

# Over-the-Horizon Drone Strikes in an Ongoing Global War: Afghanistan and Beyond

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In August 2021, twenty years after the United States entered Afghanistan, the Biden administration withdrew all U.S. armed forces, and President Biden proclaimed that the “longest war in American history” was finally over.<sup>1</sup> Yet, at the same time Biden and senior officials in his administration made it clear that the United States would continue to conduct “over the horizon” operations to target terrorists in Afghanistan.<sup>2</sup> Meanwhile, Biden administration lawyers argued in court proceedings related to Guantánamo detainees that the war in Afghanistan was actually ongoing and was not over at all.<sup>3</sup>

These somewhat contradictory statements raise questions about the international legal framework or frameworks the United States is embracing as it continues to fight the so-called “War on Terror” in Afghanistan and beyond. The statements by Biden administration lawyers at Guantánamo in particular indicate that, notwithstanding Biden’s end-of-war speech, the Administration views operations against al Qaeda and other terrorist groups as part of an ongoing transnational armed conflict that includes Afghanistan, to which the law of armed conflict applies. The war paradigm as a matter of international law generally gives the United States more legal leeway in its extraterritorial counterterrorism operations than other international legal paradigms applicable in peacetime, such as international human rights law and the *jus ad bellum*.<sup>4</sup> In particular, the law of armed conflict permits states to detain enemy forces or use lethal force against them.<sup>5</sup> Such acts would be more difficult to justify under either international human rights law or the *jus ad bellum*.<sup>6</sup>

The availability of unmanned aerial vehicles (commonly referred to as drones) to conduct lethal force operations helps to make it possible for U.S. officials to maintain their adherence to this war paradigm as a matter of international law on the one hand, while simultaneously touting the end of war in political speeches largely aimed at domestic U.S. audiences on the other. Because drones provide a mechanism for conducting operations remotely in regions where U.S. armed

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1. President Joseph Biden, Remarks by President Biden on a Successful Counterterrorism Operation in Afghanistan, White House (Aug. 1, 2022), <https://perma.cc/4RKX-E3LH>.

2. *Id.*

3. For a summary of these statements, see Laura A. Dickinson, *Still at War: The Forever War Legal Paradigm in Afghanistan*, JUST SECURITY (Apr. 14, 2022), <https://perma.cc/MK75-DQ5R>.

4. For a more in-depth analysis of this issue, see Laura A. Dickinson *National Security Policymaking in the Shadow of International Law*, 2021 UTAH L. REV. 629 (2021) [hereinafter NATIONAL SECURITY POLICYMAKING].

5. *See id.*

6. *See id.*

forces are not present on the ground, drones provide the important benefit of minimizing U.S. casualties. Consequently, drones also reduce the political costs within the United States of lethal force operations outside U.S. territory. Thus, drones enable U.S. officials to proclaim the end of war to those within the United States, even as they cling to the more lenient war paradigm as a matter of international law.<sup>7</sup>

The reduced risk of U.S. casualties also enables U.S. executive branch officials to skirt *domestic* law that envisions a necessary role for the U.S. Congress in authorizing extraterritorial lethal force operations.<sup>8</sup> This is because, under longstanding U.S. executive branch legal opinions, even lethal force operations do not amount to “war for constitutional purposes” if they are limited in “nature, scope, and duration.”<sup>9</sup> Operations that reduce the risk of U.S. casualties, according to this reasoning, are more likely to qualify as “limited” and therefore fall outside the scope of military activities requiring congressional authorization. Accordingly, the ready availability of drones, whose use minimizes U.S. casualties, facilitates the ability of U.S. executive branch officials to conduct these extraterritorial use-of-force operations without congressional involvement. In short, the deployment of drones provides the U.S. executive branch with legal leeway, both as a matter of international law and domestic law.

In *Drone Strike: Analyzing the Impacts of Targeted Killing*, Mitt Regan addresses the problem of drones from a different angle. Rather than evaluating the legal arguments embraced (or dismissed) by the United States to justify its extraterritorial counterterrorism operations, Regan examines two other key issues: the actual effectiveness of drone strikes in combating and containing al Qaeda and associated groups, and the impact of these drone strikes on civilians. Drawing on both interviews and quantitative empirical data, Regan argues that it is “crucial to have a clear understanding of these impacts to inform deliberation about the practical, legal, and ethical dimensions of decisions whether, when, and where” to conduct such operations in the future (12). Regan’s empirical focus is important because he aggregates and analyzes critical data about the ongoing impact of the use of drones in lethal force operations. This data can inform policymakers and theorists as they seek to understand, and perhaps regulate, drone use. Ideally, Regan’s impressive qualitative and quantitative information will lead to a more nuanced application of the law of armed conflict to use-of-force operations involving drones and a better accounting of civilian casualties.

