

AN ACTION PLAN ON U.S. DRONE POLICY

Recommendations for the Trump Administration



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Recommendations for the Trump Administration

This report was written by the Stimson Center, which is responsible for its content and recommendations. Members of the study group provided expert insight and advice, and served in their individual capacities.

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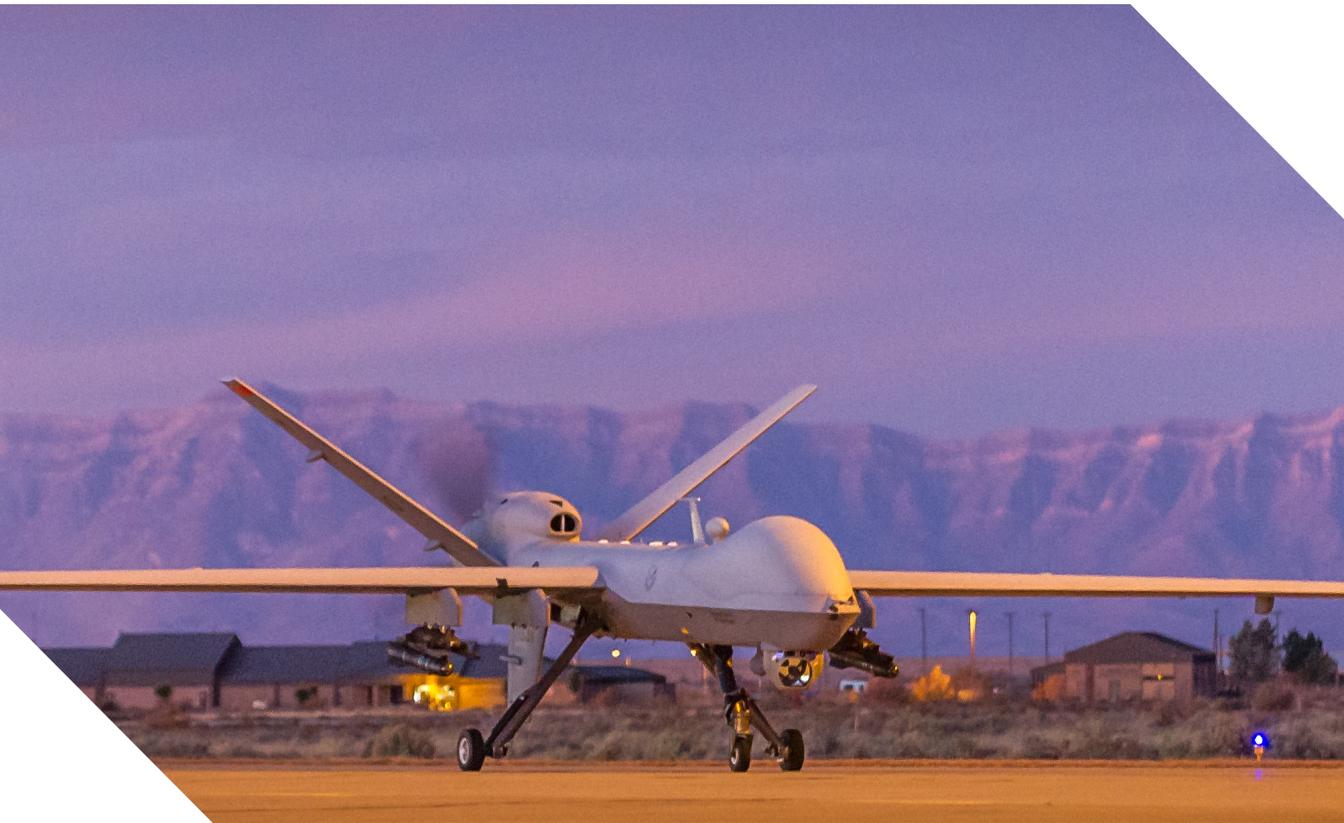
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AN **ACTION PLAN** ON U.S. DRONE POLICY

Recommendations for the Trump Administration

PROJECT DIRECTOR

Rachel Stohl



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FOREWORD

Unmanned aerial vehicles, or drones, continue to shape how, when, and where the United States conducts military and counterterrorism operations around the world. Yet U.S. use of armed drones remains controversial, in large part because of ongoing secrecy surrounding the use of lethal drone strikes outside of traditional battlefields and the resulting lack of accountability that often goes hand in hand with the absence of transparency. Currently, the U.S. drone program rests on indistinct frameworks and an approach to drone strikes based on U.S. exceptionalism. Ambiguity surrounding U.S. drone policy has contributed to enduring questions about the legality, efficacy, and legitimacy of the U.S. drone program. And the drone debate continues in the Trump administration.

In its first year, the Trump administration has demonstrated a continued commitment to the use of armed drones in efforts to advance U.S. military and national security objectives. Yet with this continued — and at times escalated — use of lethal drone strikes, the administration also appears to be reducing the transparency of and accountability for the U.S. drone program. More than 16 years after the first U.S. drone strike, the drone program remains shrouded in secrecy, complicating effective oversight and making independent assessments of the legitimacy and efficacy of the U.S. drone program extraordinarily challenging.

Given these and related concerns, such as the rapid spread of drone technology for military and national security purposes around the world, it is important that the United States develop a drone policy that is both practical and comprehensive, and that sets a constructive international precedent for future drone use worldwide.

It is in this environment that Stimson sees an opportunity to advance the common-sense approach of the 2014 Stimson Task Force on U.S. Drone Policy and the 2016 *Report Card: Grading Progress on U.S. Drone Policy* to develop a transparent and accountable action plan for U.S. drone policy that takes into account national security priorities, foreign policy objectives, and commercial interests.

Brian Finlay

June 2018



A NOTE ON METHODOLOGY AND SCOPE

This report was written by the Stimson Center. To conduct its research, Stimson convened a study group of key experts and stakeholders to discuss opportunities for and challenges to improving U.S. drone policy. Over the course of one year, the study group examined current U.S. policies and practices — as established during the Obama administration and adapted under the Trump administration — and aimed to identify tangible steps the Trump administration can take to develop, implement, and sustain a comprehensive U.S. drone policy.

Stimson requested meetings with U.S. government officials from relevant departments and agencies to supplement its knowledge and receive primary source information about the Trump administration's approach to the U.S. drone program and targeted drone strikes, particularly as part of broader counterterrorism operations. Project Director Rachel Stohl met with staff members from the National Security Council (NSC) on October 25, 2017, to supplement Stimson's knowledge and understanding of current policy developments and obtain background information on select topics to serve the accuracy of the report.



A Note on Methodology and Scope

This report focuses primarily on issues related to the U.S. export and use of armed drones and the impact of the U.S. drone program on the development of international standards and norms regarding drone export and use. Because of space and scope constraints, the report does *not* focus significantly on the following issues:

- ▶ The use of drones in domestic airspace

- ▶ The numerous nonlethal commercial uses of drone technologies

- ▶ Privacy concerns related to drone use

- ▶ The potential future use and development of autonomous, human-out-of-the-loop systems

- ▶ Legal arguments related to the scope and potential revision of the 2001 Congressional Authorization to Use Military Force

- ▶ Legal arguments related to the lethal targeting of U.S. citizens¹

¹ Although not included in this report, the lethal targeting of U.S. citizens is a critical aspect of this conversation. In 2014, the Obama administration released a Justice Department memo articulating its legal justification for targeting an American citizen abroad, Anwar al-Awlaki. The memo, released to the public following lawsuits filed by the American Civil Liberties Union and *The New York Times*, argues that U.S. citizenship did not make Anwar al-Awlaki immune from the use of force abroad and that the killing of a U.S. citizen by the U.S. government is authorized by the law of war under a public authority exception to a U.S. statute prohibiting the foreign murder of U.S. nationals. The memo reflected similar arguments contained in a Department of Justice White Paper on the Obama administration's legal rationale for using lethal force against a U.S. citizen in a foreign country, which asserted that lethal action in such cases was lawful under three conditions: "(1) an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States; (2) capture is infeasible and the United States continues to monitor whether capture becomes feasible; and (3) the operation would be conducted in a manner consistent with applicable law of war principles." For more information, see Charlie Savage, "Justice Department Memo Approving Targeted Killing of Anwar Al-Awlaki," *The New York Times*, June 23, 2014, <https://www.nytimes.com/interactive/2014/06/23/us/23awlaki-memo.html>; Violent Crime Control and Law Enforcement Act of 1994, Public Law 103-322, title IV, §60009(a), 103rd Cong., 2nd sess., <https://www.congress.gov/103/bills/hr3355/BILLS-103hr3355enr.pdf>; Michael Isikoff, "Justice Department Memo Reveals Legal Case for Drone strikes on Americans," *NBC News*, February 4, 2013, http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite

