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Cover Story

■ PREDATOR'S PART 2

A growing number of international-law and national security experts say that the legal foundations for targeted drone killings are shaky, at best.

Are Drone Strikes Murder?

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By Shane Harris



Baitullah Mehsud was a bad guy. The commander of the Pakistani Taliban, he terrorized the Islamabad government for years, kidnapped soldiers, and sent an army of suicide bombers into the streets. He is suspected of masterminding the assassination of Pakistan Prime Minister Benazir Bhutto in 2007. He was also implicated in attacks on U.S. military forces in Afghanistan. On August 5 of last year, two Hellfire missiles shot from a Predator drone that was

piloted by someone at CIA headquarters in Langley, Va., hit his father-in-law's house in a village in Pakistan's South Waziristan province, while Mehsud was lying on the roof. His wife was there, as was his uncle, who was administering an intravenous drip, probably for Mehsud's diabetes or kidney condition. The drone missile killed everyone on the roof and in the house; his mother-in-law, father-in-law, and eight others, including Mehsud's bodyguards, died. In Washington, counter-terrorism experts, administration officials, and journalists greeted news of Mehsud's death as a hard-won victory.

Was it also murder? The question may seem absurd on its face. Under international laws of war—in which the United States trains its military forces—Mehsud and people like him might be righteous targets. In a speech announcing the surge of 30,000 additional troops in Afghanistan, President Obama declared that

a "cancer" of terrorism and violence "has also taken root in the border region of Pakistan," where Mehsud made his home.

"There is no doubt that the United States and Pakistan share a common enemy," Obama said. Mehsud's death could hasten the end of a war that has claimed thousands of American lives, so it arguably was necessary and may also have justified the deaths of those around him. The attack even appeared humane because it killed far fewer innocent people than a conventional bombing run or ground assault might have.

But consider some other facts. The CIA—not the military—killed Mehsud in Pakistan, a country with which the United States

IS IN THE DOCK? Predator's Obama's one-precision Predator strike in Pakistan, could one day put him at risk of prosecution for war crimes, some experts say.

is not at war. He was the commander of the Pakistani Taliban, a separate group from the Taliban in neighboring Afghanistan, with which, most of the world agrees, the United States is engaged in an armed conflict. Melisud died not in combat but while receiving medical treatment. And few outside the Central Intelligence Agency know what steps the agency took to positively identify the man seen through the drone's cameras or what calculation officials made of the acceptable loss of other lives. The rules of engagement for the CIA—whose civilian employees are not trained in the laws of war—are secret.

Was Melisud's death legal under the laws of war, or was it simply murder? This is not an academic debate. Quietly and with little apparent notice from the Obama administration, a broad range of important international actors are raising fundamental questions about the legality of drone strikes, particularly in countries where the United States does not have a military presence. The critics are not fringe players. Their ranks include special investigators with the United Nations, scholars of international law whose work has already influenced judicial decisions in the United States, mainstream human-rights organizations that raised ear-

