

5-1-2013

The Killing of Osama Bin Laden

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Recommended Citation

Sopko, Alexander J., "The Killing of Osama Bin Laden" (2013). *Law School Student Scholarship*. 308.
https://scholarship.shu.edu/student_scholarship/308

Introduction:

The targeted killing Osama Bin Laden was legal under both international law and U.S. domestic law. Under Article 2 Section 2 of the U.S. Constitution, President Barack Obama is the commander-in-chief of the military and he had the statutory authorization to order and execute the mission under the Authorization to Use Military Force Act of September 18th.¹ The operation was neither an extrajudicial killing that lacked due process nor a violation of Pakistan's sovereignty under Article 2(4) of the U.N. Charter. It was a permissible use of force as an act of national self-defense because Bin Laden continued to pose a serious and imminent threat to the United States.² When the Navy SEALs shot and killed Bin Laden they did not violate the laws of war. Bin Laden, by virtue of his position as the head of Al-Qaeda, was considered an enemy combatant, and under the rules of engagement, if the SEALs reasonably believed that he posed an immediate threat, they had the absolute authority to kill him.³

On May 2, 2011 U.S. Navy SEALs Team, SEAL Team Six, infiltrated Osama Bin Laden's compound in Abbottabad, Pakistan and killed the al Qaeda leader. The issue is whether the killing of Bin Laden was legal under international law as well as U.S. domestic law. The Obama Administration said yes, absolutely; however, experts are unsure. Days following the raid Attorney General Eric Holder told members of the Senate Judiciary Committee that it was lawful "as an act of self-defense."⁴ Holder stated, "Bin Laden was the head of al Qaeda, an organization that had conducted the attacks of September 11th. It is lawful to target an enemy commander in the field."⁵

¹ The Authorization to Use Military Force Act of September 18, 2001. <http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf>. Retrieved December 2, 2012.

² Unknown Author (October 29, 2012). "Is the U.S. Drone Campaign in Pakistan Legal?" understandingempire.wordpress.com. Retrieved December 2, 2012.

³ Silverleib, Alan (May 4, 2011). "The Killing of Bin Laden: Was it Legal?" cnn.com. Retrieved November 2, 2012.

⁴ Silverleib, Alan (May 4, 2011). "The Killing of Bin Laden: Was it Legal?" cnn.com. Retrieved November 2, 2012.

⁵ Silverleib, Alan (May 4, 2011). "The Killing of Bin Laden: Was it Legal?" cnn.com. Retrieved November 2, 2012.

Bin Laden had been on the radar of the United States since the early 90's. As the leader of al Qaeda, a highly organized terrorist network throughout the world, Presidents Bill Clinton, George W. Bush, and Barack Obama all had issued orders to kill or capture him. For purposes of this paper, the killing of Bin Laden will be classified as a targeted killing by the United States. As such, certain legal implications come into play and will be addressed throughout.

The first barrier that must be overcome in determining the legality of Bin Laden's killing is a domestic one. His killing is contingent upon whether the U.S. officials who ordered the raid had the necessary statutory authorization to do so. Domestic statutory authorization is a prerequisite for any militaristic act ordered by the executive branch.

The second issue regards the legality of targeted killings and, more specifically, how individuals are lawfully targeted. There is much scholarly debate as to whether targeted killings violate international law. This paper will examine the various aspects of a targeted killing from both ends of the spectrum. Another sub-issue that presents itself here is whether the act of targeting and killing an individual in a foreign state adheres to international human rights law or international humanitarian law (i.e., *jus in bello*).⁶ Both bodies of law are meant to control government conduct in the international community. Whereas the former is meant to regulate government conduct at all times, the latter, *jus in bello*, covers government conduct during wartime.⁷

The third issue is whether the incursion of U.S. forces into Pakistani territory without the clear consent of Islamabad violates Pakistan's sovereignty. And whether this use of force in

⁶ Unknown Author (October 29, 2012). "Is the U.S. Drone Campaign in Pakistan Legal?" understandingempire.wordpress.com. Retrieved December 2, 2012.

⁷ Unknown Author (October 29, 2012). "Is the U.S. Drone Campaign in Pakistan Legal?" understandingempire.wordpress.com. Retrieved December 2, 2012.

violation of Pakistan's sovereignty is in contravention to the UN Charter.⁸ At stake is whether Pakistan had consented, and whether the U.S. was lawfully acting in self-defense.⁹

The fourth issue that will be addressed is a factual one and it hinges on whether any of the actions taken by the Navy Seals during the raid were in violation of the rules of war and U.S. domestic law. U.S. law is seemingly irrelevant as to whether it was legal under international law for the U.S. to invade Pakistan's sovereignty. However, in the context of a targeted killing, it must be addressed. The Navy SEALs team's actions in regard to what they encountered on the night of the raid are critical in determining whether they adhered to the rules of war and U.S. domestic law.