INTRODUCTION

Drones have become a mainstay of U.S. counterterrorism operations and national security policy writ large. The Obama administration popularized the use of armed drones — or what are more technically referred to as unmanned aerial systems, unmanned aerial vehicles, or remotely piloted aircraft — and thereby contributed to increased interest in acquiring unmanned systems as well as stirring significant debate over the legality, utility, and efficacy of drone strikes to achieve U.S. strategic objectives. Drones remain a controversial issue. Many of the details surrounding the U.S. drone program remain shrouded in secrecy, and concerns regarding U.S. drone policy have only become more salient during the Trump administration.

In the first year of the Trump administration, President Donald Trump demonstrated a continued commitment to the U.S. use of armed drones in military and counterterrorism operations worldwide. Administration officials have reportedly undertaken or considered several changes to the U.S. drone program, including increasing the tempo of strikes, expanding the geographic scope for drone operations in areas the U.S. government considers “outside of areas of active hostilities,” delegating more strike-decision authority from the White House to military operators, lowering the decision-making thresholds required to take lethal action against terrorism suspects outside of war zones, and broadening the CIA’s role in conducting lethal strikes. In short, the Trump administration’s approach to U.S. drone policy has thus far revealed a desire to roll back some of the principles, procedures, and guidelines put in place by the Obama administration — measures established to balance concerns about the use of drones in lethal operations with a greater degree of transparency and accountability. Indeed, U.S. drone policy under the Trump administration has thus far been defined by uncertainty coupled with less oversight and less transparency.

In this environment of uncertainty, the Stimson Center sees an opportunity to advance the common-sense approach taken by the 2014 Stimson Task Force on U.S. Drone Policy. A comprehensive policy on drones would align U.S. national security priorities and commercial interests with American foreign policy ideals.



U.S. DRONE POLICY

Current U.S. drone policy is guided in part by frameworks established during the administration of President Barack Obama, following considerable expansion of the U.S. drone program from 2009 to 2016. During the Obama administration, the United States came to rely upon lethal strikes — mostly conducted by drones, but also by some fixed-wing aircraft — as a key component of its counterterrorism operations around the world. From January 2009 to January 2017, President Obama authorized more than 550 strikes in Pakistan, Yemen, and Somalia, as well as other countries where the United States was not at war.² By comparison, President George W. Bush authorized 49 strikes from 2001 to 2009 in Pakistan and Yemen.³ President Trump reportedly authorized at least 80 strikes in his first year in office in Pakistan, Yemen, and Somalia, and is on pace to surpass the strike tempo of both of his predecessors, which perhaps signals a greater willingness to use lethal force.⁴

As the U.S. government expanded its use of drones in military and counterterrorism operations, however, concerns mounted about the legality, transparency, and efficacy of the drone program, while the risk of spreading troubling practices became more real with the likely proliferation of armed drones to new markets. Amid the growing controversy, the Obama administration developed policy guidance to articulate its views on responsible drone transfers and use in direct action operations, as well as steps to improve transparency and accountability in the conduct of such operations. However, these steps fell short of the transparency and standards of use that many hoped for.

² This report uses data provided by the New America Foundation. New America calculates a single strike as that which occurs in short succession and in one location. Since the inauguration of the Trump administration, the Department of Defense began reporting multiple series of strikes that are difficult to individually verify. Thus, according to DOD estimates, the Trump administration's counterterrorism strikes may exceed what is represented in New America's data.

³ New America, "America's Counterterrorism Wars," accessed October 30, 2017, <https://www.newamerica.org/in-depth/americas-counterterrorism-wars/>

⁴ Ibid. Updated as of January 29, 2018 according to New America figures for strikes in Somalia, Pakistan, and Yemen. The United States has also undertaken drone operations in Libya under the Trump administration as well. In addition, in the first two months of the Trump administration, Micah Zenko compared drone strike rates of Presidents Trump and Obama and concluded that President Obama conducted approximately 1 strike every 5.4 days throughout his entire administration, while President Trump had thus far upped the tempo to 1 strike every 1.25 days. See: Micah Zenko, "The (Not-So) Peaceful Transition of Power: Trump's Drone Strikes Outpace Obama," *Council on Foreign Relations*, March 2, 2017, <https://www.cfr.org/blog/not-so-peaceful-transition-power-trumps-drone-strikes-outpace-obama>



Several **KEY DOCUMENTS** comprise the underlying

- ▶ **The Presidential Policy Guidance on Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (PPG)** was issued in May 2013 following a speech by President Obama at the National Defense University. The PPG sets forth the policies and procedures for using lethal force against terrorism suspects outside active combat zones or “areas of active hostilities.” Specifically, the PPG requires that the United States only use lethal force, including drone strikes, against terrorism suspects that pose a “continuing, imminent threat” when capture is infeasible, when there is “near certainty” that the target is present before a strike, and when there is “near certainty” that no civilians will be injured or killed.⁵ A redacted version of the PPG was released in 2016 in response to litigation.⁶
- ▶ In 2015, the Obama administration developed the **U.S. Export Policy for Military Unmanned Aerial Systems**. The policy serves as a stand-alone framework to govern the international sale, transfer, and subsequent use of U.S. drones, and builds upon the broader 2014 U.S. Conventional Arms Transfer Policy. The drone export policy includes four principles of proper use that recipients must agree to adhere to before the United States will authorize any drone sales or transfers.⁷ The principles are intended to help ensure responsible end-use of U.S. systems and shape the development of international standards for drone transfers and use. In April 2018, the Trump administration released revised versions of both the conventional arms transfer policy and the drone export policy.

⁵ U.S. Department of Justice, Office of Information Policy, FOIA Library, “Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities,” May 22, 2013, https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets

⁶ American Civil Liberties Union, “ACLU v. DOJ — FOI Case for Records Relating to Targeted Killing Law, Policy, and Casualties,” last modified August 3, 2017, <https://www.aclu.org/cases/aclu-v-doj-foia-case-records-relating-targeted-killing-law-policy-and-casualties>

⁷ U.S. Department of State, *U.S. Export Policy for Military Unmanned Aerial Systems*, February 17, 2015.

framework for current U.S. drone policy.

- ▶ In July 2016, the Obama administration released an **Executive Order on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force (Executive Order 13732)**⁸ directing the administration to, among other things, investigate reports of civilian casualties resulting from U.S. use of lethal force, acknowledge and offer condolence payments for civilian casualties, and publicly report on an annual basis the number of U.S. strikes taken outside areas of active hostilities and the assessed number of combatant and civilian deaths that resulted from those strikes. Notably, the executive order included a provision that required the United States to consider credible nongovernmental organization information in addition to reviewing its own internal information on lethal operations, including drone strikes.
- ▶ In 2016, the Obama administration met with key international partners on the development of international standards to guide drone transfers and use. The meetings culminated in an October 2016 release of the **Joint Declaration for the Export and Subsequent Use of Armed or Strike-Enabled Unmanned Aerial Vehicles**, which served as an initial step to establish universal measures for promoting transparency and ensuring responsible export and use of armed drones. As of this writing, the standards have not yet been finalized, and the United States continues to meet with a small group of international partners to draft the standards.
- ▶ In December 2016, at the end of its term, the Obama administration released a report laying out, in a single document, the legal and policy frameworks undergirding the U.S. drone program and guiding U.S. use of force.⁹

⁸ U.S. President, Executive Order 13732, “United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force,” *Federal Register* 81, no. 130, July 1, 2016, <https://www.gpo.gov/fdsys/pkg/FR-2016-07-07/pdf/2016-16295.pdf>

⁹ Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations, December 2016, Obama White House Archives, https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf



LEGAL AND POLICY CONSIDERATIONS

Drones themselves are subject to the same legal restrictions as other conventional weapons, but the United States has repeatedly used them in ways that have caused some to raise questions about compliance with international law. When drones are used in armed conflict situations, their use is governed by the law of armed conflict, also known as international humanitarian law; yet much controversy surrounds U.S. interpretation of what does and does not constitute an armed conflict.