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7. See Dickinson, *supra* note 3.

8. U.S. CONST. ART. I, § 8 (Congress shall have Power . . . . To declare “War”); see also War Powers Resolution, 50 U.S.C. §§ 1541–48 (1973). For a more in-depth discussion of these issues, see Laura A. Dickinson, *Drones, Automated Weapons, and Private Military Contractors: Challenges to Domestic and International Legal Regimes Governing Armed Conflict*, in *NEW TECHNOLOGIES FOR HUMAN RIGHTS LAW AND PRACTICE* 93 (Molly K. Land & Jay D. Aronson eds., 2018)(2018) [hereinafter *Drones, Automated Weapons, and Private Military Contractors*].

9. See, e.g., Caroline D. Krass, Dep’t of Justice, *Authority to Use Military Force in Libya*, 35 OP. OFF. LEGAL COUNSEL 1, 8, 13-14 (2011), <https://perma.cc/9A2C-56XS> [hereinafter OLC Libya Opinion].

Yet, although it is beyond the scope of Regan's book, I argue that we need to do more than simply change our understanding of how drones and their impacts fit within the law of armed conflict. In addition, we need to consider a broader paradigm shift. Indeed, the United States should actively consider curtailing its reliance on the legal frameworks it has used for two decades to govern use-of-force operations involving drones. These legal paradigms—the law of armed conflict as a matter of international law and a broad scope for U.S. executive branch use of extraterritorial force without congressional authorization as a matter of domestic law—are fundamentally looser regulatory frameworks than the existing alternatives. This review will first briefly examine Regan's considerable achievement and the importance of the data he has gathered, and then discuss why we might go beyond that data and reconsider the international and domestic legal paradigms under which drone strikes occur.

### I.

Regan amasses and evaluates an impressive array of empirical data, both quantitative and qualitative, to evaluate the U.S. drone program over the past twenty years. The breadth and scope of the book, along with its methodology, are somewhat reminiscent of Richard Abel's massive two-volume assessment of U.S. respect for the rule of law in its response to the September 11, 2001 attacks on the United States.<sup>10</sup> Regan, however, has chosen a more specific field of research, focusing particularly on the effects of U.S. drone strikes in three countries outside areas widely viewed as war zones: Pakistan, Yemen, and Somalia.

With respect to the effectiveness of the U.S. drone program in combating and containing al Qaeda and associated groups, Regan's conclusion, in short, is that yes, the program has been effective to a limited extent. In some circumstances, a sustained series of drone strikes has reduced the capacity of a terrorist group or subgroup to expand its reach beyond a narrow geographic area. For example, Regan argues that sustained strikes in Pakistan against al Qaeda Central ("AQC") beginning in 2008 "impaired to some extent AQC's ability to plan and coordinate transnational attacks" (9). Even if the weakening of AQC did not seriously impair al Qaeda as a whole (155), it did contribute to reducing the risk of al Qaeda attacks in the United States and the West (179-80). Regan suggests, however, that after the capacity of a group such as AQC is sufficiently degraded, additional strikes may not be effective. Rather, Regan notes that a more "modest approach" to targeting "may be to use strikes to inflict enough damage on a group to convince it to eschew attacks in the [United States] and focus solely on local concerns" (11).

Regan's comprehensive approach, evaluating both quantitative and qualitative data, is both distinctive and useful. For example, the quantitative data on the

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10. See RICHARD L. ABEL, *LAW'S TRIALS, THE PERFORMANCE OF LEGAL INSTITUTIONS IN THE US "WAR ON TERROR"* (2018); RICHARD L. ABEL, *LAW'S WARS, THE FATE OF THE RULE OF LAW IN THE US "WAR ON TERROR"* (2018).