Finally, interwoven throughout this paper are issues dealing with accountability and transparency. International law requires that States maintain some sense of transparency and are accountable for their actions.¹⁰ Accordingly, a State must investigate war crime allegations and prosecute when appropriate. This area of international law is even more intensified when there is an alleged violation of the procedures banning extrajudicial executions.¹¹ The paper will not dedicate an entire section to accountability and transparency; however, the reader should be aware of both aspects of international law throughout.

I. President Barack Obama and the U.S officials who ordered the raid had domestic statutory authorization.

⁸ Unknown Author (October 29, 2012). "Is the U.S. Drone Campaign in Pakistan Legal?" understandingempire.wordpress.com. Retrieved December 2, 2012.

⁹ Unknown Author (October 29, 2012). "Is the U.S. Drone Campaign in Pakistan Legal?" understandingempire.wordpress.com. Retrieved December 2, 2012.

¹⁰ Unknown Author (October 29, 2012). "Is the U.S. Drone Campaign in Pakistan Legal?" understandingempire.wordpress.com. Retrieved December 2, 2012.

¹¹ Unknown Author (October 29, 2012). "Is the U.S. Drone Campaign in Pakistan Legal?" understandingempire.wordpress.com. Retrieved December 2, 2012.

Under the guise of President Barack Obama, the U.S. Central Intelligence Agency (CIA) orchestrated the operation, code-named Operation Neptune Spear.¹² Covert members of a Navy Special Forces Division, better known as Seal Team Six, launched the operation from neighboring Afghanistan and infiltrated the compound in Pakistan.¹³ Other units included the U.S. Army's Special Operations Command's 160th Special Operations Aviation Regiment and other CIA operatives.¹⁴ Accordingly, one can conclude that U.S. officials not only ordered the mission, but various branches of the U.S. military and special intelligence agencies solely carried it out. Therefore, one must then ask whether those U.S. officials and military branches had the statutory authorization to carry out the operation.

a. U.S. Presidential Executive Order 12333.

On December 4, 1981 U.S. President Ronald Reagan signed into effect Executive Order 12333.¹⁵ The intent of the Order was to expand certain powers and responsibilities of U.S. Intelligence Agencies and compel those Agency heads to comply with CIA requests for information.¹⁶

One relevant section of the Order is applicable to our analysis here. Section 2.11 reiterated, from prior Executive Orders, the proscription on U.S. Intelligence Agencies sponsoring or carrying out an assassination.¹⁷ Section 2.11 reads, "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in,

¹² Dilanian, Ken (May 2, 2011). "CIA Led U.S. Special Forces Mission Against Osama Bin Laden." Los Angeles Times. Retrieved November 30, 2012.

¹³ Dilanian, Ken (May 2, 2011). "CIA Led U.S. Special Forces Mission Against Osama Bin Laden." Los Angeles Times. Retrieved November 30, 2012.

¹⁴ Dilanian, Ken (May 2, 2011). "CIA Led U.S. Special Forces Mission Against Osama Bin Laden." Los Angeles Times. Retrieved November 30, 2012.

¹⁵ Ronald Reagan (December 4, 1981). "Executive Order 12333 – United States Intelligence Activities." U.S. Federal Register. Retrieved December 2, 2012.

¹⁶ Ronald Reagan (December 4, 1981). "Executive Order 12333 – United States Intelligence Activities." U.S. Federal Register. Retrieved December 2, 2012.

¹⁷ "Executive Orders – Order 12333, Section 2.11." Archives.gov. Retrieved December 3, 2012).

assassination, effectively retiring the last sanctioned assassin of the CIA, code named ‘Meroving’.’¹⁸

Executive Order 12333, on its face, is seemingly a bar to assassinations and, one might presume, targeted killings. However, if we interpret the killing of Bin Laden as a military action in the ongoing U.S. armed conflict with Al-Qaeda, Executive Order 12333 would not apply because it does not prohibit the killing of specific leaders of an opposing force.¹⁹ Further, as early as 1998, the proscription against assassination was reinterpreted, and relaxed, for targets whom the U.S. classified as individuals connected to terrorism.²⁰

The assassination prohibition of Executive Order 12333 also does not apply because, as Gary Solis (Georgetown Law Professor and former Marine) puts it, there is a strong difference between an assassination and a targeted killing.²¹ This article will analyze the exact components of a targeted killing *infra*, but for now it will just address the difference between a targeted killing and an assassination. For Solis, a targeted killing is not an assassination if certain conditional requirements are met: (i) there is an ongoing military conflict, (ii) the targeted individual (civilian or military) has taken up arms, (iii) there is no reasonable possibility of arrest, and (iv) the decision to kill is made by senior political figures.²² All four aforementioned components are clearly met in the present case.