The U.S. government maintains that it is in an ongoing armed conflict with al-Qaida and associated groups, including the Islamic State, and therefore that the law of armed conflict governs the use of force, including targeted strikes by drones, against members of al-Qaida, the Islamic State, and associated groups, in multiple countries around the world. The U.S. government has also argued that targeted killings of members of such groups are permitted under international law when such operations are necessary in self-defense. Yet the nature of U.S. operations against al-Qaida and its associated forces challenges traditional conceptions of international law as it applies to the use of force and has contributed to ongoing debate regarding the efficacy, legality, and legitimacy of U.S. operations.

Although it is generally accepted that the law of armed conflict applies to U.S. operations in Afghanistan, Iraq, and Syria, debate remains as to whether the law of armed conflict is the appropriate legal framework for U.S. operations, including drone strikes, against terrorism suspects in other locations such as Libya, Pakistan, Somalia, and Yemen. In these instances, the Obama administration claimed to be lawfully engaged in operations against “associated forces” of al-Qaida. The U.S. government’s refusal to release information about the targets of its drone attacks and the difficulty in accessing the locations where U.S. drone strikes have occurred have made it difficult for third parties to assess the legality of specific attacks.

While there is consensus that the United States is engaged in an armed conflict in Afghanistan, Iraq, and Syria, critics of U.S. policy and practice argue that U.S. drone strikes to conduct targeted killings outside these areas should be governed not by the law of armed conflict but by the stricter requirements of international human rights law, which permits killings of individuals only to prevent an imminent threat to life.

The Obama administration’s PPG was, in part, designed to add additional policy constraints on lethal action and to draw the prerequisite conditions for using drones

in areas outside traditional battlefields closer to the conditions required under a law enforcement paradigm — and international human rights law — even as the Obama administration asserted that the law of armed conflict applied. By requiring some connection to an imminent threat, a “near certainty” of the presence of the targeted subject, and no perceived risk of civilian casualties, the PPG was at least intended to minimize civilian harm. Nevertheless, some elements of the PPG — such as the requirement that a threat be both continuing and imminent — seem inherently contradictory, and many critics of U.S. drone strikes have questioned whether strikes outside areas of active hostilities are lawful.

Use of Drones to Enable Direct Action by Foreign Entities

Intense focus in recent years on U.S. use of armed drones to conduct lethal strikes against terrorism suspects has cast a shadow over a less noticed but perhaps equally significant development: the growing use of drones to provide real-time intelligence to foreign entities to enable them to undertake direct action against terrorism suspects in their own territories. While the disclosure or release of drone-derived intelligence can provide foreign partners — to include states, substate groups, and nonstate actors — with vital information to disrupt terrorist activities and plots, the unique nature of drone-derived intelligence (i.e., high-definition, full-motion video with real-time signals intelligence and geolocational capabilities) represents a new frontier with respect to sharing intelligence that supports or facilitates lethal action, and raises a number of legal, policy, and ethical questions that should be considered in the context of U.S. drone policy. However, governments cannot presume that drone-derived intelligence alone is accurate, and therefore should also include other intelligence in making policy and operational decisions.

As a policy matter, unlike the PPG, the guidelines and processes by which the U.S. government makes determinations about foreign partners with whom to share drone-derived intelligence to support or facilitate lethal actions are unclear. The Director of National Intelligence (DNI) oversees the foreign disclosure and release of national intelligence, while the Secretary of Defense oversees the disclosure and release of classified military information (CMI). But the overarching policy processes and procedures for authorizing the disclosure or release of drone-derived intelligence to support or enable lethal action are ambiguous and generally deferential to guidance or direction from the NSC.

As a legal matter, while all U.S. intelligence-sharing activities require legal review and compliance with U.S. and international law, the degree to which foreign partners who receive drone-derived intelligence comply with international human rights law and international humanitarian law is a gray area. Such arguments were made within the first year of the Trump administration in the context of U.S. arms sales to Saudi Arabia for their use in the war in Yemen (or U.S. presence in the targeting center or to assist with refueling), but it could become salient in other contexts as well and is relevant to all coalition partners, regardless of their past behavior.

Moreover, it may be difficult for the U.S. government to investigate claims of human rights abuses or violations of international humanitarian law conducted by foreign partners if the United States lacks a robust on-the-ground presence or adequate collection capabilities in the area where the abuses were alleged to have occurred (this can also be a challenge for investigating U.S. human rights abuses and potential violations, because of a lack of ground presence and/or reliable local sources). In addition, publicly available U.S. government information on the foreign disclosure and release of national intelligence and CMI does not address whether or how foreign partners are required to provide assurances that they will comply with international law as a prerequisite for receiving and using U.S.-provided intelligence, nor how the U.S. government ensures that foreign government partners comply with international standards in practice through both pre-transfer/transfer condition assurances and effective end-use monitoring and operational oversight.

Finally, the sharing of drone-derived intelligence to support or facilitate lethal action undertaken by foreign entities raises a number of legal and ethical questions, including the criteria, if any, used by foreign entities to determine who is a combatant and thus who may be targetable. For example, it is unclear what, if any, standards or criteria foreign partners who are the recipients of drone-derived U.S. intelligence use to determine that terrorism suspects pose a threat justifying the use of force, or whether the targets undergo any policy or legal review by the foreign entity before lethal force is directed against them.



THE TRUMP ADMINISTRATION'S APPROACH

One year after taking office, the Trump administration appears to have rolled back Obama-era guidelines and policy directives with regard to U.S. drone policy — including those pertaining to safeguards against civilian harm and conducting operations. Media reports indicate that the Trump administration modified U.S. lethal strike policy and altered certain aspects of the PPG in particular. The policy revisions, referred to as Principles, Standards, and Procedures (PSP), reportedly relax two Obama-era rules and maintain one important constraint — namely, the requirement of “near certainty” for no civilian casualties.¹⁰ Reported changes include:

- 1 Expanding the targets of armed strikes by eliminating the requirement that the person pose an “imminent threat,”
 - 2 Loosening the requirement of “near certainty” that the target is present at the time of the strike to a “reasonable certainty,” and
 - 3 Revising the process through which strike determinations are made by reducing senior policymaker involvement and oversight in such decisions and delegating more authority to operational commanders.
-

However, because of a lack of transparency regarding the Trump administration's policies concerning lethal action, drones, or counterterrorism more broadly, much about the policy revisions remains unclear, including whether the PSP will be made public and how the Trump administration will define “areas of active hostilities.” Although the Obama administration eventually made the guidelines contained within the PPG public, the Trump administration thus far has kept its revisions secret.

¹⁰ Charlie Savage and Eric Schmitt, “Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids,” *The New York Times*, September 21, 2017, <https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html>

Previously, under the Obama administration, “areas of active hostilities” largely consisted of Afghanistan, Iraq, and Syria, as well as parts of Libya at times — countries and/or cities the U.S. declared active combat zones. Other countries where U.S. counterterrorism operations occurred were regarded as falling outside these areas and thus represented countries where the standards detailed in the PPG applied, though ambiguity remained as to when and where the administration adhered to these standards. In March 2017, President Trump granted a Pentagon request to declare parts of three provinces in Yemen as areas of active hostilities, where looser battlefield rules apply.¹¹ The president also signed a similar directive for Somalia on March 29, 2017. This marked a departure from the Obama administration's approach in these countries and may provide an early signal of the Trump administration's intention to expand areas considered “active hostilities.”

