistani Taliban leaders who are living and working near the Afghan border.⁵ A professional staff member working on the Foreign Relations Committee confirmed that roughly two hundred U.S. special operators are now working in Pakistan, more than double the number from the year

⁵ Lolita C. Baldor, “Pentagon Seeks Billions to Battle Terror Abroad,” The Associated Press, February 4, 2010.

before. A small number, with impact; in the 1980s, there were only about fifty-five U.S. advisors in El Salvador at any given time. Despite the official U.S. position that American soldiers are not patrolling or collecting intelligence in that country. The Administration has in recent weeks become more aggressive, escalating the number of drone strikes and going after the ferocious Haqqani network of militants in Pakistan.

“The U.S. is losing patience, and they now think that taking on the Haqqani network is necessary,” said Moeed Yusuf, a South Asia adviser at the Washington-based United States Institute of Peace.⁶ The steady increases in manpower and resources for Special Forces in Pakistan and in other countries show the commitment that the executive branch, whether under President Bush or President Obama, has toward these types of operations. In an example of how the Obama administration has been relying more heavily on clandestine missions than in the past, and beefing up the U.S. capacity to carry out covert acts, the Central Intelligence Agency (CIA) has launched almost four times the number of drone strikes since the beginning of his term in office, as they conducted during the final year that President Bush was serving in the White House.⁷

President Obama’s decision to embark on an ambitious campaign of targeting Al Qaeda and militant leaders in sovereign nations such as Yemen and Pakistan, at least according to New York University’s Stephen Holmes and other scholars, has led him into a new legal arena in which the parameters both for targeting suspects and for running operations within the borders of other nations remain unclear. “He’s got an assassination list – without due process,” Holmes said, criticizing the President’s decision to eliminate terrorism suspects around the world through

⁶ Author interview with Moeed Yusuf, a South Asia adviser at the Washington-based United States Institute of Peace, October 6, 2010.

⁷ The New York Times, “CIA Intensifies Drone Campaign Within Pakistan,” by Mark Mazzetti and Eric Schmitt, September 28, 2010.

the use of Special Forces and drone strikes. Despite the ambiguous legal reasoning for this type of warfare, President Obama and his deputies have made a significant commitment to the military and the CIA and their efforts to carry out the drone strikes and other forms of targeted attacks; for a variety of reasons, the administration officials believe that this type of clandestine warfare is the best way to protect the nation from a future attack.

PART ONE: RESPONSE TO THE THREAT.

U.S. law defines covert action as operations that are designed “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.”⁸ These actions may not be secret: Special operators have ventured into Pakistan to work on psychological operations, carrying cameras and notebooks to record the opening of a girls’ school, for example, on a covert mission to influence public opinion in that country; three of the special operators were killed by the Taliban in February 2010, and news of their deaths appeared in U.S. newspapers. Yet despite the obituaries of these three special operators in U.S. newspapers, the activities of many soldiers and officers in U.S. Special Operations, working in Pakistan and in other countries, and the fact that they are operating on a regular basis in sovereign nations such as Pakistan, have not been publicly acknowledged by U.S. government officials.

There are few people in Washington who have had more experience in conducting covert operators or in overseeing this type of shadowy government work in South Asia and other regions of the world than Dell L. Dailey, a sixty-one-year-old retired general who is the former head of Joint Special Operations Command, which is part of U.S. Special Operations; he is also

⁸ March / April 2004. *Foreign Affairs*. “The Rise of the Shadow Warriors.” By Jennifer D. Kibbe, Olin Fellow in Foreign Policy Studies, Brookings Institution.

one of Washington's biggest proponents of this type of military action, and he believes that the military strikes conducted by Special Forces with the assistance of unmanned aerial vehicle, or drones, as they are commonly known, are uncannily efficient. As he spoke on a summer evening in a restaurant in northern Virginia about the air strikes, he swept his right hand toward the table in order to show just *how* precise the aircraft were in their targeting of terrorists and militants, pointing to a spot in the middle of the table as he demonstrated the accuracy of the strikes. The unmanned aircraft, he explained, do not go astray.