¹⁸ “Executive Orders – Order 12333, Section 2.11.” Archives.gov. Retrieved December 3, 2012.

¹⁹ Bowcott, Owen (May 3, 2011). “Osama Bin Laden: U.S. Responds to Questions About Killing’s Legality.” The Guardian (London). Retrieved November 15, 2012.

²⁰ Unknown Author (May 3, 2011). “Saddam Hussein’s Death is a Goal, Says Ex-CIA Chief.” Washington Post p. A36. Retrieved November 15, 2012.

²¹ Solis, Gary. The Law of Armed Conflict: International Humanitarian Law in War. Books.google.com. Retrieved November 15, 2012.

²² Solis, Gary. The Law of Armed Conflict: International Humanitarian Law in War. Books.google.com. Retrieved November 15, 2012.

The anti-assassination provision of Executive Order 12333 also does not apply to killings in self-defense.²³ The current Administration can argue that Obama's orders to kill Bin Laden were permissible under international law as an acceptable action in self-defense because Bin Laden was conspiring to commit additional attacks against the U.S.²⁴ Abraham Sofaer (Former Legal Advisor to the U.S. State Department) has been quoted saying, "Killings in self-defense are not more 'assassinations' in international affairs than they are murders when undertaken by our police forces against domestic killers."²⁵

In summation, although Executive Order 12333 proscribes assassination, its interpretation is limited in scope and does not prohibit the targeted killing of known terrorists such as Bin Laden. This is because: (i) branches of the U.S. military are authorized to target the leaders of an opposing force such as Al-Qaeda, (ii) an assassination and a targeted killing are fundamentally different in theory and in practice, and (iii) the U.S., acting in self-defense, may target an individual it deems a threat to national security.

b. The Authorization to Use Military Force Act.

In the wake of September 11, 2001, President George W. Bush passed the Authorization to Use Military Force Act (AUMF).²⁶ The AUMF empowers the President of the United States to use "all necessary and appropriate force" against persons who authorized, planned, or committed the September 11th attacks, or who harbored said persons or groups.²⁷ The AUMF is

²³ Bellinger, John B. III (May 2, 2011). "Bin Laden Killing: The Legal Basis." cfr.org. Retrieved November 16, 2012.

²⁴ Bellinger, John B. III (May 2, 2011). "Bin Laden Killing: The Legal Basis." cfr.org. Retrieved November 16, 2012.

²⁵ Sofaer, Abraham (March 26, 2004). "Targeted Killing is a Necessary Option." Hoover Institution. Retrieved December 2, 2012.

²⁶ The Authorization to Use Military Force Act of September 18, 2001. <http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf>. Retrieved December 2, 2012.

²⁷ The Authorization to Use Military Force Act of September 18, 2001. <http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf>. Retrieved December 2, 2012.

a joint resolution, which was passed by the U.S. Congress on September 14, 2001 and signed President Bush on September 18th. Section 2(a) states,

“IN GENERAL – That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”²⁸

Under the AUMF Congress granted the President the power to unilaterally target certain individuals connected to the September 11th attacks. Congress also stated that the “grave acts of violence” committed on the United States continued to pose an unusual and extraordinary threat to “[its] national security and foreign policy.”²⁹

The passage of the AUMF also served another purpose: to broaden the scope of presidential power. Then Vice President Cheney and White House Chief of Staff David Addington convinced Congress to broaden the definition of the AUMF.³⁰ As a result, Congress could not place any limits on: (i) the President’s determinations as to any terrorist threat, (ii) the amount of military force used in response to that threat, or (iii) method, timing, and nature of the response.³¹

The AUMF clearly provided President Barack Obama the capacity to use all necessary force when he executed the orders to raid Bin Laden’s compound in Pakistan. This Act is the first of many legislative devices that gave President Obama the domestic ability to use military force against members of Al-Qaeda on the international level.

c. Constitutional Powers.

²⁸ Section 2(a). The Authorization to Use Military Force Act of September 18, 2001.

<http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf>. Retrieved December 2, 2012.

²⁹ US Congress, “Authorization for Use of Military Force.” S.J. Res. 23, 107th Cong., 1st Sess.

³⁰ Ravagan, Chitra (May 21, 2006). “Cheney’s Guy.” US News and World Report. Retrieved December 1, 2012.

³¹ Ravagan, Chitra (May 21, 2006). “Cheney’s Guy.” US News and World Report. Retrieved December 1, 2012.

