

# CONFESSIONS OF AN ORWELLIAN OPPENHEIMER

Drunken Predator has one of the smartest descriptions of what I agree are two of the biggest reasons to oppose drones. On one side, he describes “Oppenheimers” who oppose some international uses of drones out of concern for the way they expand the Imperial Presidency.

I’ll call the first group “Oppenheimers,” after a guy who got a good look at a new kind of warfare and spent the rest of his life championing international institutions to make sure it never took place. They feel that remotely-piloted aircraft represent a qualitative shift in the ability of a nation, and a chief executive, to use force. And not a shift for the better.

Oppenheimers think drones will usher in an Imperial presidency. The capitalization there is important, because we’re talking Imperial as in Palpatine at the helm of the Galactic Empire. They fear that through technical means, drones are reducing or eliminating the political impediments to war, and blurring the line about what kind of conflict constitutes war in the first place. (Nobody puts a flag over drone wreckage, let alone puts it on the nightly news.) Oppenheimers also deplore the role that drones play in the larger framework of the Authorization for Use of Military Force, or AUMF, which the Obama administration interprets as giving them clearance to use force (whether under Titles 10 or 50) against al-Qaeda or its affiliates anywhere on the planet.

The first part of his description—the way drones used outside of war zones change the way we wage war—gets at part of what I was trying to describe in my two posts on drones and sovereignty and the nation-state. Drones not only degrade the sovereignty of and therefore the ability to govern in states like Pakistan in dangerous ways, but they shift the relationship between us and our own government, allowing it to wage war relatively free of political limits, which in turn appears to be accompanying and related to fundamental changes in the social compact between the government and the governed.

I'd add two things to DP's description, though. First, drones are not changing warfare alone. So are our expanded use of special forces (which, so long as they don't fight in uniforms and fight in countries we're not at war with, resemble the unprivileged enemy combatants and tactics this war started by targeting) and mercenaries. Those developments all work together to support the same changes in warfare; drones just happen to be the most visible evidence of those developments.

Also, this is not just about the AUMF. As I noted on Twitter, there are reasons to believe some of our drone strikes (and some of our paramilitary activities) are operating at least partially under the September 17, 2001 "Gloves Come Off" Memorandum of Notification, not the AUMF (or, as Stephen Preston suggested recently, an AUMF would be separate and independent from authorities that derived from Article II authority covered in a Finding). At this point, the distinction between Title 10 (military) and Title 50 (intelligence) authorities appears to have become a shell game, giving Presidents two different ways to authorize and approve various activities based on the buy-in from Congress, international sensitivities, the actual targets, and skill sets available. This—plus an urge toward "flexibility" in law enforcement and data sharing in intelligence generally—has made it easy to use tools justified for one target (like al Qaeda) to fight another target (like non-AQ

terrorists or drug cartels or leakers).

The blurring between Title 10 and 50 and domestic intelligence and law enforcement is important when we get to DP's second group, "Orwells," who oppose drones because of concern about drones used in domestic surveillance.

Their primary concern about drones is domestic. They see the technological potential for drone surveillance, the interest from law enforcement and government agencies, and the massive aerospace industry primed to meet the demand. While there are often noises made about UAV safety, the primary gripe of Orwells- who can point to an actual passage in 1984 which describes small unmanned aircraft peering through people's windows- is that drones are vanguards of a pervasive surveillance culture. The police watch you outside with robots, corporations like Facebook and Google parse your user data to better bombard you with ads, and the NSA hoovers up your phone and email communications to feed through a secret counter-terrorism algorithm.

Before I look at two characteristics of DP's discussion of domestic drones, here's where he goes with this discussion: he suggests, first of all, that drone opponents use the same stock photos because they most effectively—but inaccurately—generate support for both arguments.

It's a lot easier to make people uneasy over privacy concerns when you pair the article with pictures of a targeted-killing machine. Same way it's easier to make people care about collateral damage in Yemen or the Phillipines by being able to say with a straight face, "You may be next." This line-blurring is inaccurate, widespread, and actively harmful to an informed debate.

Oppenheimers are wrestling with the problem of how America uses force in hostile, fluid or ungoverned territory; Orwells are trying to apply 250 years of the rule of law to a new police technology. Both are doing so, by and large, in good faith.

[snip]

While I actually agree with many of the concerns of both groups, pretending that their goals have anything in common, just because they use the same stock photography, is ridiculous.

The practical problem with doing this, DP argues somewhat persuasively, is that these two problems with drones have different solutions; solving one of the problems will not solve the other.

But establishing international standards for the deployment and operation of lethal military assets will do precisely nothing to curb the rise of the surveillance state within America's borders. Nor will enhanced American legal protections against police UAV surveillance somehow prevent collateral damage in the lawless regions of Pakistan or Yemen.

Note, however, what DP does here: the international threat is military, the domestic one is civilian police. As I've suggested—and as DP's invocation of DOD's NSA among the known expanding surveillance risks—such neat lines no longer exist, though suggesting they do makes DP's argument easier. Which brings us, ultimately, to what I consider a straw man argument, the suggestion that domestic drone opponents are worried primarily that armed drones will be used for speeding enforcement.

