

Ten Steps the Administration Can Take to Improve Transparency and Accountability for Drone Strikes and Targeted Killing

THE OBAMA ADMINISTRATION has repeatedly committed to increased transparency and accountability, including with respect to national security, counterterrorism, and military operations.¹ The administration has recently taken important steps forward by issuing an executive order formalizing procedures for limiting civilian casualties when the United States uses force,² and releasing a redacted version of the Presidential Policy Guidance (PPG) on the procedures for approving capture and lethal force operations outside “areas of active hostilities”³ and a summary of its assessment of civilians and combatants killed in such lethal operations.⁴ While these disclosures are important, additional steps are needed to enable Americans to understand the nature and scope of the targeted killing program, how targeting decisions are made, the legal justifications for those decisions, and whether the program is making the country safer in the long run. Below are ten steps the administration can—and should—take right now to improve transparency and accountability for drone strikes and other targeted killings.

1. Transfer authority to conduct strikes from the CIA to the Department of Defense

The administration should transfer all authority for conducting lethal strikes to the Department of Defense,

which has an institutionalized culture of compliance with the law of armed conflict, a record of studying lessons learned, and a clear chain of command. Rather than having the military and CIA operating two parallel programs, there should be a single, integrated approach to targeting, with the CIA providing supplemental intelligence and analysis, and the military carrying out strikes. The administration has long expressed its intent to transfer authority for lethal strikes to the Department of Defense, but has yet to fully do so.

2. Acknowledge all strikes

The administration should acknowledge all lethal force operations it conducts or participates in within a reasonable amount of time. The administration should refuse to enter into agreements with other states that would prevent the United States from acknowledging such operations as soon as possible—consistent with national security and the need to protect intelligence sources and methods.

3. Align policies and practices with international law

The administration should demonstrate that its lethal targeting policies and practices align with international law. In particular, it should demonstrate that the use of lethal force as a first resort is restricted to situations of armed conflict and that strikes comply with the law of armed

¹President Obama recently emphasized the importance of transparency regarding “the basis for our counterterrorism operations and the manner in which they are conducted in order to enhance the public’s confidence in these activities, set standards for other nations to follow, and counter terrorist propaganda and false accusations about U.S. operations.” <https://www.whitehouse.gov/the-press-office/2016/07/01/fact-sheet-executive-order-us-policy-pre-post-strike-measures-address>.

²http://www.humanrightsfirst.org/sites/default/files/EO_Protecting_Civilians.pdf.

³ <http://www.humanrightsfirst.org/press-release/obama-administration-discloses-previously-classified-procedures-authorizing-force>. See also <https://www.lawfareblog.com/will-obamas-targeted-killing-policy-say-what-areas-active-hostilities-means>.

⁴http://www.humanrightsfirst.org/sites/default/files/Targeted_Killing_Casualties_FAQ.pdf.

conflict principles of distinction, proportionality, military necessity, and humanity. It should assure the public that it only targets members of enemy armed forces or other individuals who are directly participating in hostilities.⁵ The United States should also demonstrate that when it uses lethal force outside of armed conflict, it does so only as a last resort in response to an imminent threat that poses a substantial risk to human life that cannot be otherwise ameliorated—the minimum requirements that must be met to abide by international human rights law.

4. Align policies and practices with domestic law

The administration should be transparent and specific about the domestic legal basis for its overseas use of force operations. Armed conflict operations must be authorized by Congress. Absent an authorization from Congress, force may be used in self-defense based on the president’s authority under Article II of the Constitution to repel sudden attacks. When conducting counterterrorism operations abroad, the administration should specify whether its actions are authorized by an existing congressional authorization, Article II authority, or a combination of the two.

5. Disclose standards and criteria for conducting strikes

Disclosing the legal and policy justification for the use of lethal force is an essential aspect of the rule of law and democratic governance. The administration’s recent release of a redacted version of the PPG is an important step in the right direction, but the administration should release all legal and policy analysis regarding the standards for using lethal force in counterterrorism operations abroad, including Office of Legal Counsel memoranda. Even with the recent new releases, the administration has not disclosed how it defines and interprets key legal and policy constraints, leaving the public without a clear understanding of the rules the government applies to determine whether the use of lethal

force is lawful in a particular situation. For example, the PPG includes many undefined and unexplained standards, including “areas of active hostilities,” “continuing, imminent threat,” and when “capture is not feasible.” Transparency and clarity with respect to the substantive standards that apply is necessary for understanding how the policy applies in practice and to evaluate its legality.