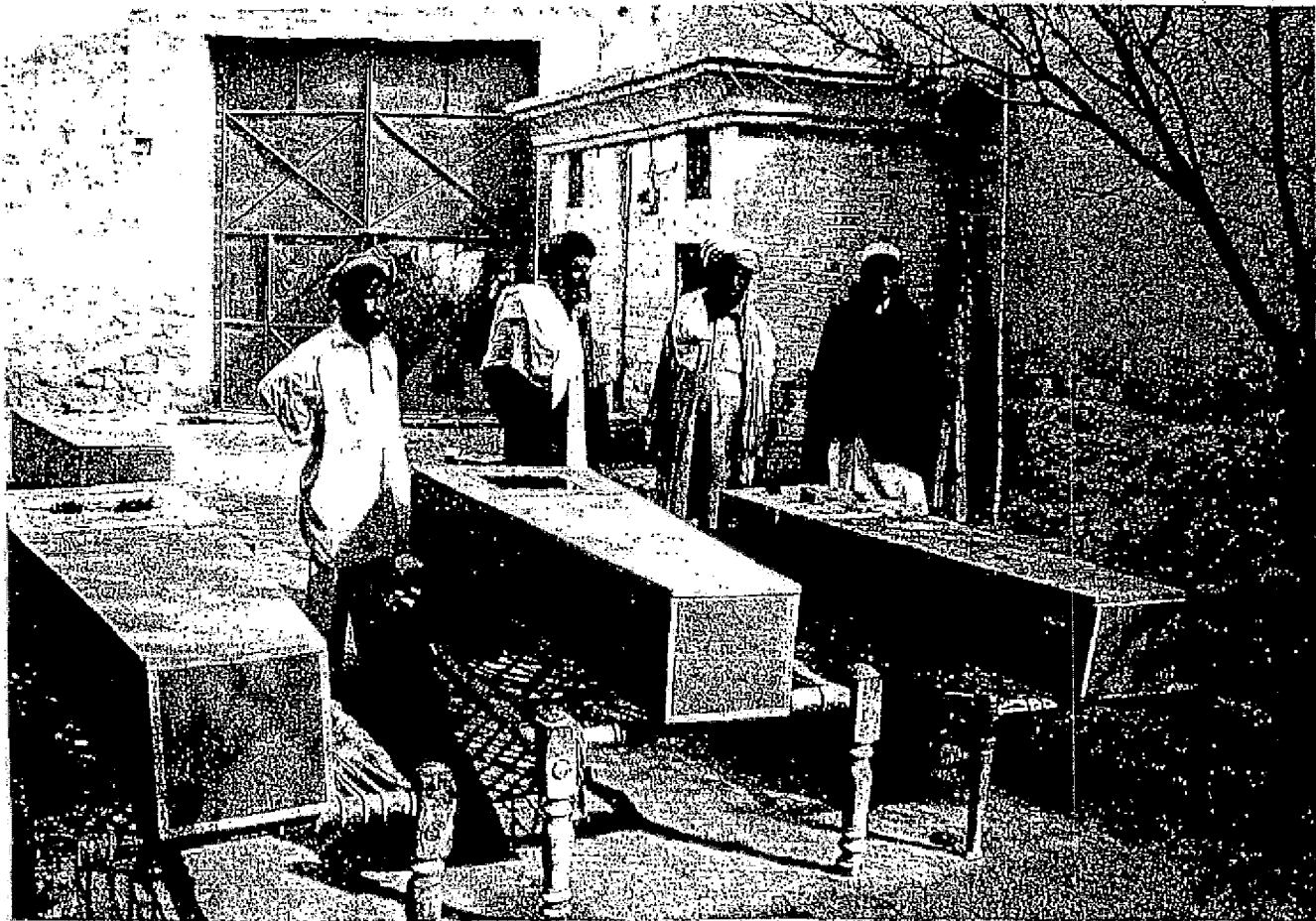
ly doubts about the legality of Predator killings under President Bush, and even intelligence and security officials from some of the United States' most stalwart allies.

Presumably, this growing list of critics could also include some senior Obama administration officials who once argued that Bush-era programs of interrogation and detention violated the Constitution. The drone program shares a legal history with those maligned policies, a fact those officials might be eager to point out were they not serving this president.

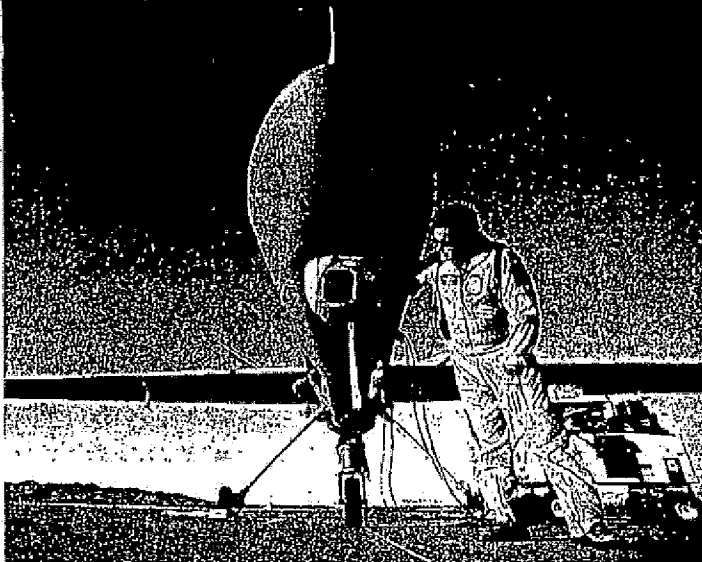
Many of these experts believe that some drone attacks could rightly be called "extrajudicial killings." That idea may also seem absurd, the product of some perverse reading of unenforceable rules espoused by those who want to undermine U.S. domestic law or foreign policy. A political consensus is building in Washington that drone attacks are effective, safe, and palatable tools for killing foreign terrorists. During the 2008 presidential campaign, the only difference on the matter between Barack Obama and John McCain was whether to talk about such operations publicly—McCain said he wouldn't.

