

COUNCIL *on* FOREIGN RELATIONS

Center for Preventive Action

POLICY INNOVATION MEMORANDUM NO. 31

Date: April 16, 2013
From: Micah Zenko
Re: Transferring CIA Drone Strikes to the Pentagon

The main obstacle to acknowledging the scope, legality, and oversight of U.S. targeted killings beyond traditional or “hot” battlefields is the division of lead executive authority between the Joint Special Operations Command (JSOC)—a subunit of the Department of Defense (DOD) Special Operations Command—and the Central Intelligence Agency (CIA). In particular, the U.S. government cannot legally acknowledge covert actions undertaken by the CIA. The failure to answer the growing demands for transparency increases the risk that U.S. drone strikes will be curtailed or eliminated due to mounting domestic or international pressure. To take a meaningful first step toward greater transparency, President Barack Obama should sign a directive that consolidates lead executive authority for planning and conducting nonbattlefield targeted killings under DOD.

ONE MISSION, TWO PROGRAMS

U.S. targeted killings are needlessly made complex and opaque by their division between two separate entities: JSOC and the CIA. Although drone strikes carried out by the two organizations presumably target the same people, the organizations have different authorities, policies, accountability mechanisms, and oversight. Splitting the drone program between the JSOC and CIA is apparently intended to allow the plausible deniability of CIA strikes. Strikes by the CIA are classified as Title 50 covert actions, defined as “activities of the United States Government . . . where it is intended that the role . . . will not be apparent or acknowledged publicly, but does not include traditional . . . military activities.” As covert operations, the government cannot legally provide any information about how the CIA conducts targeted killings, while JSOC operations are guided by Title 10 “armed forces” operations and a publicly available military doctrine. Joint Publication 3-60, *Joint Targeting*, details steps in the joint targeting cycle, including the processes, responsibilities, and collateral damage estimations intended to reduce the likelihood of civilian casualties. Unlike strikes carried out by the CIA, JSOC operations can be (and are) acknowledged by the U.S. government.

The different reporting requirements of JSOC and the CIA mean that congressional oversight of U.S. targeted killings is similarly murky. Sometimes oversight is duplicated among the committees; at other times, there is confusion over who is mandated to oversee which operations. CIA drone strikes are reported to the intelligence committees. Senator Dianne Feinstein (D-CA), chair of the Senate Select Committee on Intelligence (SSCI), has confirmed that the SSCI receives poststrike notifications, reviews video footage, and holds monthly meetings to “question every aspect of the program.” Representative Mike Rogers (R-MI), chair of the House Permanent Select Committee on Intelligence (HPSCI), has said that he reviews both CIA and JSOC counterterrorism airstrikes. JSOC does not report to the HPSCI. As of March 2012, all JSOC counterterrorism operations are reported quarterly to the armed services committees. Meanwhile, the foreign relations committees—tasked with overseeing all U.S. foreign policy and counterterrorism strategies—have formally requested briefings on drone strikes that have been repeatedly denied by the White House. However, oversight should not be limited to ensuring compliance with the law and preventing abuses, but rather expanded to ensure that policies are consistent with strategic objectives and aligned with other ongoing military and diplomatic activities. This can only be accomplished by DOD operations because the foreign relations committees cannot hold hearings on covert CIA drone strikes.

CONSOLIDATING EXECUTIVE AUTHORITY

In 2004, the 9/11 Commission recommended that the “lead responsibility for directing and executing paramilitary operations, whether clandestine or covert, should shift to the Defense Department” to avoid the “creation of redundant, overlapping capabilities and authorities in such sensitive work.” The recommendation was never seriously considered because the CIA wanted to retain its covert action authorities and, more important, it was generally believed such operations would remain a rarity. (At the time, there had been only one nonbattlefield targeted killing.) Nearly a decade later, there is increasing bipartisan consensus that consolidating lead executive authority for drone strikes would pave the way for broader strategic reforms, including declassifying the relevant legal memoranda, explicitly stating which international legal principles apply, and providing information to the public on existing procedures that prevent harm to civilians. During his February 2013 nomination hearing, CIA director John O. Brennan welcomed the transfer of targeted killings to the DOD: “The CIA should not be doing traditional military activities and operations.”

The main objection to consolidating lead executive authority in DOD is that it would eliminate the possibility of deniability for U.S. covert operations. However, any diplomatic or public relations advantages from deniability that once existed are minimal or even nonexistent given the widely reported targeted killings in Pakistan and Yemen. For instance, because CIA drone strikes cannot be acknowledged, the United States has effectively ceded its strategic communications efforts to the Pakistani army and intelligence service, nongovernmental organizations, and the Taliban. Moreover, Pakistani and Yemeni militaries have often taken advantage of this communications vacuum by shifting the blame of civilian casualties caused by their own airstrikes (or others, like those reportedly conducted by Saudi Arabia in Yemen) to the U.S. government. This perpetuates and exacerbates animosity in civilian populations toward the United States. If the United States acknowledged its drone strikes and collateral damage—only possible under DOD Title 10 authorities—then it would not be held responsible for airstrikes conducted by other countries.

The CIA should, however, retain the ability it has had since 9/11 to conduct lethal covert actions in extremely rare circumstances, such as against immediate threats to the U.S. homeland or diplomatic outposts. Each would require a separate presidential finding, and should be fully and currently informed to the intelligence committees. Of the roughly 420 nonbattlefield targeted killings that the United States has conducted, very few would have met this criteria.

The president should direct that U.S. drone strikes be conducted as DOD Title 10 operations. That decision would enhance U.S. national security in the following ways:

- Improve the transparency and legitimacy of targeted killings, including what methods are used to prevent civilian harm.
- Focus the finite resources of the CIA on its original core missions of intelligence collection, analysis, and early warning. (There is no reason for the CIA to maintain a redundant fleet of armed drones, or to conduct military operations that are inherently better suited to JSOC, the premier specialized military organization. As “traditional military activities” under U.S. law, these belong under Title 10 operations.)
- Place all drone strikes under a single international legal framework, which would be clearly delineated for military operations and can therefore be articulated publicly.
- Unify congressional oversight of specific operations under the armed services committee, which would end the current situation whereby there is confusion over who has oversight responsibility.
- Allow U.S. government officials to counter myths and misinformation about targeted killings at home and abroad by acknowledging responsibility for its own strikes.
- Increase pressure on other states to be more transparent in their own conduct of military and paramilitary operations in nonbattlefield settings by establishing the precedent that the Obama administration claims can have a normative influence on how others use drones.

A FIRST STEP FORWARD

In an interview, President Obama revealed, “I think creating a legal structure, processes, with oversight checks on how we use unmanned weapons is going to be a challenge for me and for my successors for some time to come—partly because technology may evolve fairly rapidly for other countries as well.” The Obama administration has two central objectives for its targeted killing reforms: preventing constraints on its ability to conduct lethal operations and setting precedents for the use of armed drones by other states. By law, institutional culture, and customary practice, drone strikes conducted by the CIA cannot reach the minimum thresholds of transparency and accountability required to achieve either objective. JSOC is also a highly secretive organization, but the United States could provide a much clearer and more detailed explanation of the outstanding issues regarding targeted killing without compromising the military’s sources and methods—should the president prioritize such change. Moreover, according to a February 2013 poll, U.S. public support for military drone strikes (75 percent) was higher than for those conducted by the CIA (65 percent). Without ending CIA targeted killings, the Obama administration cannot undertake any of the reforms that it has stated are necessary both to ensure drone strikes do not go the way of third-country renditions and enhanced interrogation techniques, but also to establish the precedents of greater openness in how such operations are conducted by others.

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