Retired generals such as Dell Dailey, Obama administration officials, and deputies on the National Security Council are enthusiastic about Special Forces and other types of targeted warfare that are used to wipe out terrorists and extremists; indeed, these clandestine strikes have become the signature military strategy of our time. The Pentagon will purchase more unmanned aircraft than manned ones this year and will train more drone-aircraft pilots than those who will fly all of the bomber and fighter jets combined. Special Forces carry out the bulk of these kinds of operations in Afghanistan and train local troops in Pakistan, Yemen, and in other countries, but the Central Intelligence Agency (CIA) has also become intimately involved; indeed, their participation in these programs marks a shift in priorities at the agency. One individual who worked for both the Bush and Obama administrations, John Rizzo, the former acting general counsel for the CIA, is familiar with the policies of both Presidents and compares the two administrations: The number of killings that are being carried out by the CIA under President Obama is "unprecedented," Rizzo said. "This is way beyond anything I'd experienced in the past twenty-five years."⁹ Obama administration officials talk about the hygienic aspects of targeted warfare, touting the precise targeting of both the helicopter gunships and the unmanned aerial

⁹ Author interview with John Rizzo, former acting general counsel, CIA. Washington, D.C., May 25, 2010.

vehicles, specifically describing the remotely-controlled aircraft and their range of four hundred and sixty miles and their ability to hover above a target in Afghanistan, Pakistan, or some other faraway country for more than twenty hours at a stretch.¹⁰

Yet for all of the feats that the Predator aircraft and helicopter gunships are able to perform, they nevertheless rely on intelligence gathered by human beings to carry out their missions and therefore may also hit the wrong target when the information turns out to be wrong, as one of the drone aircrafts did on a mountain road in Afghanistan in February 2010. A Predator drone hovered above the road in Uruzgan province, guided by U.S. Air Force pilots who were working in offices more than seven thousand miles away at Nevada's Creech Air Force Base.¹¹ The jet was about the size of a Chevy Impala, and its engine sounded like a leaf blower roaring in a neighbor's yard, at least while it was on the tarmac; when the aircraft was flying 20,000 feet above the mountains of Afghanistan, the engine made no sound at all. The aircraft remained silent and invisible for more than three hours above the mountain road as it recorded images of a pickup truck and two minibuses that were headed for Kandahar.

Some time earlier, a U.S. ground commander had heard that insurgents in Kandahar were planning an attack on American soldiers, and the commander believed that the people riding in the pickup truck and the minibuses were part of the plot. The aircraft collected footage of the vehicles, but the images were bluish-green and grainy and showed only bearded men riding in the back of the truck,¹² and meanwhile the people inside of the truck and in the minibuses were hidden from view. Nevertheless, the attack went ahead. At about 8:30 on that morning, February

¹⁰ February 23, 2010, Popular Science, "Gallery: The Complete Uav Field Guide, "Know your Reapers from your Global Hawks."

¹¹ May 29, 2010, US Forces, Memorandum, Commander, Uruzgan.

¹² May 29, 2010, The Associated Press, "US drone crew blamed for Afghan civilian deaths," by Rohan Sullivan.

21, American forces fired Hellfire missiles and aerial rockets at the pickup truck and the minibuses, killing more than twenty people. As it turned out, they were just a group of friends and relatives who were headed for Kandahar, and they had nothing to do with the Taliban. Several women in the vehicles were wearing brightly colored clothing, which should have alerted the Special Forces to the fact that they might not actually be Taliban militants,¹³ but nevertheless the strike was launched. These women, along with a six-year-old and a nine-year-old child, both of whom were unlucky enough to be hanging out near the road when the missiles were fired, were badly wounded in the assault.¹⁴

In contrast, the attacks from unmanned aerial vehicles are launched from “over the horizon” where it is difficult to distinguish between civilians and enemy combatants and, as one retired general who served in Iraq explained to me, may do more harm than good. “The persistence of these attacks on Pakistani territory offends people’s deepest sensibilities, alienates them from their government, and contributes to Pakistan’s instability,” wrote David Kilcullen, who has served as an adviser to Gen. David Petraeus, in a New York Times op-ed in May 2009. These experts claim that these U.S.-directed operations against terrorists in Afghanistan, Pakistan, and in other nations have inflamed anti-U.S. sentiment in these countries and in other places around the world to such an extent that they have actually increased the threat of a future attack on the United States.

U.S. officials estimate the number of deaths from drone strikes at twenty over the past year and a half.¹⁵ These numbers contradict a widely-cited report by a Washington-based organization called New America Foundation that stated more than one hundred and fifty non-

¹³ May 29, 2010, U.S. Forces, Memorandum for Commander – Uruzgan.