Should the Trump administration adopt a more expansive definition or application of “areas of active hostilities,” it could impact how and where the United States uses lethal force against perceived threats, potentially widening the use of armed drones in more theaters against a greater number of groups and individuals. For instance, the Trump administration has reportedly authorized drone strikes against ISIS targets in Yemen, not just al-Qaida in the Arabian Peninsula targets, illustrating a potentially significant expansion of U.S. operations and targets in Yemen. There was also an uptick in strikes in Somalia during the first year of the Trump administration. Twenty-two strikes were reported there in the Trump administration's first year, a considerable increase from the Obama administration's strikes in Somalia, which totaled 21 strikes over the course of five years (2011–2016). In November 2017, the government of Niger also concluded an agreement with the Trump administration to permit armed U.S. drones in its territory, which may signal a geographic expansion of drone use to the Sahel region of Africa.

Relaxing the standards for the use of lethal force in counterterrorism operations, accompanied with an increasing number of strikes and reduced U.S. engagement with partners in particular theaters, could put the United States at greater risk for blowback (when the population the United States purports to be helping is alienated by U.S. actions) when strikes goes awry, and could compromise Washington's ability to develop partnerships and cooperation with affected countries and local populations. Moreover, removing such policy constraints also risks undermining legal justifications as well as U.S. credibility in asserting the legality, efficacy, and legitimacy of the U.S. drone program.

¹¹ Charlie Savage and Eric Schmitt, “Trump Administration Is Said to Be Working to Loosen Counterterrorism Rules,” *The New York Times*, March 12, 2017, <https://www.nytimes.com/2017/03/12/us/politics/trump-loosen-counterterrorism-rules.html>

»» TRANSPARENCY

Since the Trump administration took office, concerns about the level of secrecy surrounding the U.S. drone program have increased, though criticism of a lack of transparency has never abated. The Trump administration appears to be rolling back initial, albeit limited, efforts to increase transparency in the U.S. drone program, which impedes the ability of the public to assess whether the use of drones is appropriate and responsible and to hold the government accountable for any mistakes or wrongful killings resulting from the use of drones in lethal operations. A lack of transparency also undermines the legitimacy of the U.S. drone program and the policy underpinning it, and implies that the United States has something to hide.

The Trump administration seems to be reverting to greater secrecy with regard to its drone operations and policy. For example, the Trump administration has so far refused to make public the changes it has reportedly made to Obama-era procedures and safeguards.¹² It has also refused to acknowledge the CIA's interest and involvement in conducting targeted strikes, the same information that Obama was forced by the courts to release.¹³

Greater secrecy surrounding the U.S. drone program may prompt renewed debate on the appropriate roles for both the Department of Defense and the CIA in the U.S. drone program. For example, reports indicate that the CIA is seeking to expand its power to conduct covert drone strikes in theaters where the U.S. military has traditionally held the leading role in conducting airstrikes, such as Afghanistan and other war zones.¹⁴ It is unclear to what extent the Trump administration agreed to such a proposal, if at all, but should such a policy proposal be adopted, it would mark a shift in CIA activities in Afghanistan and represent an expansion of the agency's authority to conduct covert strikes in counterterrorism operations, thereby decreasing levels of transparency to both Congress and the American public surrounding U.S. counterterrorism operations and use of force abroad. An expanded CIA role would likely also renew debate about the appropriate use of covert action, secret agreements with other governments regarding use of force in their territory, and the agencies that should (and should not) be responsible for carrying out targeted strikes.

Indeed, the Trump administration's decision not to publicly release or discuss reported policy changes, or even the role of drones in its overall counterterrorism

¹² American Civil Liberties Union v. Department of Defense, 17 Civ. 9972 (ER), United States District Court Southern District of New York, February 1, 2018, https://www.aclu.org/sites/default/files/field_document/14._govt_answer_2.1.18.pdf

¹³ Brett Max Kaufman, "The CIA Is Playing Coy About Trump's First Raid in Yemen," *ACLU*, October 16, 2017, <https://www.aclu.org/blog/national-security/targeted-killing/cia-playing-coy-about-trumps-first-raid-yemen>

¹⁴ Eric Schmitt and Matthew Rosenberg, "C.I.A. Wants Authority to Conduct Drone Strikes in Afghanistan for the First Time," *The New York Times*, September 15, 2017, <https://www.nytimes.com/2017/09/15/us/politics/cia-drone-strike-authority-afghanistan.html>

The Trump Administration's Approach

strategy, may foreshadow the administration's broader approach to limiting transparency surrounding the U.S. drone program. In choosing not to make any such changes publicly available, the administration has arguably provided an early indicator that it does not intend to continue previous moves toward greater transparency for U.S. drone policy overall. Such an approach, however, could face opposition from lawmakers, as Congress included transparency requirements from the administration in the 2018 National Defense Authorization Act (NDAA). Specifically, Section 1264 of the NDAA requires the president to submit to the appropriate congressional committees a report on the legal and policy frameworks governing the U.S. use of military force and related national security operations within 90 days.¹⁵ In addition, Section 1057 of the NDAA requires that the Secretary of Defense submit, no later than May 1 each year, an annual report to congressional defense committees on civilian casualties caused by U.S. military operations (not solely limited to drone strikes) that occurred during the preceding calendar year.¹⁶ The March 2018 release of this report provided limited details in the public version — though it is unclear whether additional information was provided to lawmakers in the classified annex. While the issuing of the report is a positive sign, the lack of public detail may provide a glimpse of the Trump administration's views toward transparency. It is important to note, however, that there is no corollary reporting requirement for CIA activities.



¹⁵ National Defense Authorization Act for Fiscal Year 2018, Public Law 115-91 (2017).

¹⁶ Ibid.



Civilian Casualties

Drones may make the use of force a more likely option of first resort, especially if policymakers or defense officials determine that capture is not a desirable or practical outcome. But once the decision to use force has been made, nothing about drone technology per se necessarily or inherently affects the likelihood of civilian casualties.¹⁷ Yet the policies governing the use of force, including strikes enabled or conducted by drones, and the processes employed in their use, to include the intelligence that underlies the identification and status of the target, have direct bearing on the likelihood and prevalence of harm.

Presumptions or assessments that rely on poor or limited intelligence about the status of individuals killed or injured in strikes can also lead to undercounting of civilian casualties. Relying on less than sound intelligence, without human intelligence on the ground, could undermine the reliability of drone strikes decisions. The context in which drones are often used — e.g., in areas that are difficult to access by conventional security forces — can complicate the ability to conduct pre- and post-strike assessments, and post-strike investigations, and to provide post-harm remedy in the event of credibly reported casualties. Yet if the United States asserts it has the intelligence to carry out lethal strikes, it should also be able to carry out these assessments, which are critical for the government to evaluate the legality and wisdom of its own actions, and to persuade allies, opponents, and the public that its actions are legitimate.

Releasing strike data as strikes occur and responding to and investigating reports of civilian casualties should be crucial elements of a new U.S. drone policy. It is not clear whether there have been any changes to data collection practices regarding civilian casualties from targeted strikes, nor whether the administration will uphold the requirement in Executive Order 13732 to publicly report on targeted strikes outside areas of active hostilities. Reported policy changes by the Trump administration suggest a less robust interagency review and/or lower levels of delegated authority for strike decisions, which could potentially have consequences for targeting decisions and increase the risk of civilian casualties. The next report on counterterrorism strikes conducted outside areas of active hostilities was required in May 2018, and was intended to capture information reported from January 1, 2017, through December 31, 2017. However, the administration did not release the report by the May 1 deadline. New congressional reporting requirements established in the latest NDAA may shed additional light on civilian casualties in 2017.

¹⁷ Although drone strikes may be more precise and less susceptible to collateral damage than a manned aircraft strike, if the intelligence identifying the target is wrong or ignored, the preciseness of a drone strike does not matter, and civilian casualties and collateral damage may be substantial.

