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Torture and Obama's Drone Program

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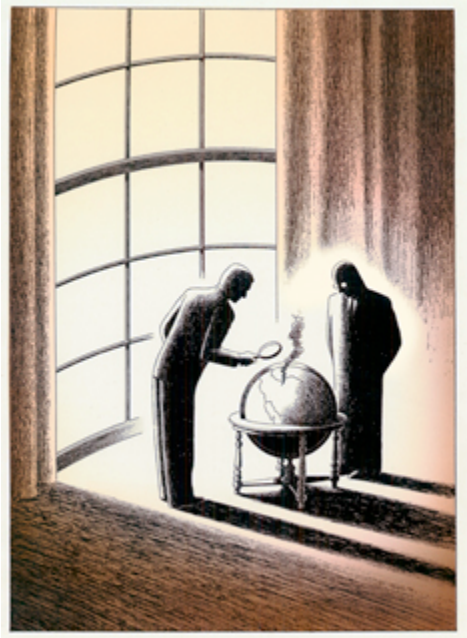

Last week, John Yoo, the Bush Administration lawyer who authored the infamous "torture memos," which offered a legal rationale for waterboarding and other forms of prisoner abuse, leapt at what he saw as an opportunity to castigate Obama for worse behavior. Writing in the *Wall Street Journal*, Yoo, who now teaches law at the University of California at Berkeley, denounced Obama's remote-controlled targeted killing of terror suspects by unmanned aerial drones as a far greater assault on human rights than anything he had ever facilitated.

"Rather than capture terrorists—which produces the most valuable intelligence on al Qaeda—Mr. Obama has relied almost exclusively on drone attacks, and he has thereby been able to dodge difficult questions over detention. But those deaths from the sky violate personal liberty far more than the waterboarding of three al Qaeda leaders ever did," he wrote.

Yoo is not alone. Several people have argued that partisanship, not principle, is the only reason that members of the mainstream press haven't treated the disclosure of a Justice Department white paper on the targeted killing of Americans, obtained by NBC, with the same outrage as it did the torture memos. Andrew C. McCarthy, writing on the *National Review*'s Web site, declared, "My, how the worm has turned." He went on to assert, "The breathtaking hypocrisy of the Obama Democrats is what screams off the pages of the 'white paper' " on drones. He ridiculed Obama's attorney general, Eric Holder, for arguing previously that terror suspects should be tried, when possible, in the criminal-justice system while simultaneously supporting their death by drone. "Ah, but arbitrary power to *kill* citizens—now, that's a different story," McCarthy wrote.

At *Reason*, the libertarian outpost, Nick Gillespie suggested that liberals' lesser outrage at Obama's drones than Bush's "enhanced interrogations" amounted to a kind of intellectual corruption. "This isn't ultimately about ideological hypocrisy—of liberals changing their tune once their guy is in office—but something much more basic and much more disturbing. It reveals that for all their crowing about being watchdogs of all that is good and decent in society, when push comes to shove, too many journalists are ready and willing handmaidens to power—including the power to kill."

Other observers of the press, such as David Carr in the New York *Times*, note that in fact the media coverage of the Obama Administration's drone program has been pretty aggressive. *The New Yorker* has carried several stories about the subject. (I wrote about the subject in 2009, and my colleagues Dexter Filkins and Steve Coll have as well.) The New York *Times* reporter Scott Shane authored a groundbreaking account of the program recently that chronicled how

a U.S. drone attack in Yemen unwittingly killed an anti-militant activist as he was trying to turn Al Qaeda–allied suspects away from terrorism.

Did Obama's supporters cut him more slack than they would have Bush, had the same white paper emerged from his White House? Perhaps, but the liberal intelligentsia, too, has its share of critics of Obama's drone program. In a piece in the Washington *Post*, for instance, Georgetown Law School professor David Cole recently raised what is perhaps the gravest concern: the President's assertion of a secret, unchecked power to kill even Americans with no due process or public accountability. "There may be extraordinary occasions" when such killing is permissible, Cole conceded, but he argued that some sort of public accounting, at a very minimum, is required. "How can we be free if our government has the power to kill us in secret?" he asked. "How can a sovereign authority be accountable to the people if the sovereign can refuse to own up to its actions?" He argued that unchecked and unacknowledged lethal power is the stuff of forced disappearances in tyrannous banana republics, not great democracies.