¹⁴ February 22, 2010, Guardian, “Afghan ministers voice anger as civilians killed in Nato air strike,” by Jon Boone and Matthew Weaver.

¹⁵ Author interview, National Security Council staff member, New York, May 1, 2010.

militants have been killed in the strikes in Pakistan during that time period. Critics of the stealth warfare believe that the U.S. officials' attempt to downplay the targeting errors is a grave mistake.

Whether the strikes kill a large number of civilians or not, critics argue that these operations have antagonized people who live in Pakistan to a significant degree and have created a great deal of ill will toward the United States and moreover have garnered sympathy for the targets of the attacks: Recent public-opinion polls, for example, show that Al Qaeda is more popular than the United States among people who live in Pakistan. Meanwhile, people in Afghanistan have become increasingly suspicious of the Americans who are trying to help rout out the Taliban and militants. Philip G. Alston, a law professor at New York University and the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, has investigated the targeted killings that have taken place in Afghanistan, and he has spoken with people who live in Kabul and other cities. Many of them believe that ““Americans think they can come in and kill anyone, and they do,”” he explained. “That perception, as silly as it was, is very hard to dispel.”¹⁶

In fact, determining the ratio of civilian-to-militant deaths in these strikes is difficult, if not impossible, to determine, since many of the assaults occur in remote regions of Pakistan where journalists are not been able to travel in order to speak with people in the area. “With each one, it would be impossible to calculate precisely what the collateral damage would be,” explained Paul R. Pillar, the former deputy director at the CIA's Counterterrorist Center. After a strike has been launched, he said, “The Pakistanis may get some sense of what the casualties

¹⁶ Author interview with Philip G. Alston, a law professor at New York University and the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, April 1, 2010, New York.

were, but even for them, you're left with an estimate. I think for us [the estimate is] based mainly on subsequent overhead imagery. You count bodies. But, you know, bodies can be moved, and sometimes they're not visible, and often you don't know what's a death and what's not."¹⁷

Critics of U.S.-director stealth warfare believe that the data from these air and ground strikes in Pakistan, Yemen, and in other countries is incomplete, and moreover that the shadowy activities of the special operators have not been examined in detail, nor have these tactics been debated in a robust manner by the public; moreover, these critics believe that an overall tally of American successes, both in the accuracy of the strikes against terrorists as well as of their ability to reduce the threat of terrorism against the United States, has not been done.

Indeed, some counterterrorism experts believe that the covert warfare is having a destabilizing affect on various other countries and is causing the United States to lose ground in the global war of ideas, shifting the balance of power toward the terrorist groups. These experts concede that the drone strikes have killed leaders of Al Qaeda and militant groups in Pakistan such as Mehsud, but they point out that terrorist groups are not like mob families that are wrecked when its leaders are captured or killed. When a terrorist group loses its leader, the organization dissolves in only one out of five cases. For these reasons, some military analysts believe that the U.S. strategy of eliminating the leaders of extremist organizations is misguided. "If the boss gets killed, they have to find another boss," said Andrew Bacevich, a professor of international relations at Boston University and the author of *Washington Rules: America's Path to Permanent War*. "But simply killing successive bosses with the expectation that will lead to the end of these groups – that does not make sense."

¹⁷ Author interview with Paul R. Pillar, director of Graduate Studies, Security Studies Program, Georgetown University's Center for Peace and Security Studies, Washington, D.C., June 16, 2010.

Once the leader of a terrorist group is killed, they are quickly replaced, and the successors are at times more brutal than the men killed by the U.S. strikes.¹⁸ Regardless of the number of civilian deaths or even the accuracy of the strikes, however, the efficiency and value of the strikes are difficult to determine, since even when the assaults eliminate Al Qaeda and Taliban leaders, they may nevertheless have little impact on the terrorist and extremist organizations. The confidence of U.S. officials and Washington-based counterterrorism experts over the “progress” that they made with the assault on the Pakistani Taliban on that night may have been excessive. After Mehsud died, he became a martyr, and some military analysts say that the air strike made it easier for the Taliban to recruit supporters in the region. Mehsud was replaced by a new leader, and the Taliban suffered almost no set back during their transition in leadership.