6. Conduct thorough, prompt, and impartial investigations

The administration should disclose its policies and procedures for investigating all credible allegations of civilian harm resulting from U.S. counterterrorism operations. Such investigations should be thorough, prompt, and impartial. All feasible steps should be taken to gather evidence, bearing in mind that the nature and degree of the investigation may vary based on the circumstances. Evidence from non-governmental sources should be sought and included if deemed credible, as now required by the Civilian Casualties Executive Order. The results of each investigation should be made public and should specify the date and location of the strike, the number of combatants and civilians killed or injured, and the domestic and international legal basis for the strike. The administration should use the investigations to take measures to mitigate future civilian harm—as is required under the Executive Order—and initiate prosecutions, when warranted.

7. Disclose policies and procedures for providing remedies when civilians are harmed

The administration should disclose its policies and procedures for compensating those who have been injured or whose family members have been killed. These policies should ensure that all victims have effective access to remedies regardless of their nationality or the location of the strike, even when the provision of such remedies will not be disclosed in the interest of national

⁵<https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>. To be targetable as a member of a non-state organized armed group, an individual must serve in a combat role, i.e., in a function that involves direct participation in hostilities. The administration should clarify that it does not classify individuals as combatants

based on associations, formal allegiances or membership, proximity to combatants, or other factors without sufficient evidence that the individual is a functional member of enemy armed forces or is otherwise directly participating in hostilities.

security or for the safety and security of the persons receiving compensation. In the recently released Civilian Casualties Executive Order the administration made an important commitment towards greater transparency and accountability by requiring the U.S. government to acknowledge responsibility for civilian casualties and offer condolences, including ex gratia payments, “as appropriate and consistent with mission objectives and applicable law, including the law of armed conflict.” The administration should ensure that this caveat does not serve as a loophole or a means for watering down the commitments of the Executive Order to acknowledging and compensation those harmed by U.S. strikes.

8. Release disaggregated casualty assessments

The administration recently released aggregate estimates of the number of civilians and combatants killed as a result of U.S. counterterrorism operations outside areas of active hostilities from January 20, 2009 to December 31, 2015.⁶ The Civilian Casualties Executive Order requires this information to be released on an annual basis going forward, by May 1 of each year. These disclosures are an important step forward for greater transparency. However, the data released consists of aggregate figures over a seven-year period, which is insufficient for assessing the discrepancies between the administration’s numbers and those from independent organizations.⁷ Although the government’s estimates will be easier to evaluate when they are released on an annual basis, additional information is necessary to ensure accountability. The administration should explain the process used to estimate the number of casualties, disclose the criteria used to classify individuals as combatants or non-combatants, disaggregate the number of casualties by strike location and date, and specify the organized armed group to which any individuals classified as combatants allegedly belonged.

⁶http://www.humanrightsfirst.org/sites/default/files/Targeted_Killing_Casualties_FAQ.pdf.

⁷http://www.humanrightsfirst.org/sites/default/files/Drone_Casualty_Data_Fact_Sheet.pdf.

⁸ The administration has previously argued that federal courts should refrain from hearing cases that concern targeted killing on

9. Facilitate judicial review

The administration should enhance accountability for wrongful deaths by supporting judicial review in appropriate cases. In particular, the administration should not assert the state secrets privilege or use the political question doctrine to prevent courts from hearing such cases on the merits.⁸

10. Conduct a comprehensive strategic review

The administration should conduct a comprehensive strategic review of the effects of lethal counterterrorism strikes, particularly outside of zones of active hostilities. Steps that would help facilitate this full review are already required under the PPG and Civilian Casualties Executive Order. The PPG requires a review of the guidance’s “implementation and operation” 12 months after its entry into force, including the requirement to “consider whether any adjustments are warranted.” The Civilian Casualties Executive Order provides for periodic consultation with government experts “[i]n furtherance of the policies and practices set forth in this order.” The PPG review and the periodic consultation mandated by the Executive Order on Civilian Casualties should be conducted annually at a minimum. The administration should use these reviews to facilitate a comprehensive assessment of the broader impact of lethal strikes on our national security over the long-term. This assessment should also evaluate the impact of these strikes on the rule of law and human rights. The results of the review should be made public. ■

the basis that the cases could reveal “state secrets” or constitute “political questions” that should not be answered by the judicial branch. See e.g.

http://www.nytimes.com/2010/09/25/world/25awlaki.html?_r=0; <https://www.lawfareblog.com/legalty-us-governments-targeted-killing-program-under-domestic-law>.