And yet the skeptics' complaints boil down to some basic questions about standards that the United States has long followed in wartime and that the Obama administration has promised to uphold. Chief among them is whether a state of armed conflict—usually a prerequisite for the legal use of violent force—actually

FIRST STRIKES: The Obama administration has taken steps to clarify the rules of engagement for drone strikes, but critics say the administration has not provided enough information to the public.



■ Thorny Issues



■ Does a **state of armed conflict actually exist** in the places outside Afghanistan where the United States is using drones to kill its enemies?

■ How do we know **if the process of choosing targets is legal** if the Obama administration won't talk about it?

■ Opinions of **international courts and human-rights groups** frequently find their way into arguments before U.S. courts.

1. PREDATOR CHECK: A technician checks the front camera on a Predator drone before it takes off on a surveillance mission.

exists in the places outside Afghanistan where the United States is using drones to kill its enemies. Critics also say that so little is known about how decision makers create target lists and minimize collateral deaths, it's impossible to say whether the administration is following the law.

The debate hasn't impeded Obama's use of drones for "targeted killings" of suspected terrorists and others deemed a threat to national security. The president ordered more strikes in his first year in office than Bush did in his two terms. During the presidential campaign, Obama promised to pursue terrorists around the world, ridiculed Bush for failing to act "aggressively enough to go after Al Qaeda's leadership," and vowed to attack targets in Pakistan with or without that government's permission.

As president, Obama has made good on his promise. The Predators have become the central component of his global counterterrorism campaign. Without them, he has few good options for hunting down terrorists where they live. According to CIA Director Leon Panetta, the drone program is "the only game in town."

It's precisely Obama's embrace of this convenient, modern weapon, however, that threatens to undermine his adherence to international law. So far, critics are keeping their powder not exactly dry but in reserve. The president's popularity abroad—and, ironically, among the international-law thinkers who are part of the growing opposition—may have shielded him from public condemnation. But in the trenches of influential legal scholarship and in overlooked public statements by those capable of ratcheting up the pressure on the White House, evidence is growing that Obama's drone program rests on a shaky legal foundation. Whether the president realizes that is an open question.

The Seeds of Dissent

Kenneth Anderson, a professor at American University's Washington College of Law in D.C., was one of the first to identify the

incipient legal threat to the Predator program. In a paper for the Brookings Institution, "Targeted Killing in U.S. Counterterrorism Strategy and Law," Anderson cited prominent and respected scholars, including a former law professor at the U.S. Military Academy, to conclude that the current justification for targeted killing is far too narrow to support the even-expanding use of drones. Several national security and international-law authorities have been reading Anderson's paper in recent months and have found his insights arresting.

Following the 9/11 attacks, Congress passed the Authorization for Use of Military Force, which gave the president broad powers to combat terrorism around the world. The Bush administration justified targeted killings under those powers and under the laws of armed conflict, asserting that the United States was engaged in a "global war on terror." The Obama administration has dropped that label for its struggle against terrorists, but it has not disavowed the claims of legal authority to kill terrorists.

Absent an armed conflict between two parties, Anderson wrote, the use of lethal force at first looks criminal. But this perception is wrong according to international and U.S. law, he says, because it neglects the law of self-defense. The customary right to use force in self-defense even outside an armed conflict was reaffirmed in a major address in 1980 by Abraham Sofaer, then the legal adviser to the State Department, who laid out the United States' legal position on terrorists and states that support them. But neither Bush nor Obama has invoked self-defense to justify the use of drones.

Anderson says he finds the "strategic and humanitarian logic" for drone killings persuasive. The remotely guided aircraft can strike where soldiers can't, and their precision limits the risk of casualties to military forces and civilians—the people whom the laws of war are meant to protect. Targeted killing can be a legitimate tool, but as the program is currently conducted, "the legal space for it and the legal rationales on which it has been traditionally justified are in danger of shrinking," Ander-

son writes, "in ways that might surprise members of Congress and the Obama administration."

Who Can Be Killed?

"Under international law, the question of when constitutes an armed conflict is in a state of flux, because of the nature of these asymmetric wars and the involvement of nonstate entities," William Banks, a professor in the Syracuse University College of Law, said in an interview. In Afghanistan, fighters who aren't members of any recognized military routinely strike U.S. forces and then flee into neighboring Pakistan. "If the nonstate entity can simply duck across the border ... you don't have a realistic concept of the battlefield."