Pakistan AQC strikes, standing on its own, does not provide conclusive evidence of effectiveness. But Regan puts that quantitative data together with qualitative materials, including an assessment of extensive al Qaeda correspondence. The qualitative data shows that targeted strikes eliminated “several important leaders,” making it “more difficult . . . for leadership to coordinate operations,” disrupting “the ability . . . to conduct attacks,” and eventually leading “to abandonment of the [Federally Administered Tribal Areas] as a safe haven” (179). Regan’s assessment of the data is careful and measured, and he admirably takes pains not to draw conclusions beyond what the data supports.

With respect to civilian casualties and other forms of civilian harm, Regan shows that U.S. efforts to limit the civilian toll of the drone program have been fitful and uneven. This finding is important because drones are often praised for their precision and corresponding ability to limit civilian harm (233). Yet, through his deep empirical dive into the impact of the U.S. drone program on civilians, Regan shows that the United States has in practice not been able to “meet its own civilian casualty standard” (11). This standard requires that for any use of force outside areas of active hostilities, there must be a “near certainty” that civilians will not be killed. Interestingly, even though the United States insists that the law of armed conflict rather than international human rights law applies to such operations, the government has adopted, as a matter of policy, the “near certainty” standard, which more closely approximates the standard under international human rights law. As I have argued elsewhere, such legalistic policies are sometimes adopted to smooth over differences with other countries, international organizations, and non-governmental organizations regarding the applicable legal paradigm.<sup>11</sup> Nonetheless, while Regan shows that the use of drone strikes has helped the United States reduce civilian casualties in lethal force operations, such strikes have in practice definitely not been able to meet the “near certainty” standard (258).

Finally, in addition to highlighting the limits of the often-touted precision of drone strikes, Regan also suggests that the United States may not be fully informed about the impacts of such strikes on civilians (258). More transparency about the limitations of drone strikes, Regan argues, might lead to institutional reforms that would result in use of drones that would both be more effective and more consistent with stated U.S. “legalistic”<sup>12</sup> policies (258).

## II.

Regan’s careful account of the impact of drone strikes, combined with his thoughtful suggestions for reform, make a significant contribution to the legal and policy debate about the promise and peril of new military technologies (specifically drones) and the best methods of ensuring that these new technologies comply with legal limits and fulfill policy goals. Still, I think it is also worth

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11. *National Security Policymaking*, *supra* note 4.

12. *Id.*

going beyond Regan's project to consider the extent to which the use of drones perpetuates legal frameworks that facilitate endless "forever wars" such as the United States' longstanding and essentially global "War on Terror." These legal frameworks arguably overly empower the executive branch to deploy lethal force as a matter of both international and domestic law.

#### A. *International Law*

Because the United States can deploy drones, it can pursue lethal force operations even where none of its armed forces is on the ground, such as in Afghanistan. Thus, as discussed above, despite withdrawing all U.S. forces from Afghanistan in August 2021, the United States has maintained that it will continue to conduct "over the horizon" operations there, as necessary, to combat terrorist groups.<sup>13</sup> Drones directed and controlled outside Afghan territory are the primary means of conducting such operations.

These "over the horizon" strikes are not merely hypothetical. On August 1, 2022, President Biden announced that a U.S. drone strike had killed al Qaeda leader Ayman al-Zawahiri in downtown Kabul.<sup>14</sup> Al-Zawahiri was an architect of the September 11, 2001 attacks on the United States.<sup>15</sup> The drone, operated by the Central Intelligence Agency, dropped two Hellfire missiles and reportedly killed al-Zawahiri on a balcony without killing anyone else.<sup>16</sup>

This sort of drone warfare helps to make it possible for the United States to embrace a law of armed conflict framework to govern such operations as a matter of international law, despite there being no "hot battlefield" in Afghanistan where U.S. forces are deployed. To be sure, U.S. officials have not made the precise legal rationale for the strike clear. For example, Biden's speech focused vaguely on "justice,"<sup>17</sup> and Pentagon briefings described the strike as an example of the government's ability to "achieve counterterrorism objectives" without "boots on the ground."<sup>18</sup> Secretary of State Blinken's statement about the strike<sup>19</sup> also did not mention the legal rationale. Thus, it is not entirely evident that the United States applied the law of armed conflict to the strike.

Nonetheless, statements made by Biden administration officials in litigation involving Guantánamo detainees clearly indicate that the United States continues

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13. President Joseph Biden, Remarks by President Biden on a Successful Counterterrorism Operation in Afghanistan, *supra* note 1.

