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A General Atomics MQ-9 Reaper stands on the runway during a demonstration of unmanned aerial vehicles, or drones, at Naval Base Ventura County Sea Range, Point Mugu, near Oxnard, California, on July 31, 2015. (Patrick T. Fallon/Reuters)

INSIGHTS FROM A CFR MEETING

Evaluating the Obama Administration's Drone Reforms

January 31, 2017

*In December 2016, the Council on Foreign Relations (CFR) held a meeting in Washington, DC, on the future of the Obama administration's reforms to the lethal use of drones. The meeting was supported in part by a grant from the Open Society Foundations. The views described here are those of meeting participants only and are not CFR or Open Society Foundations positions. **The Council on Foreign Relations takes no institutional positions on policy issues and has no affiliation with the U.S. government.***

MEETING TAKEAWAYS

- The Barack Obama administration sought to create a lasting policy and legal framework to govern the use of lethal drones, but it is unclear how those principles—and especially their limitations—will survive in the Donald J. Trump administration.
- The Trump administration may change aspects of the Obama administration’s legal framework. Nonetheless, elements that have broad support among military operators, such as a “near certainty” standard for targeted strikes, will likely survive.
- However employed, lethal drones should be part of a more comprehensive counterterrorism strategy, including updated, unambiguous legal authority from Congress.

INTRODUCTION

Unmanned aerial vehicles, or drones, serve a host of military functions. Although they are predominantly used for surveillance, they are increasingly used as remotely operated weapons platforms. The United States’ lead role in the use of lethal drones makes it crucial for the country to help develop and enforce global norms shaping their use.

In December 2016, the Council on Foreign Relations convened twenty current and former government officials and outside experts in Washington, DC, to evaluate the Obama administration’s drone reforms. The policy and legal framework governing the use of lethal drones in the fight against terrorism is especially important as President Trump and his administration take office.

In its waning months, the Obama administration published the policies and procedures that had come to govern its use of lethal drones for so-called targeted strikes on suspected terrorists. Meeting participants described the Obama administration’s approach as centralized, with final authority for lethal strikes reserved for the president, and requiring an imminent threat as well as near certainty about the identity of targets.

“An informed public can scrutinize our actions and hold us to account,” President Obama said in December 2016.

In 2016, the Obama administration released the legal framework governing lethal drone strikes—including a declassified Presidential Policy Guidance from May 2013 and a sixty-one-page compendium of the internal decision-making processes—in a bid to institutionalize those procedures before leaving office. As Obama said in December 2016, “An informed public can scrutinize our actions and hold us to account.”

Although the Obama administration made efforts to increase transparency, significant issues remain. For example, strikes are still carried out overtly by the Joint Special Operations Command (JSOC)—a subunit of the Department of Defense Special Operations Command—and covertly by

the Central Intelligence Agency (CIA). The two agencies' different authorities, policies, and accountability mechanisms confuse oversight over the use of lethal drones.

THE ENDURANCE OF THE OBAMA DRONE REFORMS

Given Trump's promises to go after terrorists far more aggressively than Obama, participants agreed that the Trump administration will either ignore or, more likely, formally repudiate aspects of the Obama administration's legal framework for the use of lethal drones. Most participants expected to see a more expansive interpretation of whatever rules govern the use of drones. They anticipated that the Trump administration will favor signature strikes—which target anonymous suspected militants based on their behavior patterns and personal networks—rather than circumscribed strikes carefully targeted at named, positively identified terrorist leaders. This approach would allow the administration to have more latitude in conducting strikes, a change that Trump indicated during the presidential campaign he would like to implement.

However, the Obama administration's decision to make public the legal rationale and procedures for the drone program may make it harder for the Trump administration to roll back the reforms entirely, many participants said.

Some important elements of the program—such as the requirement of near-certain identification before authorizing a lethal drone strike—are embraced by high-level military officials, who are aware of the political and diplomatic costs of killing noncombatants in other countries. One participant noted that there would be pushback from these officials if the Trump administration tries to weaken that standard. Indeed, despite some expected formal repudiation, participants agreed that many of the best practices will remain.

Other elements of the framework—such as the demand that any threat be deemed “continuing and imminent” in order to lawfully authorize a strike—may be changed during the Trump administration as part of a more forceful counterterrorism strategy, participants said. The continuing and imminent standard can make it difficult for the United States to use drones to support allies who face threats from terrorists ready to carry out attacks within their territory or potentially beyond their borders.

Many participants noted that the Obama administration's framework for the use of lethal drone strikes was tailored to suit the legalistic mindset of one particular president and his senior advisors and officials. A future administration that did not share Obama's approach to the program would not only ease self-imposed restrictions, but could abandon the framework itself.

DEBATING THE USE OF LETHAL DRONES

There remains a broad debate over the role that lethal drone strikes can and should play in fighting terrorism. To the extent that lethal force is needed, some participants defended drone strikes by arguing that they are effective at eliminating the leadership of terrorist networks; minimize civilian casualties; do not radicalize neutral individuals to become terrorists; and have not, at least in the Obama administration, been used as an option of first resort. Others argued that civilian casualties from drone strikes are much higher than the Obama administration contends, and that lethal drone strikes do, in fact, tend to foster more radicalization.

Participants also noted the limitations of relying on lethal drone strikes. Captured terrorists provide intelligence that dead terrorists cannot, some noted, though capturing more terrorists would entail other operational and legal complications, such as where to hold them and under which jurisdiction they should be tried.

Ultimately, lethal drone strikes should be one component of a broader counterterrorism strategy. As one participant said, killing is not a counterterror strategy and it will only buy time for a wider policy to work. However, participants noted that the Obama administration's relatively careful use of drone strikes was not well integrated into a broader counterterrorism policy.