»» OVERSIGHT AND ACCOUNTABILITY

The Trump administration appears to be shifting practice in how drone operations are conducted. There appears to be greater delegation to operational commanders on the ground, an expansion of theaters in which drone strikes are conducted, a lack of clarity over who represents a legitimate target, and greater secrecy regarding the ways in which operations are conducted, by whom, and the results of such operations. All of these aspects raise challenges for ensuring proper oversight and accountability of the U.S. drone program and the use of force more broadly.

One challenge, in particular, arises in determining the responsible agency or agencies for conducting lethal drone operations. Should the Trump administration seek to increase the CIA's role in drone strikes, the result could be renewed discussions over which government agency should maintain control over the drone program — a years-long debate that is unlikely to be resolved in the near term.

As modern warfare has evolved, so too have authorities governing the use of force at the operational level. In particular, Title 10 and Title 50 authorities have blended to provide for greater cooperation and integration between the military and intelligence services.¹⁸ Yet, as several experts have noted, such blending has resulted in a blurring of boundaries between traditional military activities and covert operations, which complicates oversight at the operational level and has led to confusion and a lack of accountability.¹⁹ Title 10 outlines the functions and responsibilities of U.S. armed forces. Title 50, by comparison, governs how the United States conducts war and protects its national security interests, and includes (but is not limited to) intelligence operations. Both Title 10 and Title 50 maintain different oversight and accountability mechanisms, particularly with regard to congressional oversight. Title 10 is overseen by the House and Senate Armed Services Committees and the executive branch, while Title 50 activities are overseen by congressional intelligence committees and the executive branch. Lethal drone operations, however, complicate the distinction between Title 10 and Title 50 activities, as they are at times defined by a combination of overt and covert activities — or those operations that are semi-covert and semi-overt.²⁰ In this environment, it has become increasingly difficult to distinguish between the primary operators — that is, CIA vs. military officials — in lethal drone strikes, and it is often unclear who is making strike decisions and who is pulling the trigger. As the Trump administration delegates more strike-decision authority to

¹⁸ U.S. Congress, Senate, Committee on Armed Services, *The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force: Hearing before the Committee on Armed Services*, 113th Cong., 1st sess., 2013, 16–17.

¹⁹ Jennifer Kibbe, "Conducting Shadow Wars," *Journal of International Security Law & Policy* 5, no. 2 (January 2012): 373–92.

²⁰ Rosa Brooks, "Shadow Wars," *Foreign Policy*, September 20, 2012, <http://foreignpolicy.com/2012/09/20/shadow-wars/>

commanders in the military and potentially takes steps toward reestablishing the CIA's role in conducting lethal drone strikes, questions will undoubtedly reemerge regarding responsible agencies and appropriate levels of oversight and accountability for U.S. drone operations.

The decision-making process for strike determinations also appears to be loosening. Reported policy changes suggest that the Trump administration has eliminated the interagency vetting and review process for approving lethal action against terrorism suspects that was established by the Obama administration. Proposed drone strikes against individual targets would be delegated to operational commanders and forgo much of the interagency vetting and review. As a result, it is likely that strike decisions will have less scrutiny in areas where the United States is not at war, which could potentially increase the risk of, while at the same time reducing accountability for, wrongful killings and mistakes.

The Role of Congress

In the current environment, it may be necessary to strengthen oversight of the drone program outside of the executive branch. Congress has the most obvious oversight role to play, but was largely silent on issues surrounding the U.S. drone program during the first year of the Trump administration.²¹ While Congress did take some steps in 2017 through the 2018 NDAA, which aimed to increase transparency on the legal and policy frameworks governing U.S. use of military force and related national security operations as well as augment congressional oversight on civilian casualties caused by all U.S. military operations, there has been scant public congressional debate about the drone program during the Trump administration thus far, despite a significant increase in the intensity and geographic scope of such activities.

Admittedly, a number of other pressing national security matters currently require congressional attention and engagement. However, a lack of sustained, robust congressional oversight of U.S. drone policy risks stifling any public discourse and allowing the executive branch to craft and implement policies without appropriate checks and balances on a program that kills individuals outside active war zones.

²¹ Sarah Kreps and Miles McCain, "Congress Keeps Quiet on U.S. Drone Policy — And That's a Big Problem," *The Washington Post*, August 24, 2017, https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/24/congress-keeps-quiet-on-u-s-drone-policy-and-thats-a-big-problem/?utm_term=.58eff29b2227. It is worth noting that some in Congress did speak up regarding drone strikes, particularly from 2011 to 2014. One of the largest debates revolved around the appropriate roles and responsibilities of the CIA and DOD.

» INTERNATIONAL NORMS

The United States does not maintain a monopoly on the use of armed drones in conflicts, nor do states, alone, retain a monopoly on the use of this technology. Thus, it is important to examine the precedent the United States is currently setting for lethal drone use and ensure that U.S. policy and practice is lawful, appropriate, accountable, and transparent — and supports U.S. interests. In developing its own practice for conducting lethal drone operations, the United States is setting a de facto international standard for transparency and accountability regarding drone use, even though such a standard may run counter to global norms for use.²² Indeed, the U.S. approach to and use of armed drones may be perceived as acceptable in a legal and policy context specific to the United States, but may run counter to long-term U.S. interests if adopted by other countries.²³ In short, U.S. policy and practice impacts not only what is happening within and to the United States, but how our allies, partners, and even our enemies utilize drones for their own purposes.²⁴

In 2016, the United States initiated efforts to begin considering the implications of drone proliferation and use at the international level. Captured in what has since been referred to as the “joint declaration process,” the initiative aims to develop global standards to guide the transfer and subsequent use of armed drones. Fifty-three countries signed on to the joint declaration when it was launched in October 2016 and agreed to begin a process to develop global standards on export and subsequent use of armed drones. After participating in early meetings to develop international standards in the first half

²² For example, the United Kingdom followed the U.S. precedent of conducting a drone strike against its own citizen in a third country (Syria) under the justification of self-defense as the United States did with its strike against Anwar Al-Awlaki in Yemen. For more information, see *UK Lethal Drone Strikes in Syria*, Report to the Intelligence and Security Committee of Parliament, April 26, 2017, https://b1c9a9b3-a-5e6631fd-s-sites.googleusercontent.com/a/independent.gov.uk/isc/files/20170426_UK_Lethal_Drone_Strikes_in_Syria_Report.pdf?attachauth=ANoY7cow0GD6w3IYGR6a2ieAnnBKLoGCKsbEhXgjjMSD4kKU3GS6kwMdOmHvvcAxvWse-1qZ1nEirlqJdgBsMWYz0jCGr65lwbjWjJmY8LEAy4rxHvo48XLUdK7ucONnYAossszyhQuw1hAeN53JHRA1RI9Ux-QZ8nlNVGlgUcAenw9dDpiz5mhbt21FT-oc73zgZ_msbs3gBombQYw_LptXIV6OWxLZDu70cLdCxFssQyl3ZSwr-Go-2wElfRvy5zKgYhienX2MqxajYhU4XSMYGIaOeedXg3g%3D%3D&attredirects=0;

²³ To date, there is no one unified position on the appropriate use of armed drones. The European Union has pursued these discussions through its efforts to develop an EU Common Position on Drones. See European Parliament, Directorate-General for External Policies, *Towards an EU Common Position on the Use of Armed Drones*, by Jessica Dorsey and Giulia Bonacquisti, June 15, 2017, [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU\(2017\)578032](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU(2017)578032). Additionally, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Ben Emmerson, noted in a recent report that the “use of armed drones is not inevitably unlawful, but must be subject to clear and public principles circumscribing their use” and underscored the importance of national policies on armed drones complying with international legal obligations, including those under international humanitarian law and international human rights law. Emmerson stated that “the use of lethal drones in accordance with international law requires transparency to the greatest extent compatible with national security.” See UN Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, by Ben Emmerson, March 24, 2017, <https://undocs.org/A/HRC/34/61>

²⁴ For more insight into how other countries perceive armed drones and anticipate their use, and how the U.S. drone program has influenced such perceptions, see Kelley Saylor, Ben FitzGerald, Michael C. Horowitz, and Paul Scharre, *Global Perspectives: A Drone Saturated Future*, Center for a New American Security, May 2016, <http://drones.cnas.org/reports/global-perspectives/#1460563103267-1900a533-b5dd>

of 2017, the Trump administration took time to consider whether it would continue to maintain a leadership role in the joint declaration process.