14. Peter Baker, Helene Cooper, Julian E. Barnes & Eric Schmitt, *U.S. Drone Strike Kills Ayman al-Zawahiri, Top Qaeda Leader*, N.Y. TIMES (Aug. 1, 2022), <https://perma.cc/LJR2-7TWQ>.

15. *Id.*

16. *Id.*

17. President Joseph Biden, Remarks by President Biden on a Successful Counterterrorism Operation in Afghanistan, *supra* note 1.

18. Dr. Colin Kahl, Undersecretary of Def. for Pol'y, USD (Policy) Dr. Kahl Press Conference, U.S. Dep't of Defense (Aug. 8, 2022), <https://perma.cc/DSB2-5X7X>. The Pentagon's news announcement also failed to articulate the legal rationale for the strike. Jim Garamone, *U.S. Drone Strike Kills al-Qaida Leader in Kabul*, DOD NEWS (Aug. 2, 2022), <https://perma.cc/ZKR6-W77G>.

19. Anthony Blinken, Sec'y of State, Press Statement, The Death of Ayman al-Zawahiri, Dep't of State (Aug. 1, 2022), <https://perma.cc/RJZ9-J3ER>.

to view the law of armed conflict as applicable to U.S. operations in Afghanistan, even after the withdrawal of U.S. armed forces. For example, in its response to a habeas petition filed by Saifullah Abdullah Paracha, a Pakistani citizen held briefly in Afghanistan and then transferred to Guantánamo in 2004, Biden administration lawyers argued in October 2021—after the withdrawal from Afghanistan—that “the United States remains in active hostilities against al-Qaeda and its associated forces, including in Afghanistan.”<sup>20</sup> In subsequent pleadings in the same litigation, the Administration similarly argued that “the record evidence demonstrates that hostilities against al-Qaeda and associated forces have not ceased, whether in Afghanistan or elsewhere.”<sup>21</sup> And in briefing materials filed in October 2021 in response to the habeas petition of Assadullah Harun Gul, an Afghan citizen held at Guantánamo since 2007, the Administration similarly argued that there is a “current ongoing conflict against al-Qaida and associated forces in areas of Africa and the Middle East, including Afghanistan . . . [and] U.S. forces remain engaged in active hostilities with al-Qaida and associated forces in these regions.”<sup>22</sup>

If the United States is applying the law of armed conflict paradigm to use-of-force operations in Afghanistan, that legal framework provides greater leeway to the United States than alternative international law paradigms, such as international human rights law. Of course, even the law of armed conflict establishes rules for targeting—including principles of distinction, proportionality, and feasible precautions—that constrain the use of force in important ways.<sup>23</sup> But international human rights law is far more constraining because it completely prohibits the premeditated killing of specific individuals and allows the use of lethal force in self-defense only if strictly necessary.<sup>24</sup> Thus, the availability of drones to conduct lethal force operations enables the United States to continue to maintain that an armed conflict is ongoing in Afghanistan and therefore claim the greater flexibility that the law of armed conflict confers, even without boots on the ground.

### B. Domestic Law

As I have argued elsewhere, the ongoing use of drones also expands the discretion of the U.S. executive branch to use force overseas as a matter of domestic law.<sup>25</sup> Under opinions authored by the U.S. Department of Justice’s Office of

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20. Respondents’ Return to Petition for Habeas Corpus and Response to Petition for Other Relief at 6, *Paracha v. Biden*, No. 1:21-cv-2567-PLF (Oct. 25, 2021), <https://perma.cc/QJT4-LUCB>.

21. Respondents’ Return to Supplemental Petition for Habeas Corpus Based on Newly Available Grounds at 29, *Paracha v. Biden*, No. 1:21-cv-2567-PLF (Jan. 14, 2022).

22. Respondents’ Supplemental Opposition in Response to Petitioner’s Request for Renewed Consideration of the Motion for Immediate Release at 13, *Gul v. Biden*, No. 1:16-cv-1462 (APM) (Oct. 1, 2021), <https://perma.cc/5FYW-R8S9>. The District Court for the District of Columbia granted Mr. Gul’s petition, *Gul v. Biden*, 573 F. Supp. 3d 148 (D.D.C. 2021), but the United States has subsequently repatriated him to Afghanistan, Carol Rosenberg, *U.S. Repatriates Afghan Whose Guantanamo Detention Was Unlawful*, N.Y. TIMES (June 24, 2022), <https://perma.cc/7KK3-Q6YG>.