No one asserts that the United States may not legally target and kill legitimate combatants, but international-law experts hotly debate the definition of "armed conflict." Some argue that if two forces are not engaged in constant, ongoing hostilities, the authority to use lethal force harks in a gray zone. To shed some light on this murky way of war, the International Committee of the Red Cross last year published guidance on the legal concept of direct participation in hostilities and the criteria for determining whether someone is "continuously" engaged in combat and therefore a legitimate target. Terrorists, insurgents, and guerrilla fighters have long fallen into a fuzzy zone—farmers by day, fighters by night—and the guidance was meant to bring the law of war in line with the realities of modern combat.



The Pakistani Taliban leader was killed by a Predator strike while lying on the roof of a house.

The Red Cross spent several years developing its guidance, with input from several countries and non-governmental organizations. In the end, though, the participants failed to reach a consensus. People who were involved in the writing process described it as highly contentious. Three sources who were close to the proceedings said that the U.S. representative, a Defense Department official and legal scholar, refused to sign off on the published document.

The guidance suggests that people who are more than one step removed from combat are not valid targets. By that logic, many of the individuals whom the Bush administration targeted over eight years—including terrorist financiers, logistical personnel, even drivers for major Qaeda figures—might not be considered combatants. Anyone who is not party to an armed conflict would certainly be out of bounds.

"The United States uses a much more expansive definition of direct participation than most countries that interpret the laws of war use," said Cahor Riva, the international legal director for Human Rights First, the global nonprofit based in New York City and Washington. "In its decisions on targeting, the United States uses concepts of membership, rather than conduct, and uses con-

cepts of support for enemy forces rather than simply participation in hostilities."

The Obama administration has not divulged its standards for deciding whom to target with drones. "We'd like to see their legal theory" said Jonathan Matos, a legal fellow with the American Civil Liberties Union. "And that would include who could be targeted, how they're discriminating between civilians and noncivilians, measures to minimize civilian casualties, and under what circumstances drones can be used."

The United Nations' special rapporteur on extrajudicial killings, who monitors nations' adherence to the laws of war, said he can't get that information. "The administration continues to say that these are matters of armed conflict [and], therefore, human-rights investigators have no role," Philip Alston told the independent TV and radio news program *Democracy Now* in October. "In other words, their suggestion is that the U.N. Human Rights Council should not be looking at what the U.S. is doing."

It's a technical point—international humanitarian law, distinct from human-rights law, governs armed conflict. But withholding the legal underpinnings for drone strikes fits a pattern, several authorities say, that flows Obama's campaign promises of more transparency in national security decision-making. Alston's comments suggest that the Obama administration, like the previous one, views drone strikes as legitimate under the laws of armed conflict. (The U.N. council's members include countries with a history of severe human-rights abuses, something that members of Congress from both sides of the aisle pointedly mention whenever U.S. policy comes in for criticism.)

"If the United States has failed to follow the targeting guidance and the laws of war, officials could be in jeopardy," Riva said. "If the people [conducting drone attacks] are making deliberate decisions to target individuals who the law of war does not permit to be targeted, then they're committing war crimes."

Americans in the Dock?

CIA employees or others involved in Predator strikes could conceivably face legal scrutiny and prosecution. Spanish judge Baltasar Garzon has pursued torture investigations against former Bush administration officials, including lawyers who drafted memos supporting the "enhanced interrogation techniques" that the CIA used on detainees. The International Criminal Court also appears to be scrutinizing the drone strikes.

In a November interview with *The Wall Street Journal*, Chief Prosecutor Luis Moreno-Ocampo said that American and NATO troops in Afghanistan fall under the ICC's jurisdiction to investigate war crimes, regardless of whether their home countries are members of the court. Afghanistan ratified the court's founding treaty in 2003; the United States has never done so, but the ICC assures jurisdiction over all forces operating within its member states. Ocampo told *The Journal* that he was conducting a "preliminary examination" that could include NATO and American soldiers.

"There are different reports about problems with bombings, and there are also allegations about torture," Ocampo said. Asked whether drone strikes in Afghanistan and Pakistan were among the "bombings" he would investigate, Ocampo chuckled and replied, "We have people around the world concerned about this.... Whatever the gravest war crimes are that have been committed, we have to check."