To date, it appears the United States will remain involved in the joint declaration process and will continue such involvement as it remains in U.S. interest. Many questions remain about the level of U.S. engagement, key policy priorities, and the extent to which experts and perspectives from those outside national governments will be incorporated into the international standards that are being developed by a core group of governments, namely Germany, Italy, Japan, the Netherlands, the United Kingdom, and the United States.²⁵

The administration's decision to maintain the U.S. leadership role in multilateral efforts to develop global drone standards has been viewed with some skepticism. Critics point to the lack of transparency surrounding U.S. drone use as well as the ongoing domestic debate regarding the underlying legal and policy frameworks for U.S. operations, and wonder whether the U.S. drone program adequately reflects the standards being pursued by the core group of states.

Though the joint declaration process is moving forward, there is widespread sentiment from countries both in and outside the process that the current effort to establish international standards on drones cannot simply serve as a box-checking exercise, but must add value to existing international regimes and policies. States have expressed concerns that the current process risks giving the veneer of oversight and responsibility by presumably developing a check on transfers and use, but may prove meaningless in establishing appropriate controls.²⁶ The process continues to remain closed, consists of only an elite group of states, and has largely failed to take other views into account.

The United States is looking to integrate the finalized standards into an existing forum or regime — such as the Arms Trade Treaty, the Wassenaar Arrangement, or the Missile Technology Control Regime — but has not yet examined this point in great detail or decided upon how to advance the final standards. Until such a decision is made, the process to develop international drone standards will continue to exist as a stand-alone forum, and the core group will discuss and decide on the need for further independent meetings in the future.

²⁵ In addition to the core group of five states working to draft international standards on drone transfers and use, Israel and Turkey have participated as observers to the core group.

²⁶ China, which is responsible for a significant percentage of global drone exports, is not part of the joint declaration process. Critics have said that without major exporters such as China and Israel included in the development of international standards, such a process would be limited in value.

Partner Approaches to Armed Drone Use

More countries are acquiring and/or looking to acquire lethal drone technologies — including U.S. partners and allies. As a result, policy positions have been articulated by the United Kingdom and France regarding drone use. However, it is important to note that these government positions have been viewed by other states as controversial, and they are not identical to the U.S. policy and legal framework.

- ▶ In August 2017, the United Kingdom published a new doctrine to guide drone use, representing the first update since 2011. The doctrine highlights lessons learned from drone use by the United Kingdom, NATO, and allied nations, and addresses such issues as autonomy, stress on pilots, similarities in the use of unmanned and manned aircraft, and the importance of public debate on the issue.²⁷ However, on September 20, Rights Watch UK challenged the UK government as a result of London's refusal to disclose the advice and legal justifications used to conduct a targeted drone strike against a British citizen in Syria in 2015.²⁸ The case may serve as one example of how the U.S. drone program — including the policy frameworks that underpin U.S. drone operations and the government's apparent claims to secrecy — can influence related processes and decision-making in foreign governments.
- ▶ In September 2017, France announced that it had decided to arm its U.S.-origin MQ-9 Reapers, according to Defense Minister Florence Parly.²⁹ Minister Parly noted that several of France's closest partners have already decided to arm their surveillance drones, and that such a move will support counterterrorism efforts in West Africa. Parly stated that France's eventual drone strikes will be governed by "strict rules of engagement" applied by the French army.

²⁷ United Kingdom Ministry of Defence, *Joint Doctrine Publication 0-30.2: Unmanned Aircraft Systems*, August 2017, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/673940/doctrine_uk_uas_jdp_0_30_2.pdf

²⁸ Rosalind Comyn, "The United Kingdom's Drone Programme: Secrecy and Accountability," Oxford Human Rights Hub, September 20, 2017, <http://ohrh.law.ox.ac.uk/the-united-kingdoms-drone-programme-secrecy-and-accountability/>

²⁹ "France Turns to Armed Drones in fight Against Sahel Militants," *Reuters*, September 5, 2017, <https://www.reuters.com/article/us-france-drones/france-turns-to-armed-drones-in-fight-against-sahel-militants-idUSKCN1BG2K2>



» TECHNOLOGY DEVELOPMENT

As drone technology proliferates around the world, several technological developments may complicate U.S. efforts to address regulatory concerns regarding drone transfer and use.³⁰ These technological advancements could signal a broader challenge in which innovation in the commercial sector outpaces the military and proceeds without due consideration for regulatory controls or policy implications. Furthermore, the United States no longer holds a monopoly on drone technology development, as other governments with different control regimes continue to pursue widespread innovation across both the commercial and military drone sectors.

Two significant regulatory challenges are presented by continued drone innovation and proliferation. The first is commercial versus military application of drone technology. The lines between commercial and military technology have become increasingly blurred at both the national and international level, and the controls on drone technology are often unclear. A variety of users — including nonstate actors — are adapting commercial technologies for military or operational gain.³¹ Indeed, the U.S. government and military have grown increasingly concerned about the potential modification and use of “weaponized” small commercial drones both within and outside the United States. Recent use by terrorist groups in Iraq and Syria has advanced the urgency in addressing these concerns and making clear the distinctions between commercially available systems and military systems, as well as better understanding which foreign militaries (as well as paramilitaries and nonstate armed groups) possess which types of systems.³² In 2016, the Federal Aviation Administration (FAA) estimated that sales of small drones were expected to increase to 7 million in 2020, compared to 2.5 million in 2016.³³ The Department of Homeland Security has noted that the proliferation of these systems, and the relative ease with which users can adapt them for nefarious purposes, is a domestic security concern.³⁴

³⁰ For fiscal year 2019, the administration requested \$3.4 billion for the Department of Defense–related drone procurement, research, development, testing, and evaluation, which reflects a marginal increase from the previous four years. While the increase is modest, the request returns funding to levels that are comparable to those requested in fiscal year 2013 and earlier.

³¹ For example, 3-D printed drones have become increasingly common in the commercial sector, and may have profound implications for drone production and use in both the commercial and military sectors. The ease of both hacking and building/printing drones means that additive manufacturing will continue to pose a challenge for regulators and operators alike. For more on this topic, see David Szondy, “3D Printing Goes to War,” *New Atlas*, May 2, 2016, <https://newatlas.com/3d-printing-military-feature/42384/>; Megan Eckstein, “Marines’ 3D-Printed ‘Nibbler’ Drone Creating Lessons Learned on Logistics, Counter-UAS,” *USNI*, September 27, 2017, <https://news.usni.org/2017/09/27/marines-3d-printed-nibbler-drone-creating-lessons-learned-logistics-counter-uas>

³² Don Rassler, “Drone, Counter Drone: Observations on the Contest Between the United States and Jihadis,” *CTC Sentinel* 10, issue 1 (January 2017): 23–27, https://ctc.usma.edu/app/uploads/2017/01/CTC-Sentinel_Vol9Iss1122.pdf; Nabih Bulos, “What’s That Drone Flying in Over the Horizon? It’s a Scout from Islamic State,” *Los Angeles Times*, May 26, 2017, <http://www.latimes.com/world/la-fg-iraq-drone-20170526-story.html>

³³ Federal Aviation Administration, News & Updates, “FAA Releases 2016 to 2036 Aerospace Forecast,” last modified March 24, 2016, <https://www.faa.gov/news/updates/?newsId=85227>

³⁴ U.S. Department of Homeland Security, “Unmanned Aircraft Systems (UAS) — Critical Infrastructure,” last modified November 7, 2017, <https://www.dhs.gov/uas-ci>

The second challenge of drone proliferation is the resulting development of counter-drone capabilities. Governments, including the United States, are preparing for adversaries, including nonstate actors, to use drones to target their national territories. Policymakers and technology innovators are trying to address this concern. For example, in July 2017, the Pentagon granted the authority for personnel at domestic U.S. military bases to shoot down and seize any private or commercial drones that are perceived to be a threat to aviation safety or to pose other security concerns.³⁵ The policy was developed with the FAA and other unspecified agencies.

