

OUR UNLAWFUL ENEMY COMBAT-DRONES AND THEIR SPOOKY BUTTON- PUSHERS

If you haven't already read these two posts at Danger Room, you should do so. It reports and elaborates on the discussion at a Congressional hearing yesterday about whether or not our use of drones is legal.

As you recall, State Department Legal Advisor Harold Koh recently justified the use of the drones because they operated within law of war principles.

First, the principle of distinction, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack; and

Second, the principle of proportionality, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.

But whether or not you buy that second bit—that we're not causing excessive civilian losses with our sloppy drone targeting—there's something Koh didn't address: how the drones fit into the schema we've adopted surrounding who is and is not a legal combatant in this war. From Loyola Law Professor David Glazier's statement for the hearing:

A complicating factor in the current conflict is the United States' failure to clearly classify our adversaries

within any recognized law of war categorization. If we consider al Qaeda and Taliban fighters as combatants then we can lawfully kill them or detain them for the duration of hostilities based simply on establishing that status. The fundamental privilege that the law of war confers on a combatant in exchange for this vulnerability is immunity from domestic laws, which ordinarily criminalize any act of violence to persons or property. As a result of this immunity, sometimes called "the combatant's privilege," their conduct must be judged under the law of war rather than ordinary criminal laws. **We have refused, however, to accord members of al Qaeda and the Taliban the basic right to engage in combat against us. We have instead treated any such conduct, such as Omar Khadr's alleged throwing a grenade at an attacking U.S. soldier, as criminal on the ground that these are not uniformed military personnel legally entitled to engage in hostilities. As a matter of law, this is tantamount to declaring these adversaries to be civilians. Civilians who engage in hostile activity can still be attacked, but only for such time as they are directly participating in hostilities. This classification thus imposes additional limitations on our authority to conduct drone strikes (or any other attacks) against them.** There have been suggestions that U.S. targeting may have been expanded, at least for some period of time, to include Afghan drug traffickers who were supporting the Taliban with sale proceeds. This would clearly be unlawful by law of war standards, as would direct attacks on other individuals who are merely performing non-combat support functions, such as financiers, bookkeepers, propagandists, etc.

This issue is equally relevant to who conducts attacks on our behalf. There is no question that uniformed military personnel, whether regular, reserve, or national guard in federal service are lawful combatants entitled to “fly” drone strikes in a recognized armed conflict. But CIA personnel are civilians, not combatants, and do not enjoy any legal right to participate in hostilities on our behalf. It is my opinion, as well as that of most other law of war scholars I know, that those who participate in hostilities without the combatant’s privilege do not violate the law of war by doing so, they simply gain no immunity from domestic laws. Under this view **CIA drone pilots are liable to prosecution under the law of any jurisdiction where attacks occur for any injuries, deaths, or property damage they cause. But under the legal theories adopted by our government in prosecuting Guantánamo detainees, these CIA officers as well as any higher level government officials who have authorized or directed their attacks are committing war crimes.** [my emphasis]

That is, our argument about drones depends on a double standard that treats Omar Khadr as an illegal enemy combatant who is not entitled to (allegedly) throw a grenade to defend himself, yet pretends that the non-military spooks who are pushing the buttons of the drones should enjoy the immunity of legal militants. And while Washington College of Law Professor Kenneth Anderson thinks the CIA’s use of the drones are legal, he concedes that others disagree.

Some commentators, including eminent laws of war scholars, have suggested that the activities of the CIA operating drones (including from locales in the United States) in the context of the armed conflict in AfPak constitutes

unlawful combatancy by CIA personnel.

Anderson expands on his views in one of the Danger Room posts.

Though perhaps the most eloquent description of what is going on here comes in that same Danger Room post, describing the vulnerability in the command chain involved in this targeted (the speaker is the only one in this discussion who also addresses JSOC):

As Mike Innes of Current Intelligence writes Danger Room: "Intelligence and SF/SOF [special operations] targeting in general is a surprisingly ordinary, bureaucratic process. Can't imagine there's all that much that's fundamentally different about the drones approach. If I had to guess, there's a long chain of individuals who take small decisions that add up to one big one. Everyone's responsible, so no one's responsible ... which doesn't mean someone somewhere won't be covered in sh*t once it hits the fan over all this."

At a time when the last Administration's justifications for torture are falling apart and exposing the torturers while insulating the architects of our torture program, we're blithely ignoring that our use of drones puts us in the same legal gray zone we've willfully put al Qaeda in.