International Investigators



Luis Moreno Ocampo (far left), the chief prosecutor for the International Criminal Court, has said that NATO and U.S. troops could fall under the court's jurisdiction. Spanish Judge Baltasar Garçon (left) has pursued investigations of Bush administration officials.

Ocampo declined an interview with *National Journal* to discuss the legality of Predator strikes and whether he thinks they merit investigation. But a spokeswoman offered a list of "prerequisites" for the prosecutor's office "to take into consideration before taking any steps to open an investigation." First among them was jurisdiction—whether the crimes were committed in the territory of a party to the ICC or by its nationals. Pakistan, the spokeswoman noted, is not a party to the court. She did not mention Afghanistan.

Some scholars believe that the United States could legally defend the drone strikes in Pakistan if the government there had requested them. But the Pakistanis have never explicitly condoned the attacks. Indeed, according to a former senior American intelligence official who worked on the program, the United States has gone to great lengths to give Pakistani officials plausible deniability within their own country. After some drone strikes, Pakistani troops and helicopters arrived at the scene moments later, so that Islamabad could claim that its forces had carried out the attack, the former official said.

"The United States has put itself in a vulnerable position," Mary Ellen O'Connell, a professor at Notre Dame Law School, wrote in a recent paper. "Without express consent, Pakistan is in a position to claim the U.S. is acting unlawfully, even bringing a future legal claim for compensation."

The United States could not justify all of its drone strikes on the basis of self-defense, O'Connell contended, because the United Nations charter permits such violence only if an armed attack has occurred. "That means significant force may only be used on the territory of a state that is responsible for an armed attack... There simply is no right to use military force against a terrorist suspect far from any battlefield."

The Yemen Precedent

Pakistan is hardly far from the Afghanistan battlefield. No one doubts that legitimate parties to that conflict are moving back and forth across the rugged and essentially ungoverned frontier between the two countries. But what about drone strikes hundreds or thousands of miles away from the active combat zones of the "Af-Pak" region?

A well-reported drone strike in Yemen gets to the heart of that question. In November 2002, the CIA fired a Hellfire missile at a vehicle traveling in a sparsely populated part of the country, kill-

ing the suspected head of Al Qaeda in Yemen and five others. Before striking, the CIA waited for surrounding traffic to get clear of the car, apparently to avoid killing innocent people.

The Qaeda figure, Qaed Salim Sinan al-Harethi, also known as Abu Ali, had reportedly known Osama bin Laden for more than 20 years, serving once as his bodyguard and later as the communications coordinator for the 9/11 attacks. U.S. and Yemeni officials believed that Abu Ali, along with his five companions, had played roles in the October 2000 attack on the USS *Cole* in Yemen's port of Aden, which killed 17 American sailors.

The drone strike bore the hallmarks of a legal killing. The Bush administration had authority from Congress to pursue those who had participated in the 9/11 attacks. The Yemeni government had given permission for the drone to fly in its airspace. The strike was arguably justified on the basis of self-defense because officials could reasonably conclude that Al Qaeda was still plotting attacks against the United States. Nevertheless, a report for the United Nations Commission on Human Rights found the strike to be "a clear case of extrajudicial killing." In the eyes of the U.N.'s special rapporteur, as well as some analysts who have reviewed the strike in the years since, the United States had a legal obligation to capture, rather than kill, Abu Ali.

Yemeni officials told the U.N. they had tried to apprehend him and his cohorts and that they would have respected the men's legal rights upon capture. Scholars still debate whether the United States could have used a helicopter force or found some other means of taking Abu Ali alive. The special rapporteur, who called the attack "truly disturbing," was unmoved by the Yemeni claims, and wrote that "an alarming precedent might have been set for extrajudicial execution by consent of government." In other words, Yemen couldn't apprehend the men, so it allowed the United States to kill them.

Caution at the CIA

The drones' extraordinary reach enables them to go where soldiers can't. It also means that the drone pilots, far from the battlefield, are in no physical danger. According to former officials as well as sources familiar with the drones' technology, CIA strikes are directed from a room in agency headquarters in suburban Washington. Predator operators have immediate, easy access to sources of information across the intelligence community and the military. The pilots can loiter over their target for hours,

his identity using cameras and sometimes voice-recognition are, and call to support from either reconnaissance drones or spy planes.