Additionally, the U.S. Navy and Air Force continue to test new counter-drone technologies for use from a variety of military platforms, including armored vehicles, ships, and helicopters. DARPA also launched a project to create a layered defense system that would protect land or sea platforms from small drone attacks.³⁶ Moreover, the U.S. Army and Marine Corps are exploring ways to create and deploy 3-D printed drones, known as “Nibblers,” in combat operations.³⁷

Another related concern surrounding increased interest in and development of unmanned systems is the potential that such systems may be enabled to take lethal action without appropriate or “meaningful” human control.³⁸ Such a concern has been raised in the global debate pertaining to lethal autonomous weapons.

³⁵ Tara Copp, “New Policy: Military Bases Can Shoot Down Trespassing Drones,” *Military Times*, August 7, 2017, <https://www.militarytimes.com/breaking-news/2017/08/07/dod-can-now-shoot-down-trespassing-uavs/>

³⁶ Defense Advanced Research Projects Agency, News and Events, “Mobile Forces Protection Aims to Thwart Adversaries’ Small Unmanned Aircraft,” August 21, 2017, <https://www.darpa.mil/news-events/2017-08-21>

³⁷ Eckstein, “Marines’ 3D-Printed ‘Nibbler’ Drone”; Amanda Kooser, “US Army Wants to Deploy On-Demand, 3D-Printed Drones,” *CNET*, December 18, 2017, <https://www.cnet.com/news/drones-3d-printing-army-marines/>

³⁸ For further discussion on “meaningful human control” and insight on the debate regarding lethal autonomous weapons, see Bonnie Docherty, “Making the Case: The Dangers of Killer Robots and the Need for a Preemptive Ban,” Human Rights Watch, December 2016, https://www.hrw.org/sites/default/files/report_pdf/arms1216_web.pdf; Michael C. Horowitz and Paul Scharre, *Meaningful Human Control in Weapon Systems: A Primer*, CNAS Working Paper, March 2015, https://s3.amazonaws.com/files.cnas.org/documents/Ethical-Autonomy-Working-Paper_021015_v02.pdf?mtime=20160906082257



»» DOMESTIC POLICY

Export Controls

In 2014, the Obama administration issued a new Conventional Arms Transfer (CAT) Policy.³⁹ A year later, the 2015 U.S. Export Policy for Military Unmanned Aerial Systems was released.⁴⁰ The drone export policy bridged export controls for drones and their subsequent use, which were codified in “principles for proper use.” In April 2018, the Trump administration revised both the CAT and drone export policies, shifting the focus of the U.S. approach to arms sales to emphasize support for U.S. economic security and strengthen the manufacturing and defense industrial base.⁴¹ The new drone export policy applies to transfers of all U.S.-origin drones and contains three notable changes from the 2015 policy. The policy provides the opportunity for industry to sell armed drones through the direct commercial sales process, in which weapons manufacturers can negotiate sales directly with foreign governments.⁴² The updated policy also removes special scrutiny for unarmed systems equipped with laser designators and modifies end-use monitoring processes to allow for possible, rather than obligatory, enhanced end-use monitoring — which calls for more stringent assessments of physical security and accountability for particular defense items. The Trump administration’s review of both the conventional arms transfer policy and the drone export policy is predicated on helping the U.S. economy and defense industrial base, with a strong focus on nonproliferation.

The review of the drone export policy was initiated in part as a result of pushback from U.S. partners and allies as well as the defense industry that the policy creates unnecessary burdens and prevents U.S. industry from competing in the global drone market. The Trump administration believes the new drone export policy will balance the market for commercial and military drones. According to government officials, the revised U.S. drone policy recognizes that commercial drones can be converted for military use, and acknowledges the need to more closely examine the market to better clarify distinctions between commercial and military technology. The Trump administration has asserted that it seeks a drone export policy that ensures partners

³⁹ White House, Presidential Policy Directive 27, “United States Conventional Arms Transfer Policy,” January 15, 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/01/15/presidential-policy-directive-united-states-conventional-arms-transfer-p>

⁴⁰ U.S. Department of State, “U.S. Export Policy for Military Unmanned Aerial Systems,” February 17, 2015, <https://2009-2017.state.gov/r/pa/prs/ps/2015/02/237541.htm>

⁴¹ White House, “National Security Presidential Memorandum Regarding U.S. Conventional Arms Transfer Policy,” April 19, 2018, <https://www.whitehouse.gov/presidential-actions/national-security-presidential-memorandum-regarding-u-s-conventional-arms-transfer-policy/>

⁴² U.S. Department of State, “U.S. Policy on the Export of Unmanned Aerial Systems,” Fact Sheet, April 19, 2018, <https://www.state.gov/r/pa/prs/ps/2018/04/280619.htm>

have what they need to share the burden, prevent reverse engineering, and guarantee that U.S.-origin drones are used for their intended purposes. Although specific details about the Trump administration's drone export policy remain classified, administration officials have noted that transfer decisions will still be made on a case-by-case basis and transfers will include principles for proper use. The drone export policy maintains U.S. commitment to existing laws, regulations, and international control regimes and subjects all sales to the provisions of the CAT policy, including efforts to reduce the risk of operations causing civilian harm. In addition, the policy highlights that the United States will be pursuing unspecified changes to the Missile Technology Control Regime to appropriately govern drone exports.⁴³

The changes to the drone export policy may impact the substance of the international standards for drone export and use, because the initial discussions surrounding global drone standards were influenced by elements of the 2015 U.S. drone export policy. How the recent changes will impact the pursuit of international standards and their substance remains unclear.

National Airspace

The Trump administration also seeks to integrate drones into the national airspace. Although this report does not focus on the use of drones in the domestic context, domestic policies are linked to international efforts to counter the use of drones in foreign theaters. Additionally, the use of drones in the domestic context holds implications for national security, particularly as their use by nonstate actors continues to grow.⁴⁴

⁴³ There remains ongoing debate as to whether the Missile Technology Control Regime is an appropriate regime for guiding drone transfers, given its initial focus on technology akin to cruise missiles that could deliver a WMD and the contrast with more recent developments in drone technology that allow drones to operate like traditional aircraft. For more on this debate, see Stimson Center, *Drones: Export Controls and Regulatory Challenges*, October 2015, <https://www.stimson.org/content/export-controls-and-regulatory-challenges>

⁴⁴ However, U.S. agencies do not have legal authorities to test countermeasures for domestic drone use. Title 18 of U.S. Code prohibits such tests (it did not foresee drones in its origination) and so would have to be amended in order to address ways to counter domestic threats arising from drone use. Although there are regulations regarding self-defense and defense of others, as well as safeguards around DOE and DOD installations, there is a critical gap regarding countermeasures for drones flying into public spaces/gatherings.

CONCLUSION

The first year of the Trump administration demonstrated President Trump's willingness to continue to rely on armed drones to conduct U.S. military and counterterrorism operations around the world. While drone use is expanding under the Trump administration, transparency and oversight of the U.S. drone program appear to be diminishing. Such backsliding by the United States is occurring alongside international efforts to advance global standards for the responsible transfer and use of armed drones. Questions remain about the efficacy of drone operations in achieving broader security objectives, and concerns about the negative consequences that could arise from continued use without the development of appropriate international standards to guide drone transfers and subsequent use. Despite these concerns, the United States has yet to develop a comprehensive U.S. drone policy that is transparent, accountable, and sustainable at a time when lethal drone technology continues to proliferate around the world.

In short, the Trump administration's approach to U.S. drone policy shows worrying signs of potential actions that are designed to dismantle the nascent policy structure and safeguards established under the Obama administration. Indeed, the Trump administration's drone policy appears to be less restrained, less transparent, and less accountable.