There are some disturbing similarities between the Obama white paper and the Bush torture memos. Both use slippery legal language to parse dark government programs. Both have been deliberately hidden from public and even congressional oversight. And both involve the blurring of C.I.A. and military operations, and even include some of the same personnel. John Brennan, Obama's nominee to direct the C.I.A., is a long-time veteran of the agency who, prior to joining the Obama Administration, served as chief of staff for former C.I.A. director George Tenet, under the Bush Administration during the depths of the torture scandal. Despite this, several human-rights experts have endorsed Brennan's promotion, and Obama seems to respect him deeply. Whether that trust is well-placed remains to be seen; Brennan's refusal, during his Senate confirmation hearings last week, to admit that waterboarding—the partial drowning of a prisoner—is a form of torture was a chilling display of institutional loyalty.

Clearly there are plenty of troubling questions surrounding the Obama Administration's targeted-killing program. But, that said, are Obama's drones comparable in terms of human-rights violations, to Bush's Torture program?

Those who argue so miss an important distinction, one that David Cole also has brought up: torture under all our systems of law—including the laws of war—is illegal. This is true without exception, regardless of the circumstances, including national-security emergencies. Torture is also condemned by every major religion. Waterboarding was, and is, a form of torture. This has been established as far back as the Spanish Inquisition, and as recently as the Vietnam War. To argue otherwise is to legalize criminality. That was what the Bush Administration's torture memos did.

More than that, John Yoo argued that under certain circumstances, the President isn't bound by *any* laws—and that any form of force or cruelty could be justified if the President, as Commander-in-Chief, authorized it. Fundamentally, the Bush Administration viewed law as an inconvenience when national security was at stake.

Obama, in contrast, has tried to bring his counterterrorism program inside the law by reasserting the criminality of torture and by trying to define which drone strikes are legal. The Obama Administration's lawyers' attempt to define those boundaries in their white paper isn't prima facie scandalous, because the Constitution authorizes lethal combat, unlike torture.

I see the common sense in John Yoo's argument—that it's better to be alive with no fingernails than dead. From the standpoint of the victim, he may be right that torture is preferable to death. But his argument glosses over the difference between killing that is authorized by the state—such as in self-defense in combat and police raids—and torture of a defenseless captive, which is always illegal. Not for the first time, he and the torture program's defenders are blurring what has always been a bright line placing the cruel and inhuman treatment of prisoners inarguably outside the law.

Surprisingly, perhaps, to some, philosophers specializing in the theory of "just war," such as Michael Walzer and Jeff McMahon, who joined me and Amy Davidson for an online chat about the ethics of drone warfare this week, see Obama's use of drones as far less objectionable than Bush's use of physical and psychological cruelty to interrogate detainees. Walzer, the author of "Just and Unjust War," argued in *Dissent* that "targeted killing isn't new" nor is it necessarily indefensible. It can, he pointed out, be an improvement over "untargeted" or "indiscriminate" killing, such

as takes place in terrorist attacks.

But there are rules in war, as in peace. Targeted killing is only justifiable when lesser uses of force, such as capture, are impossible. It must take place inside of a military conflict, in self-defense, against an enemy, rather than against either an ordinary civilian or a political target. The force used must be proportional to the threat posed by the situation, and any civilian harm must be kept to a minimum. Also, in theory, anyone targeted should be granted the opportunity to safely surrender—an option that is disturbingly unavailable to those in imminent danger of being incinerated by a missile launched from an unseen drone. Those are at least some of the legal prerequisites. The strategic considerations are more daunting still.

In some ways, what's most disturbing about the Obama white paper is not that it tried to set limits in order to ensure that the drone program was within the laws of war. Rather, what seems more worrisome is what it *didn't* attempt to figure out, and which no one else seems to be addressing either: namely, whether conventional laws of war should still apply to America's unconventional counterterrorism program, particularly now that it is over a decade old, and is seemingly morphing into an endless worldwide lethal manhunt. Drones per se are weapons, and they are not so much the problem as the parameters of the war in which they're being used. The U.S. is no longer targeting just terrorists specifically tied to the 9/11 attacks, as was initially envisioned by the Authorization to Use Military Force in 2001, but a new generation of terrorists, who share the same goals but are part of a diaspora stretching across new countries and continents with whom we are not at war. McCarthy, the conservative critic, makes this point, too, and while I don't necessarily think his solutions make sense, I think he's right in defining the problem. Arguably the appropriateness of the laws of war to these nonuniformed, international gangs is the real concern from which all the other drone worries stem.

Illustration by Guy Billout.

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