23. See National Security Policymaking, *supra* note 4, at 649.

24. See *id.*

25. *Drones, Automated Weapons, and Private Military Contractors*, *supra* note 8, at 101-12.

Legal Council (“OLC”), use of force operations “limited in . . . nature, scope, and duration”<sup>26</sup> do not qualify as “war” for constitutional purposes,” thereby limiting Congress’s role in authorizing such operations.<sup>27</sup> Of course, OLC opinions do not carry the weight of judicial precedent. Still, these opinions provide the legal reasoning that continues to guide U.S. executive branch action.

More specifically, an operation is far more likely to be deemed to be of “limited. . . nature, scope, and duration” if the risk of U.S. casualties is low, and the deployment of drones reduces that risk. Therefore, the ability to use drones in a lethal force operation makes it more likely that U.S. government lawyers will conclude that a particular operation does not constitute war for constitutional purposes: because the risk of U.S. casualties is low, lawyers can more likely conclude that operations involving drones will be of “limited. . . nature, scope, and duration,” and therefore fall below the constitutional “war” threshold that requires congressional authorization. The use of drones may also enable government lawyers to conclude that an operation does not entail introducing “armed forces. . . into hostilities” within the meaning of the War Powers Resolution.<sup>28</sup> Thus, from Libya to Syria to Afghanistan, the ability to use drones expands the range of U.S. executive power in relation to Congress. To be sure, the existing 2001<sup>29</sup> and 2002<sup>30</sup> Authorizations to Use Military Force (“AUMFs”) have themselves offered broad congressional authority for the use of force, an authority that the U.S. executive branch has stretched to, and perhaps beyond, the limit of plausibility.<sup>31</sup> But even if Congress were to repeal one or both of these AUMFs, or in the event that a particular use of force does not fall within them—as in the case of the U.S. intervention in Libya in 2011—the availability of drone strikes bolsters arguments that Congress need not even authorize such extraterritorial use-of-force operations.

#### CONCLUSION

Regan’s book offers a powerful analysis that will surely influence scholarly and policy discussions about the actual efficacy and impact of drone warfare. By contributing empirical data to what is often an abstract debate, Regan’s contribution is significant, timely, and well-positioned to challenge long-held assumptions

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26. OLC Libya Opinion, *supra* note 9, at 14.

27. *Id.* at 8, 13. In articulating this standard, the OLC Libya Opinion built on previous OLC opinions related to the U.S. military interventions in Kosovo, *see* Randolph Moss, Dep’t of Justice, *Authorization for Continuing Hostilities in Kosovo*, 24 OP. OFF. LEGAL COUNSEL 327 (2000), <https://perma.cc/C52J-TSA7>, and Bosnia, *see* Walter Dellinger, Dep’t of Justice, *Proposed Deployment of U.S. Armed Forces into Bosnia*, 19 OP. OFF. LEGAL COUNSEL 327 (1995), <https://perma.cc/9V49-4FEE>.

28. 50 U.S.C. § 1543 (1973).

29. Authorization for Use of Military Force, Pub. L. No. 107-40, §2(a), 115 Stat. 224, (2001) (“2001 AUMF”).

30. Authorization for Use of Military Force Against Iraq, Pub. L. No. 107-243, 116 Stat. 1498 (2002) (“2002 AUMF”).

31. *See, e.g.*, OFFICE OF THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 4-7 (2016).

about the use of drones. Certainly, to the extent drone strikes fail to conform even to the U.S. government's own criteria for such strikes, that is a significant piece of data that should inform decisionmakers.

Yet, as we learn from Regan's outstanding work, we also need to go beyond it, to consider the ways in which drones empower the executive branch to pursue forever wars despite international and domestic legal regimes. By allowing the executive branch to skirt legal rules that might limit such extraterritorial uses of force, drones contribute to ongoing declarations of wars with no geographical loci and no temporal endpoints. Thus, whether considering international or domestic legal regimes, the ongoing use of drone strikes must be studied not only for its effects on the ground, but for its effects on the rule of law more generally.