In another case, U.S. Special Forces spent two-and-a-half years in an effort to track down Abu Musab al-Zarqawi, Al Qaeda’s leader in Iraq, and the Special Forces conducted hundreds of tactical missions in pursuit of their target, until they killed him in June 2006.¹⁹

Eliminating Zarqawi was widely considered to be one of the greatest achievements of U.S. Special Operations, and yet his death had little or no impact on the terrorist organization itself and did little to reduce the violence in the country.²⁰ Moreover, as Boston University’s Andrew Bacevich has argued, the military campaign against Zarqawi and other members of Al Qaeda and extremist groups is similar to a Vietnam-era program that was designed to wipe out the Vietcong and later became notorious for widespread human-rights abuses; as military historians point out, the program was largely unsuccessful and has much in common with the

¹⁸ February 12, 2010, PoliticsDaily.com. “Obama’s Drone War: Does The Killing Pay Off?” By David Wood.

¹⁹ Author interview with a former Delta troop commander and author of *Kill Bin Laden* (St. Martin’s Griffin), under the pseudonym of Dalton Fury. September 27, 2010.

²⁰ January 2010, Boston Review, “U.S. Strategy in Afghanistan.” Nir Rosen.

current campaign of targeted warfare. “It is in a sense a version of the Phoenix program. We’re assassinating them with missiles.”²¹

The durability and adaptability of Al Qaeda reinforces the findings about these attempts to eradicate the terrorist groups, since Al Qaeda members have managed to persevere in the tribal areas despite the strikes against them. The air strikes have managed to slow Al Qaeda down, but the attacks have not been debilitating, as its ongoing operations have demonstrated over the past two years. Al Qaeda fell behind on the number of media releases it produced in 2008, issuing only half the number it had distributed during the previous year, but by the following year its media division had returned to normal. Rather than destroying Al Qaeda’s safe haven in Pakistan and eliminating the terrorist group, the stealth warfare has caused Al Qaeda to adapt to a new and more treacherous environment, as counterterrorism experts have explained, and may have helped the organization transform itself into an even more powerful, global operation.

Counterterrorism experts explain that Al Qaeda is no longer a terrorist organization with a media offshoot, as it was in the early 2000s; it has instead become a media organization with a terrorist component. Its members have adopted a more aggressive role in global brand management, offering coffee mugs with a terrorist logo to supporters, and they have also become increasingly sophisticated in their marketing. In one of the Al Qaeda promotional videos, for instance, filmmakers show footage of counterterrorism experts Michael Scheurer, a former CIA officer, and Peter Bergen, a CNN security analyst, both of whom describe the dangers of Al Qaeda and inadvertently help boost the terrorist brand. Through these efforts, and drawing on the anti-American sentiment that has developed because of the clandestine strikes in countries such as Pakistan, Al Qaeda and other terrorist groups are expanding their base.

²¹ Author interview with Andrew Bacevich, professor of international relations, Boston University. September 17, 2010.

A report by the head of the Counterterrorism Research Group in the United Kingdom's Foreign and Commonwealth Office has demonstrated that there is a correlation between drone strikes in the tribal areas of Pakistan and the rate of radicalization among people who are living in that region as well as among Pakistanis who are residing in Great Britain; the report was based on two years of field research in Pakistan and England, but its findings are classified. (The head of the Counterterrorism Research Group described unclassified sections of the report to me during an interview in Washington.) One individual, Faisal Shahzad, the Pakistani-American who tried to set off explosives at Times Square, said afterwards that he had joined forces with Al Qaeda partly because he was enraged at the drone strikes that killed women and children in Waziristan.

PART TWO: LEGAL DIMENSIONS OF TARGETED WARFARE.

The empirical data that demonstrates the effectiveness of U.S.-directed targeted warfare in diminishing the threat posed by Al Qaeda and militant groups against the United States may be incomplete, at least according to counterterrorism experts and military analysts, but nevertheless President Obama and his deputies are committed to an escalation in the covert operations. The reasons for the Obama administration's shift toward targeted warfare are many and complex, ranging from the changing nature of the terrorist threat to the public perception of national security.