And when Orwells and Oppenheimers imply that the New Jersey State Police will

soon rain Hellfire missiles onto Garden State Parkway speeders, it creates a rhetorical fog bank that's too thick for logic to penetrate.

First, as bmaz and I argued on Twitter, it will be a long time before armed drones target New Jersey's speeders. But it will probably be a much shorter time until armed drones operate either in northern Mexico or on the border, hunting drug cartels, against which the Obama Administration has already started applying counterterrorism tactics, to say nothing of ratcheting up fear based on cartels' alleged ties to both al Qaeda and non-AQ terrorists we're fighting. While it is a stretch to imagine armed drones used in day-to-day law enforcement in the US, it is not a stretch to imagine armed drones seeping across the border in search of drug traffickers, as many other Executive Branch abuses already have.

Moreover, there is plenty to fear from drone-based surveillance well before they start shooting down New Jersey's speeders.

DP, for example, argues that helicopter surveillance represents a bigger threat than drones, as they currently are. But that ignores the added sensor technologies that represent further incursions on privacy—and under Fourth Amendment precedent on thermal imaging surveillance would be a legal problem. Plus, I think the debates about using satellite surveillance for precisely the same applications currently envisioned for drones and the Court's treatment of GPS technology in *Jones* suggest that there will be a lot of fluidity in privacy law in upcoming years, which ought to invite a robust discussion about whether and for what drones are appropriate. All that said, the most extensive government surveillance currently takes place behind the veil of secrecy-protected intelligence collection, which has prevented anyone from challenging the most intrusive GPS surveillance (the Secret PATRIOT application) and would likely prevent anyone from challenging

the most abusive potential uses of drones, so their unquestioning use is, by itself, a problem.

I also think DP focuses too closely on the FAA roll out of drones, and too little on the NDAA's rollout of six test sites for military drones in civilian airspace. Sure, I never much worried about the omnipresent F-15s [correction: F-18s?] flying over my head when I lived and worked near Miramar, which like these drones would be in part, were engaged in training. But that was before our government expanded the use of unwarranted DOD (NSA) surveillance in the US. In other words, it is one thing to envision police use of drones to help capture cattle rustlers targeted for probable cause, it is another to imagine DOD use of drones for unwarranted surveillance—the kind of surveillance that is already in place through NSA and certain DOJ authorities. Besides, the rollout of domestic drones explicitly envisions the kind of resource sharing that went into that cattle rustler bust, which means in the era of flexibility and data sharing, authorities can get around limits on the use of posse comitatus and CIA surveillance.

Which brings us, ultimately, to DP's too narrow treatment of the Imperial Presidency. When Arthur Schlesinger Jr. wrote the Imperial Presidency, he talked about the waging of secret wars, but he also cited a list of things that made Nixon historically worse, including illegal wiretapping, illegal electronic surveillance, tampering with witnesses, misprision of felonies. When John Conyers invoked the term, his list included illegal wiretapping and abuse of PATRIOT Act authorities as well as torture and rendition.

That is, the post-9/11 presidents, like the archetypal Imperial President, have done more than just unilaterally wage secret (and not-so secret) wars. They have also invoked domestic enemies at a time of war to use novel tools against them. To some degree the war on terror is custom made to do so—to roll out massive

surveillance in hunt of people who are or might be entrapped to become enemies amongst us. And both the Bush and Obama Administration have expanded the targeting using such authorities from just Muslim extremists to include Occupy protestors, Tea Partiers, hackers, peace activists, journalists. Furthermore, while in the current political environment, it is unlikely a President will use a drone to kill an alleged terrorist within the US, the Administration is currently using the Imperial President's favorite tool—secrecy—to avoid admitting that they believe they have legal authority to do so in some circumstances.

Yes, the discrete solutions to the international problems drones present are different than solutions to metastasizing domestic surveillance, including drones.

Yes, the first abusive use of drones in the US probably won't be the targeted killing of New Jersey's speeders. But there is plenty there that resembles the continuum of drone uses overseas. Ultimately, the Imperial Presidency claims the authority to ignore the laws of sovereign or private property.

And both (potential or actual) uses of drones are the two faces of the Imperial Presidency, one directed outward to conduct foreign wars with few checks, the other directed inward to target "domestic enemies" protected by a great deal of secrecy. Neither, by itself, fully empowers the Imperial Presidency. Both spheres—war and surveillance—are among the ways the Imperial Presidency operates outside of traditional legal limits.

And at that level, only legislative efficacy—to the extent such a thing exists anymore, particularly in light of the surging drone lobby—supports distinguishing between the two reasons.

Drunken Predator provides excellent summaries of—and superb names for—the two main reasons to oppose drones. But I think he mistakes the

degree to which they are simply two sides of an Imperial President continuum.

Update: As if on cue, the Air Force makes it clear that it can incidentally (though not intentionally, unless the Secretary of Defense tells it to) collect US person images in the US. It won't keep that data, but will instead pass it onto a civilian law enforcement agency, which will almost certainly, in turn, pass it onto the National Counterterrorism Center.