As stated *supra*, the U.S. has claimed that the killing of Bin Laden was an act of self-defense. Bin Laden posed an ongoing and continuous threat to U.S. national security. Article 2, Section 2 of the Constitution grants the President the exclusive authority to order the killing of a targeted individual enemy of the U.S. in self-defense.³²

Under Article 2, Section 2 the President is the commander-in-chief of the military, and, since the Clinton Administration, lawyers of the executive branch have contended that, under this clause, the President has the implicit authority to use lethal force when necessary.³³ Historian Thomas Woods states, “[this section] has been interpreted to mean that the President may act with an essentially free hand in foreign affairs, or at the very least that he may send men into battle without consulting Congress.”³⁴

Therefore, it is clear that President Obama had the domestic statutory ability to order, plan, and execute the raid. This is because Executive Order 12333 is not a bar to targeted killings, the AUMF is an Act of Congress that grants the President the exclusive ability to execute such an order, and Article 2, Section 2 of the Constitution can be interpreted as an implicit grant of Presidential power to unilaterally use military force in this fashion without the consent of Congress. The next section of this paper will define and analyze the various components of a targeted killing, and address whether a targeted killing is legal under international law.

II. Targeted Killings.

³² Gellman, Barton (October 28, 2001). “CIA Weighs ‘Targeted Killing’ Missions.” *Washingtonpost.com*. Retrieved November 13, 2012.

³³ Gellman, Barton (October 28, 2001). “CIA Weighs ‘Targeted Killing’ Missions.” *Washingtonpost.com*. Retrieved November 13, 2012.

³⁴ Gellman, Barton (October 28, 2001). “CIA Weighs ‘Targeted Killing’ Missions.” *Washingtonpost.com*. Retrieved November 13, 2012.

A targeted killing is classified as the intentional killing of a targeted person, by a government or its agents.³⁵ The targeted individual is considered to be an unlawful enemy belligerent by the targeting government, and is typically not in their custody.³⁶ Further, the targeted individual has allegedly lost certain immunities provided by the Third Geneva Conventions that would otherwise be applicable because the target has been engaging in terrorism or armed conflict, through the use of bearing arms or otherwise.³⁷

The governmental tactic of targeting certain individuals raises difficult questions pertaining to: (i) what type of conditions must exist before the tactic can be employed, (ii) who may qualify as an appropriate “kill list” target, and (iii) what are the legal implications for its application.³⁸ Some experts consider a targeted killing to be a legal form of self-defense that reduces terrorism³⁹, and others, on the opposite end of the spectrum, classify it as an extrajudicial killing that lacks due process.⁴⁰

Unfortunately, there is no law or bright line rule on targeted killings. Therefore, all this article can provide are both sides of the argument: one advocating and justifying it as a necessary result of the new enemy the U.S. is facing, and one vehemently opposing it as being morally repugnant and lacking certain wartime procedural safeguards.

- a. The current program on targeted killing does have its benefits; it is an effective and precise way to take out an enemy belligerent without incurring substantial loss of civilian life.**

³⁵ Solis, Gary. The Law of Armed Conflict: International Humanitarian Law in War. Books.google.com. Retrieved November 18, 2012.

³⁶ Solis, Gary. The Law of Armed Conflict: International Humanitarian Law in War. Books.google.com. Retrieved November 18, 2012.

³⁷ Solis, Gary. The Law of Armed Conflict: International Humanitarian Law in War. Books.google.com. Retrieved November 18, 2012.

³⁸ Solis, Gary. The Law of Armed Conflict: International Humanitarian Law in War. Books.google.com. Retrieved November 15, 2012.

³⁹ Sofaer, Abraham D. (March 26, 2004). “Responses to Terrorism/Targeted Killing is Necessary Option.” The San Francisco Chronicle. Retrieved November 16, 2012.

⁴⁰ Daraghmeh, Mohammed (February 20, 2001). “ Hamas Leader Dies in Apparent Israeli Targeted Killing.” Times Daily. Retrieved November 16, 2012.

The United States' military tactic of issuing and implementing targeting killings dates back to World War II, during FDR's administration. After U.S. planes had shot down Admiral Isoroku Yamamoto, the architect behind the attacks on Pearl Harbor, over the Pacific, FDR remarked that he would continue to endorse this new policy of targeting certain individuals whom the U.S. deemed an ongoing threat to national security.⁴¹

John Yoo (Professor at Berkeley Law) advocates targeted killings claiming that precise attacks against individual enemy terrorists are based on precedent and they "further the goals of the laws of war by eliminating the enemy and reducing harm to innocent civilians."⁴² He further explains that the rationale behind a targeted killing is that, in today's undefined war with limitless battlefields, attacking a specific individual rather than a larger military installment limits collateral damage.⁴³ Targeted killings are proportional and necessary to the threat they represent.⁴⁴

Today's war with Al-Qaeda is unprecedented in the sense that it is complicated by the fact that "America's enemy resembles a network not a nation."⁴⁵ Al-Qaeda's leaders, members, commanders, and fighters are classified as enemy belligerents because they do not wear customary distinguishing uniforms; they conceal themselves within civilian populations; and their command and control apparatus is far from being evident and transparent.⁴⁶ Because Al-

⁴¹ Will, George F. (December 9, 2012). "Targeted Enemy Killings Beats the Alternative." The Columbus Dispatch. Retrieved December 9, 2012.