There is no longer an urgent need for terrorism suspects to be interrogated since the threat against the United States has faded since the 2001 attack. At the same time, many Americans were so appalled by the harsh interrogations of terrorism suspects during the Bush administration that they called for an end to prisoner abuse and mistreatment, and consequently the detention

and interrogation of terrorism suspects became politically contentious areas. Some legal experts argued that as a result it became easier, not to mention politically more expedient, to kill terrorism suspects rather than to hold them in a detention facility and to ask them questions. “The reliance on drone warfare is driven by the desire not to take prisoners,” explained Peter Berkowitz, chairman of the Hoover Task Force on National Security and Law at the Hoover Institution, Stanford University.²²

Indeed, some legal experts stated that it would be wiser to kill these men from afar in aerial strikes rather than up close with small firearms, so that Americans would not be faced with the messy prospect of an Al Qaeda leader who wants to surrender (many leaders of terrorist organizations want to surrender, at least according to commanders of Special Forces who have captured them; suicide bombers aside, the leaders of these groups are usually in no hurry to die.)²³ In one case last fall in which a terrorist leader was tracked down by American forces, U.S. soldiers ended up killing the militant, an Al Qaeda-linked leader named Saleh Ali Saleh Nabhan, 30, who was crossing the Somalia desert in a truck on a September afternoon. American officials talked about trying to capture him, but they could not figure out where to put him if they took him alive and so decided just to kill him, firing at the truck from military helicopters. With the rise in the number of strikes that the U.S. military has launched against terrorism suspects and militants, including assaults on individuals who are living in sovereign nations such as Pakistan and Yemen, Obama administration officials have naturally begun to take a closer look at the legal foundation for the U.S.-directed strikes to ensure that they are on a solid grounding.

²² Author interview with Peter Berkowitz, chairman of the Hoover Task Force on National Security and Law at the Hoover Institution, Stanford University. Washington, D.C., June 14, 2010.

²³ Author interview with Dell Dailey, former head of Joint Special Operations Command, which is part of U.S. Special Operations, Lorton, Virginia, July 6, 2009.

These officials, along with experts in international humanitarian law, have been grappling with some of the more contentious issues surrounding the use of covert strikes and targeted warfare.

One of the fundamental questions about this form of military campaign is the legality of the covert strikes when they are carried out in sovereign nations. Killing enemy fighters in the combat zones in Afghanistan and Iraq is an acceptable part of war; targeting suspected terrorists and militants who are operating not in a combat zone, but are instead living thousands of miles from the battlefields in sovereign nations that are not at war, however, is more complex, particularly when these individuals do not pose an immediate threat to the safety of Americans. Many experts believe that this type of targeted warfare falls into a legal gray area. In a broader sense, some experts in humanitarian law believe that the targeted killings carried out by the United States should abide by a series of internationally recognized rules stating that these killings are legally justified and moreover that the public knows and understands the justification for these killings “and that there are effective mechanisms for investigation, prosecution, and punishment if laws are violated,” explained Philip G. Alston, a law professor at New York University and the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.²⁴

U.N. Special Rapporteur Philip Alston and other international humanitarian-law experts believe that Obama administration officials have fallen short in their efforts to present an argument in favor of targeted warfare to Americans and to the rest of the world; moreover, these experts believe that American officials have not consistently been following the international laws regulating targeted warfare and that the U.S.-directed strikes against terrorism suspects in countries such as Pakistan and Yemen therefore constitute extrajudicial killings. Alston and other

²⁴ “Rules for Drone Wars: Six Questions for Philip Alston,” By Scott Horton, *Harper’s Magazine*. June 9, 2010.

experts have argued that the United States government should stop conducting these kinds of missions, or at least administration officials should re-evaluate the conditions in which they are carried out, since these experts believe that these covert actions exist in a legal lacuna and that there is little accountability for the U.S. Special Forces or American officials when the missions go wrong.

Not all experts in international law agree with this assessment, however. Some of these scholars have been examining the issue of targeted warfare and decided to make recommendations to administration officials to help them follow the best course of action so that they will be able to *escalate* the programs of targeted warfare and expand upon the capacities. These legal scholars believe that targeted warfare is efficient and useful, and they have attempted to build a framework for the programs to target and kill terrorism suspects and Al Qaeda leaders in countries around the world and have worked hard to ensure that the U.S. government officials who carry out these programs are not later prosecuted for their actions. The scholarly recommendations in support of targeted warfare have been presented in testimony on Capitol Hill and in academic papers, including an essay entitled “Targeted Killing in U.S. Counterterrorism Strategy and Law” by Kenneth A. Anderson of American University Washington College of Law, which appeared in a 2009 book entitled *Legislating the War on Terror: An Agenda for Reform* (Brookings Institution Press), which was edited by Benjamin Wittes.