The Obama Drone Rules

Some participants questioned both the current standards for lethal drone strikes and the increased transparency about how the United States intends to use them. Requiring near

The Evolution of the Obama Administration's Justification for the Lethal Use of Drones

March 2010: State Department legal advisor Harold Koh publicly lays out the Obama administration's justification for the use of drones for targeted killing, harkening back to deliberate killings of Japanese military leaders in World War II.

January 2012: President Obama publicly acknowledges the targeted use of drones in the fight against terrorism, stressing the "very precise precision strikes against al-Qaeda and their affiliates."

May 2013: Obama issues a Presidential Policy Guidance (PPG), which establishes the "near certainty" and "continuing and imminent" standards for drone strikes and the preference for capture operations.

February 2015: For the first time, the State Department releases export guidance for armed drones, allowing their sale only on a case-by-case basis with numerous restrictions.

July 2016: The Office of the Director of National Intelligence evaluates U.S. counterterror strikes during the Obama administration, concluding that they have caused only a small number of civilian casualties—much lower than outside assessments.

August 2016: Pressed by lawsuits, the Obama administration declassifies the 2013 PPG.

December 2016: The White House releases a sixty-one-page legal and policy framework that regulates the lethal use of drones in conflict.

certainty to authorize a strike is unpopular with some field commanders, one participant said, and the standard is impractical for warfare. Likewise, the requirement that threats be continuing and imminent constrains military commanders' ability to target and destroy constantly changing terror networks, some participants argued. One participant noted that increased transparency around lethal drone strikes could also be counterproductive, such as by encouraging terrorists to use civilians as human shields. Another participant pointed to an additional downside to transparency, namely, that it could establish a precedent by which the public demands ever more sensitive information about a range of military operations.

Other participants countered that the more rigorous public standards in place for lethal drone strikes are needed to further minimize civilian casualties and to ensure the cooperation of governments in nations where U.S. forces operate. Senior military leaders are sensitive to the need to follow stringent standards to avoid angering host nations with civilian deaths, which, as one participant noted, could end up slamming the door on U.S. military operations for months.

Although there is broad dissatisfaction with the continuing and imminent threat standard, many participants argued that some sort of regulation is necessary for the lethal use of drones. Some participants suggested that an increased use of signature strikes by the Trump administration could reduce the pressure to ease the rules regarding targeted strikes. Many policymakers pushing for relaxed targeting rules see the current standards as an impediment to effective counterterrorism operations, a concern that could be assuaged by the use of signature strikes.

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The fate of the Obama administration's drone reforms is not limited to the conduct of future U.S. counterterrorism operations, participants said. Rather, at a time of steady global proliferation of drones, especially as weapons platforms, the Obama administration's embrace and public release of formal, strict guidelines for the use of lethal drones was probably the last opportunity for the United States to shape global norms.

Other participants countered that countries such as China, Russia, and Israel are increasingly developing more capable armed drones and have never cared as much as the Obama administration did about standards and norms. A participant predicted that in five years, there could be a much more norm-free environment globally, despite the reforms.

What Is Left to Be Done

As the Trump administration takes office, it is unclear whether it will include many champions of the Obama drone reforms. Some prospective cabinet members are believed to agree with some of the Obama administration's limits, such as the "near certainty" standard. But crafting and adhering to a legalistic policy to regulate drone strikes, one participant said, requires vigorous buy-in and advocacy at the top. Another participant noted that continued transparency requires leadership by the White House and the Department of Justice, and it is unclear whether this will be a priority in the Trump administration.

A FAILURE OF DEMOCRACY

More than fifteen years after the 9/11 terror attacks, the domestic legal authority for the U.S. war on terror remains insufficient, especially when it comes to targeting the self-proclaimed Islamic State. The 2001 congressional Authorization for the Use of Military Force (AUMF) allows the president to use force against nations or individuals responsible for those attacks. In the years since, it has been stretched to justify strikes against terror groups that either did not exist on 9/11, or are unaffiliated with al-Qaeda. Yet, the AUMF remains the domestic legal underpinning for all U.S. military actions against Islamist terrorists.

Many participants argued that prosecuting the war against the Islamic State requires a fresh congressional authorization. Pretending that the AUMF applies to the Islamic State, one participant said, is a problem already and will continue to be a problem in the Trump administration. Another participant declared the lack of an updated congressional authorization a failure of democracy and a legal time bomb.

FURTHER REFORMS

Some participants suggested increasing the flexibility of the current rules by adapting different targeting standards depending on the adversary and on the host-nation government's concerns. One participant suggested transforming the defensive standard, which requires a continuing and imminent threat, to a more offensive standard that could more sustainably support counterterrorism operations in partner nations. Another participant suggested using armed drones more expansively in support of host-nation counterterrorism efforts—such as for providing close air support—rather than for targeted strikes.

Several participants said it was past time for the CIA to get out of the targeted killing business. Placing all lethal drones under JSOC authority could further increase the transparency of targeted killings, and would embed drone processes in long-standing, public military doctrine that guides all manned and unmanned airstrikes. This was an Obama administration goal, but was never fully implemented, in part due to the belief of congressional members on the intelligence committees that the CIA is institutionally more effective and more precise with the use of lethal drones.

There is also a need for revised guidance on U.S. drone exports in light of the continuing growth of the global drone marketplace, participants said. Some participants argued that the U.S. government is too cautious when it comes to approving exports of U.S. drone technology and is therefore ceding the playing field to other exporters that may not have rigorous standards regulating drone use. Although lethal strikes represent just a small fraction of overall drone use, which mainly involves nonlethal activities such as intelligence gathering and surveillance, the public focus on drones as tools for targeted killing has skewed the debate.