⁴² Will, George F. (December 9, 2012). "Targeted Enemy Killings Beats the Alternative." The Columbus Dispatch. Retrieved December 9, 2012.

⁴³ Will, George F. (December 9, 2012). "Targeted Enemy Killings Beats the Alternative." The Columbus Dispatch. Retrieved December 9, 2012.

⁴⁴ Will, George F. (December 9, 2012). "Targeted Enemy Killings Beats the Alternative." The Columbus Dispatch. Retrieved December 9, 2012.

⁴⁵ Will, George F. (December 9, 2012). "Targeted Enemy Killings Beats the Alternative." The Columbus Dispatch. Retrieved December 9, 2012.

⁴⁶ Will, George F. (December 9, 2012). "Targeted Enemy Killings Beats the Alternative." The Columbus Dispatch. Retrieved December 9, 2012.

Qaeda is not a traditional enemy, the United States' technological process of targeting certain individuals and then taking them out is a last resort and a potent one at that.⁴⁷ The military process of Targeting and killing members of Al-Qaeda serves the dual purpose demoralizing and creating confusion amongst the enemy.⁴⁸

Unlike conventional warfare means and methods, today's war with Al-Qaeda is against a dispersed enemy with undefined borders and no territory to invade.⁴⁹ The United States' continued success in the "war on terror" hinges on its ability to destroy Al-Qaeda by selectively killing or capturing its members.⁵⁰ Although critics claim that targeted killings are unjustified as morally irresponsible and lacking due process, unfortunately they are a necessary result of the new kind of enemy the U.S. is facing.

Targeted killings are further justified when the country involved consents or is unwilling or unable to take action against the threat.⁵¹ This particular aspect of a targeted killing will be addressed *supra*, in the section on Pakistani Sovereignty. The key issue that will be addressed there is whether Pakistan consented to the raid on Bin Laden's compound or whether they were unable to take action, had they known he was taking refuge in Pakistan. For now, the next section of this paper will examine some of the legal and moral implications of the U.S. policy on targeted killings.

b. There are glaring weaknesses in the current administration's policy on targeted killings.

⁴⁷ Will, George F. (December 9, 2012). "Targeted Enemy Killings Beats the Alternative." The Columbus Dispatch. Retrieved December 9, 2012.

⁴⁸ Will, George F. (December 9, 2012). "Targeted Enemy Killings Beats the Alternative." The Columbus Dispatch. Retrieved December 9, 2012.

⁴⁹ Will, George F. (December 9, 2012). "Targeted Enemy Killings Beats the Alternative." The Columbus Dispatch. Retrieved December 9, 2012.

⁵⁰ Will, George F. (December 9, 2012). "Targeted Enemy Killings Beats the Alternative." The Columbus Dispatch. Retrieved December 9, 2012.

⁵¹ Brennan, John O. (April 30, 2012). "The Ethics and Efficiency of the President's Counterterrorism Strategy." John O. Brennan's speech at the Woodrow Wilson International Center for Scholars on April 30, 2012. Retrieved November 28, 2012.

The first part of this section will look at the Obama Administration and analyze their views on targeted killings. Some of the things that the Obama Administration has done since implementing a targeted killing policy underscore the fact that they are unsure whether such a practice is legal under international law.

John O. Brennan (Assistant to the President for Homeland Security and Counterterrorism) has justified the Administration's policy on targeted killings from an international law and domestic law standpoint. As a matter of domestic law, the Constitution and the AUMF empowers the President to protect the nation and use all necessary force against the possible threat of an attack that he deems is imminent.⁵² And, as a matter of international law, since the United States is at war with Al-Qaeda and the Taliban, it may use force consistent with its inherent right to national self-defense as a result of September 11th attacks.⁵³ This type of rhetoric clearly carries argumentative weight, but the current Administration is saying one thing and doing the exact opposite. For example, it appears that it is insulating itself from certain liabilities if they were to arise in the future as a direct result of the current policy on targeted killings.

The Obama Administration has made a certain departure from the traditional processes of targeted killings carried out by prior administrations. In 2011 the method for selecting targets outside of defined borders and warzones was amended so that power was condensed to a small group of people within the White House.⁵⁴ Under this new plan, White House Counter Terror

⁵² Brennan, John O. (April 30, 2012). "The Ethics and Efficiency of the President's Counterterrorism Strategy." John O. Brennan's speech at the Woodrow Wilson International Center for Scholars on April 30, 2012. Retrieved November 28, 2012.