American University’s Kenneth Anderson has a background in international law, and he served as the legal editor of the first edition of a book entitled *Crimes of War: What the Public Should Know*, edited by Roy Gutman and David Rieff (W.W. Norton & Co.) Kenneth Anderson represents a growing number of scholars and experts in the field of international law who see the

escalation of U.S.-directed targeted warfare in a positive light, since they believe that new technology, such as the unmanned aerial vehicles, as well as the advanced skills of the military personnel who work in U.S. Special Operations, mean that these strikes can be executed with such precision that fewer civilians will be killed or injured in these types of assaults than in the more conventional, and often clumsy, strikes that are carried out by the U.S. military.

One of the nation's leading human-rights advocates explained recently, for example, that he and his colleagues had decided to support the covert, killing teams that are working under the auspices of U.S. Special Operations, explaining that U.S.-directed targeted warfare is an efficient way of ensuring that fewer civilians will be killed during the pursuit of terrorists. Indeed, many scholars and policy analysts agree. "The narrower the targeting, the better," explained Benjamin Wittes, a senior fellow at Brookings Institution, and the editor of *Legislating the War on Terror*.

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Leading human-rights advocates in Washington also believe that it is wiser to let U.S. Special Forces attempt to kill militants in countries such as Yemen rather than to let local forces do it.²⁶ The fact that human-rights advocates and experts in international law support the U.S.-directed targeted killings may seem surprising, since human-rights advocates have traditionally condemned state violence and have argued for caution in the use of lethal force; moreover, critics of programs of U.S.-directed strikes point out that the assaults are imperfect, despite the confidence that many human-rights advocates have in their accuracy, and that they sometimes hit the wrong target. Yemeni authorities protested, for example, against the U.S. attacks on their

²⁵ Author interview with Benjamin Wittes, a senior fellow at Brookings Institution, Washington, D.C., June 18, 2010.

²⁶ Author interview with the director of a human-rights organization who preferred to remain anonymous because of the sensitive nature of the discussions, Washington, D.C. October 2, 2010.

soil, particularly since one of the recent strikes, the U.S. accidentally killed a Yemeni provincial governor.

Nevertheless, human-rights leaders support the targeted strikes, despite the fact that they sometimes misfire and that innocent people are killed, and meanwhile many experts in international law, such as American University's Kenneth Anderson, have been forthright in their defense of these military and U.S.-directed units that carry out these killings. Anderson has argued that Obama administration officials should defend their right to carry out these types of missions and moreover should build on the foundation that allows for these missions. He constructed a legal basis in defense of targeted warfare. "Part of the purpose of the paper was that the United States has to articulate and defend its position," explained Brookings Institution's Benjamin Wittes.²⁷ Anderson argued that "the U.S. justification for the legality of a particular targeted killing should focus on self-defense as the basis."²⁸

He wrote, "The accepted space for targeted killings is eroding even within what a reasonable American might understand as the four corners of our conflict with al Qaeda. In many situations in which any American president, Obama certainly included, would want to use a targeted killing, it is unclear to some important actors—at the United Nations, among our allies, among international law scholars, and among NGO activists—as a matter of international law that a state of armed conflict actually exists or that a targeted killing can qualify as an act of self-defense. The legal situation, therefore, threatens to become one in which, on the one hand, targeted killing outside of a juridical armed conflict is legally impermissible and, on the other

²⁷ Author interview with Benjamin Wittes, a senior fellow at Brookings Institution, Washington, D.C., June 18, 2010.

²⁸ "Targeted Killing in U.S. Counterterrorism Strategy and Law" by Kenneth A. Anderson of American University Washington College of Law; *Legislating the War on Terror: An Agenda for Reform*, ed. Benjamin Wittes. Washington, D.C.: Brookings Institution Press, 2009.

hand, as a practical matter, no targeted killing even within the context of a ‘war’ with al Qaeda is legally permissible, either.”²⁹

His support of targeted warfare was persuasive, apparently so convincing that some people who were once skeptical of this type of warfare changed their views. Less than a year after Anderson’s paper was published, his legal argument was apparently adopted by the Obama administration; former Yale Law School Dean Harold Koh, who is serving as the legal advisor to the State Department, expressed a legal opinion about targeted warfare that echoed the argument that was presented in Kenneth Anderson’s paper in a public forum in Washington in March 2010. At Yale, Harold Koh was an outspoken critic of the Bush administration and their policies on interrogation, detention, and other aspects of the war on terror. Koh was not known beyond academic and legal circles, but he had an impeccable reputation within this sphere because of his public stance against injustice and enjoyed an impressive moral stature. In March 2008, for instance, Koh signed a letter stating that targeted warfare violated international law.