RECOMMENDATIONS FOR ACTION

Whether within or outside of an agreed-upon context of armed conflict, drone policies should include an emphasis on transparency, accountability, and unambiguous policy guidelines. There may be particular instances where serious national security considerations require certain strikes to be unacknowledged. However, these circumstances should be a rare exception to a policy that prioritizes transparency and accountability. As a general rule, the administration should seek transparency and accountability by making each strike, along with its legal and policy justification, and any civilian harm that results, public.

The United States has an opportunity to be a leader on U.S. drone policy and to establish an effective, transparent, and accountable policy that reflects oversight from appropriate stakeholders. Such an approach will lend credibility and legitimacy to, and reliability of, the U.S. drone program. Moreover, a U.S. drone policy that values human rights, the rule of law, and good governance, and protects U.S. national interests, is consistent with and furthers U.S. values and principles. To that end, Stimson recommends the following:

Recommendations

For the Trump Administration

TRANSPARENCY

- 1 Publicly release and explain any new policies, principles, standards, or procedures on U.S. drone policy.

- 2 Continue to promptly submit and publicly release the reports required under Sections 1264 and 1057 of the 2018 NDAA on the legal and policy frameworks governing the U.S. use of military force and related national security operations and on civilian casualties caused by U.S. military operations that occurred during the preceding year.

- 3 Retain and adhere to all requirements under Executive Order 13732 on Pre- and Post-Strike Measures to Address Civilian Casualties, including to:
 - ▶ train U.S. personnel on compliance with legal obligations and good practices and feasible precautions to reduce the risk of civilian casualties
 - ▶ review or investigate incidents that reportedly resulted in civilian casualties — including by reviewing relevant information from non-U.S. government sources
 - ▶ publicly acknowledge U.S. responsibility for civilian casualties that may arise from U.S. operations and offer compensation to civilians who are injured or to families of those who are killed
 - ▶ share best practices with foreign partners to mitigate the risk of civilian casualties
 - ▶ engage with the nongovernmental organizations that work in conflict zones to gain better situational awareness of the battlespace and better distinguish between military targets and civilians

- ▶ publicly release an annual report on strikes undertaken by the U.S. government outside combat zones, or outside “areas of active hostilities,” and on casualties resulting from such strikes
 - ▶ organize interagency consultations with relevant defense, counterterrorism, intelligence, legal, civilian protection, and technology experts on civilian casualty trends and consider potential improvements to U.S. government risk mitigation efforts
-

4

Direct the Office of the Director of National Intelligence to facilitate independent reviews of individual strikes that generate significant discrepancies between public and government reports of civilian casualties, and share the results of such reviews with the public, taking into account the need to protect sensitive sources and methods.

5

Expand on Executive Order 13732 to include a requirement to publicly release the number and location of all drone strikes on an annual basis, as well as the number and location of combatants and noncombatants killed in those strikes.

6

Undertake a strategic assessment concerning the efficacy and long-term impacts of the U.S. drone program. Identify whether continued use of lethal drone strikes is achieving broader strategic and/or operational goals, and disclose the metrics used to determine success. Such a review should take into account the short- and long-term costs and benefits of lethal drone operations and the impact on partners, allies, and affected populations.

7

Consult with industry, Congress, U.S. allies, and other relevant stakeholders regarding any proposed changes to the U.S. drones export policy, and take into account the implications of drone export policy changes for efforts to develop global standards guiding drone transfers and use.

ACCOUNTABILITY

- 1 Adhere to all PPG requirements pursuant to sections 3.C (Interagency Review Process), 3.D (Deputies Committee Review), and 3.E (Presentation to the President and the Principal of the Nominating Agency) when nominating a target for lethal action involving the use of U.S. drones, in order to facilitate a rigorous review of the intelligence underpinning the target package and to ensure that all relevant interagency equities have been considered before undertaking lethal action.

- 2 Undertake an effort to refine the processes involved with pre-strike estimates and post-strike assessments of civilian harm, particularly in light of access limitations in many strike locations. The U.S. government should specifically improve the processes by which it receives and considers information provided by third parties, and should disclose the status and findings of any investigations to the affected parties or the public as appropriate.

- 3 Uphold international human rights law and international humanitarian law through the continuation of written assurances on use from U.S. drone export recipients. Such assurances should include post-transfer monitoring and initiate corrective action if violations are found. Assurances should be provided pre-transfer, and a recipient's human rights record and record of compliance with international humanitarian law, as well as the will and capacity to comply with international law after the sale, should be assessed as part of the transfer process.

- 4 Work with recipients to reduce the likelihood of civilian casualties by sharing lessons learned, best practices, and greatest risks associated with the use of drones, to include common errors in intelligence and communications. The U.S. government should also encourage recipients to adopt and implement civilian casualty mitigation policies and practices.

5 Require the DNI and Secretary of Defense to develop policies, standards, and procedures governing the foreign disclosure and release of drone-derived classified national intelligence and CMI (including analysis produced and information disseminated by the Intelligence Community or DOD) that supports or facilitates lethal action by foreign entities. Such guidance could be amended to Intelligence Community Directive 403 and National Disclosure Policy-1, or be developed as new guidance altogether.

6 Ensure that any new policy guidance governing the disclosure or release of classified national intelligence or CMI derived from U.S. drones that is intended to support or facilitate lethal action undertaken by foreign partners require the receipt of credible and reliable assurances from the foreign partner prior to sharing such information, and include clear interagency processes and procedures for receiving, analyzing, and regularly vetting the credibility and reliability of the assurances.

7 Declassify any new U.S. policy guidance developed governing the foreign disclosure or release of drone-derived classified national intelligence or CMI to the greatest extent possible, consistent with the protection of sensitive sources and methods, to promote transparency and accountability and establish international norms regarding the responsible use of such intelligence. Such steps should be taken in light of the rapid proliferation of drone technologies and increased sharing of drone-derived intelligence to enable foreign partners to take lethal action against terrorist suspects on their behalf.



For Congress

- 1 Hold public hearings and organize briefings on relevant law and policy on drones, including U.S. policy and practice, post-strike investigation and redress, and efforts to mitigate civilian harm.

- 2 On an annual basis, publicly release a report explaining congressional oversight activities over the prior year regarding U.S. drone operations conducted outside areas of declared active combat zones.

- 3 On an annual basis, publicly release the amount of funds appropriated for U.S. drone operations outside areas of declared active combat zones.

- 4 Request a Congressional Budget Office or GAO report on the resources devoted to investigating civilian casualties, reporting on them, and taking appropriate action in response to potential operational mistakes.

- 5 Require a report on the legal and policy frameworks governing U.S. use of military force and related national security operations and on civilian casualties by CIA operations and U.S. military operations that occurred during the preceding year.

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Drones have become a mainstay of U.S. counterterrorism operations and national security policy writ large. The Obama administration popularized the use of armed drones — or what are more technically referred to as unmanned aerial systems, unmanned aerial vehicles, or remotely piloted aircraft — and thereby contributed to increased interest in acquiring unmanned systems as well as stirring significant debate over the legality, utility, and efficacy of drone strikes to achieve U.S. strategic objectives. Drones remain a controversial issue. Many of the details surrounding the U.S. drone program remain shrouded in secrecy, and concerns regarding U.S. drone policy have only become more salient during the Trump administration.

In the first year of the Trump administration, President Donald Trump demonstrated a continued commitment to the U.S. use of armed drones in military and counterterrorism operations worldwide. Administration officials have reportedly undertaken or considered several changes to the U.S. drone program, including increasing the tempo of strikes, expanding the geographic scope for drone operations in areas the U.S. government considers “outside of areas of active hostilities,” delegating more strike-decision authority from the White House to military operators, lowering the decision-making thresholds required to take lethal action against terrorism suspects outside of war zones, and broadening the CIA’s role in conducting lethal strikes.

In this environment of uncertainty, the Stimson Center sees an opportunity to advance the common-sense approach taken by the 2014 Stimson Task Force on U.S. Drone Policy. A comprehensive policy on drones would align U.S. national security priorities and commercial interests with American foreign policy ideals.

STIMSON CENTER

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