⁵³ Brennan, John O. (April 30, 2012). "The Ethics and Efficiency of the President's Counterterrorism Strategy." John O. Brennan's speech at the Woodrow Wilson International Center for Scholars on April 30, 2012. Retrieved November 28, 2012.

⁵⁴ Dozier, Kimberly (May 21, 2012). "Who Will Drones Target? Who in the U.S. Will Decide? Associated Press. salon.com. Retrieved December 2, 2012.

Chief John Brennan compiles a list of potential targets and goes over the names with other agencies at a weekly White House meeting.⁵⁵ At the head of this top-secret operation that designates terrorists for kill or capture is President Obama.⁵⁶ He has the final authority to approve or disapprove any lethal action, and he further signs off on any strike in Pakistan, Somalia, or Yemen.⁵⁷

The targeted killing program has also intensified under the Obama Administration. Unlike the Bush Administration, which placed more of an emphasis on targeting higher-ups within Al-Qaeda, the Obama Administration has been targeting rank-in-file foot soldiers.⁵⁸ Further, the lack of a procedural framework being handed down from prior administrations has increased the Obama Administration's laissez faire approach. And it appears that this Administration is acutely aware of the possibility that the current policy could get out of hand very quickly.

So much so that in 2012 with the looming possibility of defeat in the Presidential Election, the Obama Administration attempted to develop explicit rules for the targeting of terrorists.⁵⁹ If President Obama lost the election, the incoming President and his Administration would inherit certain guidelines and possible legislation outlining standard operating procedure pertaining to targeted killings, thus neutering the inbound cabinet in a proverbial sense.⁶⁰

⁵⁵ Dozier, Kimberly (May 21, 2012). "Who Will Drones Target? Who in the U.S. Will Decide?" Associated Press. salon.com. Retrieved December 2, 2012.

⁵⁶ Becker, John and Shane, Scott (May 29, 2012). "Secret 'Kill List' Proves a Test of Obama's Principles and Will." The New York Times. Retrieved December 2, 2012.

⁵⁷ Becker, John and Shane, Scott (May 29, 2012). "Secret 'Kill List' Proves a Test of Obama's Principles and Will." The New York Times. Retrieved December 2, 2012.

⁵⁸ Bergen, Peter and Braun, Megan (September 6, 2012). "Drone is Obama's Weapon of Choice." CNN.com. Retrieved November 13, 2012.

⁵⁹ Shane, Scott (November 24, 2012). "Election Spurred a Move to Codify U.S. Drone Policy." The New York Times. Retrieved November 14, 2012.

⁶⁰ Shane, Scott (November 24, 2012). "Election Spurred a Move to Codify U.S. Drone Policy." The New York Times. Retrieved November 14, 2012.

In reality, attempts to codify the current policy, on behalf of the Obama Administration, began as early as 2011.⁶¹ An unnamed official within the Obama Administration said, “There was concern that the levers might no longer be in our hands” and “Obama did not want to leave an amorphous program to his successor.”⁶² Had Romney won the election codifying the policy would have been rushed with a target completion date by January; however, since Romney lost it will now be done at a more leisurely pace.⁶³ With regard to the current policy Obama has stated, “One of the things we’ve got to do is put a legal architecture in place, and we need Congressional help in order to do that, to make sure that not only am I reined in but any president’s reined in terms of some of the decisions that we’re making.”⁶⁴

Now, it may require some logical insight, but after hearing the Obama Administration’s policy on targeted killing, one can conclude that what they are doing stretches the outer bounds of the law. The current policy lacks the legislative framework that would, otherwise, establish the parameters and boundaries necessary when the executive branch of the government unilaterally targets enemy combatants far from the designated battlefield and without the foreign country’s consent. Further, President Obama clearly has reservations with the current program; however, he is doing very little to implement change.

Although the current policy is not in violation of the law, it is creating certain foreign policy implications that could have resounding effects in the years to come. For instance, if other countries in the near future implement a similar policy and use the current U.S. program as a template, than the battlefield is seemingly endless. Theoretically, any country could target any

⁶¹ Shane, Scott (November 24, 2012). “Election Spurred a Move to Codify U.S. Drone Policy.” The New York Times. Retrieved November 14, 2012.

⁶² Shane, Scott (November 24, 2012). “Election Spurred a Move to Codify U.S. Drone Policy.” The New York Times. Retrieved November 14, 2012.

⁶³ Shane, Scott (November 24, 2012). “Election Spurred a Move to Codify U.S. Drone Policy.” The New York Times. Retrieved November 14, 2012.

⁶⁴ Shane, Scott (November 24, 2012). “Election Spurred a Move to Codify U.S. Drone Policy.” The New York Times. Retrieved November 14, 2012.

individual in any part of the world without consequence. If the U.S. desires to be a global leader going forward, then certain governmental policies, such as the current targeted killing program, must be reformed.

c. Critics of the current targeted killing program.