After joining the Obama administration, however, Koh began to see things differently: Drone strikes are legal, he announced earlier this year at a conference sponsored by the American Society of International Lawyers. “Some have argued that the use of legal force against specific individuals fails to provide adequate process and thus constitutes unlawful extrajudicial killing,” he said. “Our procedures and practices for identifying targets are extremely robust, and advanced technologies make our targeting even more precise. In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meetings.” The targeted killings that are carried out by the United States, he explained, fall

²⁹ “Targeted Killing in U.S. Counterterrorism Strategy and Law.”

within the parameters of the law.³⁰ And while few people would expect that a Yale Law School professor, however principled, would maintain all of his positions once he takes a job in Washington, nevertheless the shift in Harold Koh's thinking has been noteworthy, because of its abruptness and because of the implications for President Obama's version of targeted warfare. When Harold Koh announced that targeted killings are legal, that meant, as one legal expert explained, "Obama says it's okay."³¹

Experts in international law believe that the administration officials have little basis for their justification for the targeted killings. "The U.S. government has put forward legal rationales, such as the doctrine of self-defense, which are self-serving and unsupported by international law," explained New York University School of Law's Philip Alston. "The administration has put forward a 'law of 9/11' self-defense justification, which would permit it to use force in the territory of other countries on the basis that it is in an armed conflict with Al Qaeda, the Taliban, and 'associated forces.' The latter group, of course, is undefined and open-ended," said Alston. "This interpretation of the right to self-defense is so malleable and expansive that it threatens to destroy the prohibition on the use of armed force contained in the United Nations Charter. If other states were to use this justification for the killing of those they deemed to be terrorists, the result would be chaos. States can, of course, defend themselves. They can do so in response to an armed attack or one that is real and imminent."

"That use of force has to be both necessary and proportionate. But the U.S. position is, in essence, that nine years after 9/11 it is still responding to a real and imminent attack and will

³⁰ March 25, 2010, Harold Koh, legal advisor, U.S. Department of State. American Society of International Law. Washington, D.C.

³¹ Author interview with Peter Berkowitz, chairman of the Hoover Task Force on National Security and Law at the Hoover Institution, Stanford University. Washington, D.C., June 14, 2010.

probably continue to do so for years to come. Even if we were to accept that the U.S. is able to do whatever, whenever, because it is responding to somewhat distant armed attacks (which I don't accept), that doesn't give the U.S. a carte blanche to target and kill whomever it deems to be a terrorist or an enemy. Even if it is acting in self-defense, the targeting of a particular person still needs to comply with the requirements of the laws of war and human rights law. The United States seems to want to marginalize or even eliminate the relevance of human rights law and the laws of war in situations that it claims are governed by the self-defense rationale.”

Regardless of whether or not the strikes from unmanned aerial vehicles and U.S. Special Forces gunships are effective against terrorists or even legal, they have a P.R. problem. A retired military officer who heads up a psychological-operations division the State Department told me that he and his colleagues are not allowed to publish articles defending the use of these targeted strikes in Pakistan, Yemen, and in other countries because officially these programs do not exist. Indeed, the secrecy surrounding the program is so great that it has made it nearly impossible for Americans, both in elite circles here in Washington and among the general public, to evaluate whether or not these tactics are worthwhile. When covert actions are done on a small scale, public support for these operations is not necessary, but when these operations are conducted on a broad scale, over a period of several years, the government has a responsibility to garner support for them, particularly since the potential for errors and scandals increases with the frequency of their use.

Even supporters of the drone strikes believe the government has made a weak case for the program. “They’re going to have to do a better job in telling the story,” John Nagl, president of the Washington-based Center for a New American Security, said. Meanwhile, most of the operations remain shrouded in mystery. It is not clear, for example, what the formal process is

for determining that certain individuals pose a threat to the United States and should die. Earlier this year, the American Civil Liberties Union filed a lawsuit against the U.S. government in order to find out the government's legal basis for the targeted strikes and to determine how the government ensures that these strikes are consistent with international law. The lack of transparency about the targeted-killing campaign is not hurting the public-relations efforts in the short term, since there is little outcry against the lethal strikes, but it could make the situation more difficult for government officials if there is a problem down the road, such as a misguided assault that kills women and children, with footage released on WikiLeaks, and an Abu Ghraib-like scandal in its wake. If this situation were to unfold, the secrecy of the "PlayStation War," as some experts describe it, would make it harder for the government officials to defend their tactics.