Some of the "particular attributes" require operators to exercise greater caution than do soldiers, according to John Radsan, who was assistant general counsel at the CIA from 2002 to 2004. "The United States should, and should insist on better targeting," he said. "Because the drone pilots have more information at their disposal than a soldier on the ground, the acceptable margin of error in targeting is smaller."

According to the former CIA official who worked on the Predator program, the agency assesses each target and calculates collateral damage before any strike. Another source familiar with the technology said that operators have the benefit of multiple views, from live video to sensor reports, as well as visual estimates of where U.S. or allied forces are on the ground. The CIA's rules say that the agency is not shooting from the hip, but is following a regimen that at least appears to be based on the law of war.

Nevertheless, "the military has much more experience than the CIA in killing during armed conflict," said Radsan, who is a professor at the William Mitchell College of Law in St. Paul, Minn. "The Defense Department blends the laws of war and polices them into rules of engagement. I must think the CIA is using something very similar to these rules."

Asked whether the agency was making adequate decisions when targeting people for drone attacks, Radsan replied, "I'm confident that they're trying their best. I'm not sure that they're succeeding."

Why Target Is Different

Perhaps frustratingly for the critics of the drone kills, the program's legality cannot be determined across the board. The U.S. uses the Predators in so many contexts—against the military in Afghanistan and Iraq, by the CIA elsewhere—and against such a variety of targets that each must be individually assessed.

John Melzer, the legal adviser for the International Committee of the Red Cross, is perhaps the best qualified to judge the merits of each strike; he authored the committee's guidance on direct participation in hostilities. Asked to assess the killing of Osama bin Laden, Melzer declined to comment or speculate about any particular individual. But speaking in his personal capacity, he said that such narrow questions are "not the individual in question a legitimate military target in relation to the surrounding armed conflict, as the conflict in Afghanistan? If the individual is a combatant member of an organized armed group fighting against the U.S. in Afghanistan, then he is no longer a civilian and can be attacked at any time unless he surrenders, [or] is captured or wounded. If he is not a member of the fighting forces," Melzer said, "he's a civilian and can only be targeted while directly participating in hostilities."

Osama bin Laden was the commander of Pakistan's Taliban. Although the group is often blurred with the one in neighboring Afghanistan, the two forces are distinct. Bin Laden's Taliban, moreover, was directly a jihadi. It had some 12,000 local fighters, including some from his own tribe, but also 4,000 foreigners, such as Saudis and Central Asians. And bin Laden had a crew of teenage

boys whom he used as suicide bombers. At first, bin Laden's forces had mostly attacked the Pakistani military and other targets in his country. But in a theatrical press conference at a remote base in South Waziristan in May 2008, bin Laden declared a jihad against U.S. forces in Afghanistan. The United Nations directly blamed bin Laden for the vast majority of terrorist attacks there.

While not speaking directly to bin Laden's case, Melzer said, "It is conceivable that there may be Taliban groups in Pakistan that are armed and organized but that are not involved in the war fighting in Afghanistan and, therefore, are not legitimate targets in that conflict." In general, "in order for a person to be a legitimate military target, you always need a definite link to an existing armed conflict, such as the one in Afghanistan or Iraq, or you would need a separate armed conflict in the country where the attack takes place."

Dissension in the Ranks?

If the Obama administration has an explanation for why drone strikes in places where the United States is not at war nonetheless comport with international law, officials have not made the case publicly. *National Journal* requested an interview with the senior administration figure responsible for promoting the development of international law, State Department legal adviser Harold Koh. He is a prolific writer and authority on human rights, civil liberties, and the application of international law. In his former position as the dean of Yale Law School,



the Obama administration has no right to use military force against a terrorist

Suspect bin Laden

—Mary Ellen O'Connell,
University of Notre Dame
Law School

Koh was a vocal critic of Bush's counterterrorism policies.

Koh declined the interview request, but a survey of his writings suggests that he might take issue with the drone program, at least as it is currently designed. In a 2002 paper for the *St. Louis University Law Journal*, Koh asserted that the United States was not in a war with terrorists. Because Congress had never declared one, "If we choose to treat this as a war," he wrote, "it follows that we must obey the international laws of war."

In a May 2003 article for the *Stanford Law Review*, Koh maintained that the Bush administration's "insistence upon labeling suspected terrorists as 'enemy combatants'" was one issue "driving a wedge between the United States and its allies." The administration used the term to justify targeted killings, labeling suspected terrorists as parties to a legitimate global conflict. But merely using the term, Koh wrote, "does not relieve the United States of its Geneva Convention obligations" under international law.