Critics of the current policy mirror some of the arguments made in the preceding section of this paper. The American Civil Liberties Union claims that a program of targeted extrajudicial killings far from any battlefield, without criminally charging that individual and placing that individual on trial, is in violation of the constitutional guarantee of due process.⁶⁵

Opponents of extrajudicial targeted killings essentially claim that, under international humanitarian law (IHL), the lawful killing of an enemy belligerent is, otherwise, permissible in an area of armed conflict.⁶⁶ The key point to understand here is that the killing must occur in areas of armed conflict, and since the U.S. is not engaged in an armed conflict with Pakistan, nor any of its territory, the targeted killing of Bin Laden was illegal under international law.

Accordingly, in the absence of an established “zone of armed conflict”, IHL does not apply (i.e., *jus in bello*), and, therefore, to classify an enemy target as a belligerent does not work.⁶⁷ So what exactly does that mean? It means that targeted killings in countries like Pakistan, Yemen, and Somalia are illegal.⁶⁸ Further, under conventional IHL standards, the

⁶⁵ Unknown Author (October 29, 2012). “Is the U.S. Drone Campaign in Pakistan Legal?” understandingempire.wordpress.com. Retrieved December 2, 2012.

⁶⁶ Unknown Author (October 29, 2012). “Is the U.S. Drone Campaign in Pakistan Legal?” understandingempire.wordpress.com. Retrieved December 2, 2012.

⁶⁷ Unknown Author (October 29, 2012). “Is the U.S. Drone Campaign in Pakistan Legal?” understandingempire.wordpress.com. Retrieved December 2, 2012.

⁶⁸ Unknown Author (October 29, 2012). “Is the U.S. Drone Campaign in Pakistan Legal?” understandingempire.wordpress.com. Retrieved December 2, 2012.

involvement of the CIA is also illegal because CIA agents are classified as civilians and civilians do not have the right to use force.⁶⁹

Opponents of the program insist that U.S. forces should have captured Bin Laden, extradited him to a U.S. territory, charged him, and placed him on trial. This type of argument may carry some merit in theory; however, in reality, it would have incurred a tremendous amount of resistance. Had the U.S. acted in this manner issues of extradition, choice of venue, and place of detention, to name a few, would have impeded the chance of a free, fair, and expedient trial.

Opponents of the current program also claim that it is in violation of international law due to the fact that lethal force may only be used outside of an armed conflict as a last resort to prevent the imminent threat of attack, and also when non-lethal means are not available.⁷⁰ They claim that the U.S. is turning the entire world into a battlefield by targeting suspected terrorists for execution, far from any warzone.⁷¹ Further, a policy that adds names to a “kill list” through bureaucratic secrecy, and whose names remain on a list for months if not years undermines the notion that those individuals are an imminent threat.⁷²

While the aforementioned argument is insightful, in reality it is unsound. The U.S. has declared a “war on terror”. Terrorist network cells exist throughout the world, and they thrive in third world countries that have trouble policing their own citizens. The U.S. is not trying to create a global battlefield, it is just trying to dispose of certain threats that it deems necessary and imminent. Targeted killings are generally precise and effective and they also reduce civilian

⁶⁹ Unknown Author (October 29, 2012). “Is the U.S. Drone Campaign in Pakistan Legal?” understandingempire.wordpress.com. Retrieved December 2, 2012.

⁷⁰ Unknown Author (October 29, 2012). “Is the U.S. Drone Campaign in Pakistan Legal?” understandingempire.wordpress.com. Retrieved December 2, 2012.

⁷¹ Unknown Author (October 29, 2012). “Is the U.S. Drone Campaign in Pakistan Legal?” understandingempire.wordpress.com. Retrieved December 2, 2012.

⁷² Unknown Author (October 29, 2012). “Is the U.S. Drone Campaign in Pakistan Legal?” understandingempire.wordpress.com. Retrieved December 2, 2012.

casualties. Pertaining to Bin Laden, the Obama Administration deemed him an ongoing threat to U.S. national security and they had a very narrow window to act.

Whereas the past two sections have addressed targeted killings from a statutory and abstract perspective, the next section will analyze targeted killings from a national sovereignty standpoint. Pakistan's involvement has been overlooked thus far. However, determining whether Pakistan consented or was unable or unwilling to capture or kill Bin Laden is critical in assessing whether the targeted killing of him was legal under international law.

III. Pakistan's Sovereignty.

Approximately twenty-four heliborne U.S. Navy SEALs commenced the raid on Bin Laden's compound from a military base in neighboring Afghanistan.⁷³ Obama and his top military advisors temporarily transferred the military personnel assigned to the mission to the control of the civilian based Central Intelligence Agency.⁷⁴ From a legal standpoint this is key because the U.S. was not at war with Pakistan and, had they sent U.S. military into a non-warzone for the purpose of killing an enemy target, it would have been a clear violation of Pakistan's sovereignty under international law. However, since they were transferred to a civilian division no violation occurred.