CONCLUSION. THE WAR OF IDEAS.

Critics of the current counterterrorism strategy claim the strongest argument to be made against the use of U.S.-directed targeted warfare and extensive use of Special Forces in direct-action, or killing, programs around the world is a pragmatic one: The covert actions have little impact on terrorist groups. Counterterrorism experts believe that there are roughly five hundred to one thousand hardened Al Qaeda fighters around the world; at first glance, it would seem easy to rid the world of this group, particularly with precise, laser-like strikes monitored by Special Forces. Yet as one legal expert has explained, the number of Al Qaeda fighters and jihadists is not a useful measurement of their potential to wreak havoc on the United States. "I would get away

from quantification,” he said. “The strength of Al Qaeda is the strength of commitment; it’s not a temporal concept. It’s not about time. It’s not about numbers.”³²

Al Qaeda has lost an array of mid-level leaders through the drone strikes in Pakistan over the past year and a half, but they have nevertheless managed to expand their reach. It is a war of ideas, and, as ground commanders in Afghanistan know all too well, the United States is losing. Al Qaeda and the Taliban has been aggressively signing up members here and abroad, many of whom are enraged over the drone strikes, and not all of them are going to leave their keys in the car (as Pakistan-American Faisal Shahzad did when he attempted to set off explosives in Times Square). And while terrorists have taken an aggressive role in global marketing, promotion, and brand management, the United States is still attempting to kill its way to victory. Reaching a deeper understanding of the roots of terrorism and its everyday brutality is a complex, but necessary part of keeping America safe from another attack. Critics of the current counterterrorism strategy believe that the Special Forces units and targeted strikes will never rid the world of terrorism. “Just as our enemy adapted, we must adapt,” said one of the leading counterterrorism experts who works for one of the nation’s intelligence agencies. “We must rely not only on the military option. How can we drain the swamp? We haven’t been attempting to reach out to the Muslim world and discredit Al Qaeda.”³³

Counterterrorism experts believe that making a case against Al Qaeda is straightforward: “The most effective U.S. approach will be to call attention to Al Qaeda’s depredations and weaknesses, through proxies as much as possible,” explained Steve Coll, the author of *Ghost*

³² Legal scholar, specializing in counterterrorism issue, Global Security conference, New York University’s School of Law, New York, May 1, 2010.

³³ May 1, 2010, intelligence officer, U.S. intelligence agency, Global Security conference, New York University Law School, New York.

Wars and president of New America Foundation, in testimony on Capitol Hill. “Closing Guantanamo, repudiating torture, reaffirming American constitutional values, engaging constructively with the Israeli-Palestinian conflict, affirming the sanctity of civilian life in military conflict, are all examples of specific acts by the Obama administration – attempted or completed – that by themselves can contribute to a successful strategic communications policy aimed at Al Qaeda’s continued political isolation,” Coll said on January 27, 2010, during his Capitol Hill testimony. Critics of the new, U.S.-directed targeted warfare believe that questions about this strategy involve more than a military issue. They believe that these issues are at the heart of the way that Americans that define national character and their role in the world and beyond that raise difficult questions such as whether or not stealth warfare is helping U.S. efforts to achieve peace and stability in other regions or a misguided attempt to protect power.

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About the Medill Project:

The Medill Project on Targeted Warfare and the Law, directed by Tara McKelvey, encompasses original research on U.S. Special Operations, covert actions, and the work of intelligence agencies, as well as their legal dimensions. The Project is made possible through the generous support of the Carnegie Corporation of New York, and its chief advisor is Timothy J. McNulty, the co-director of the Medill National Security Journalism Initiative. Additional guidance is provided by Ellen Shearer, co-director of the Medill National Security Journalism Initiative; and Josh Meyer, director of education and outreach, National Security Journalism Initiative, and as well as by faculty advisors such as Jonathan Caverley, an assistant professor in the Department of Political Science at Northwestern University; Hendrik Spruyt, a professor of international relations in the Department of Political Science at Northwestern University and the director of the Buffett Center for International and Comparative Studies; and Jack Doppelt, a professor at Northwestern University's Medill School of Journalism. The project is overseen by John Lavine, dean of Medill; with the assistance of Mary Nesbitt, associate dean for curriculum and professional excellence at the Medill School.