According to a top official within the Obama Administration, the U.S. did not make Pakistan privy to the mission until its aftermath.⁷⁵ However, there are mixed reports as to how much Pakistan knew. Pakistan's Foreign Ministry claimed that U.S. forces solely conducted the

⁷³ Gorman, Siobhan (May 23, 2011). "Spies, Military Ties Aided Bin Laden Raid." The Wall Street Journal. Retrieved December 4, 2012.

⁷⁴ Dozier, Kimberly and Burns, Robert (May 5, 2011). "Raid Raises Questions: Who's Soldier, Who's Spy?" Associated Press. ABC News. Retrieved December 4, 2012.

⁷⁵ Unknown Author (May 2, 2011). "Osama Bin Laden Killed in Pakistan, Says Obama." Dawn. Retrieved December 4, 2012.

raid.⁷⁶ On the other hand, officials within Pakistan's Inter-Services Intelligence (ISS) claimed that it was a joint operation, one in which they were present at.⁷⁷ Pakistan's President Asif Ali Zardari vehemently denied this claim⁷⁸ and Pakistan's foreign secretary Salman Bashir confirmed that they became aware of the mission mid-way through and they sent F-16s to the compound, but U.S. helicopters had already left.⁷⁹ In light of the foregoing, for purposes of this paper, it will be assumed that Pakistan was neither aware of the attack nor consented to it.

a. Legal Analysis

Pakistan maintains that this mission was a violation of its sovereignty. Pakistan's Prime Minister Yousaf Raza Gilani claimed that the mission was not done in accordance with international law, human rights law, or humanitarian law.⁸⁰ Article 2(4) of the U.N. Charter prohibits the use of force by one state against another.⁸¹ However, Article 2(4) recognizes two exceptions: (1) when force is carried out with consent of the host state, and (2) when the use of force is an act of self-defense in response to an armed attack or an imminent threat, and where the host state is unwilling or unable to take appropriate action.⁸² Whereas the former does not apply because Pakistan did not consent, the latter could apply if the U.S. can show that it was acting in self-defense to an imminent threat.

⁷⁶ Unknown Author (May 2, 2011). "Bin Laden Operation Conducted by US Forces: Pakistan." Dawn. Retrieved December 4, 2012.

⁷⁷ Rodriguez, Alex (May 2, 2011). "Suspicious Grow Over Whether Pakistan Aided Bin Laden." Los Angeles Times. Retrieved December 3, 2012.

⁷⁸ Zardari, Asif Ali (May 3, 2011). "Pakistan Did its Part." The Washington Post. Retrieved December 3, 2012.

⁷⁹ Wright, Tom (May 5, 2011). "Pakistan Rejects U.S. Criticism." The Wall Street Journal. Retrieved December 3, 2012.

⁸⁰ Gilani, Yousaf Raza (May 9, 2011). "Pakistan PM's speech on Osama Bin Laden Situation." International Business Times. Retrieved December 3, 2012.

⁸¹ Unknown Author (October 29, 2012). "Is the U.S. Drone Campaign in Pakistan Legal?" understandingempire.wordpress.com. Retrieved December 2, 2012.

⁸² Unknown Author (October 29, 2012). "Is the U.S. Drone Campaign in Pakistan Legal?" understandingempire.wordpress.com. Retrieved December 2, 2012.

Those who claim that the mission was in violation of Pakistan's sovereignty argue that neither of the two exceptions under Article 2(4) apply.⁸³ Under the first exception they claim that it is clear that Pakistan did not consent to the raid.⁸⁴ Again, as stated *supra*, this paper will concede that notion. Under the second exception opponents claim that there is some doubt as to whether the terrorist attacks on September 11th are enough to justify a targeted killing program in 2011.⁸⁵ They argue that the United States' loose interpretation of the self-defense clause violates the second exception under Article 2(4). Further, they claim that placing an individual on a kill list for months, if not years, at a time disproves the notion of an imminent threat.⁸⁶ Finally, they contend that Pakistan was capable of taking action against Bin Laden had the U.S. informed them that he was in their country.⁸⁷

While the opposition makes a compelling argument that the mission was unlawful under international law, their reasoning and logic is simply unsound. Their argument lacks merit due to the foregoing reasons: (i) the U.S. along with most of the modern world is at war with terrorism, (ii) Bin Laden, as the leader of Al-Qaeda, posed an ongoing and continuous imminent threat to U.S. national security, (iii) the U.S. was justified in taking action against Bin Laden when it saw the opportunity, (iv) the use of force was limited in scope and proportional to the threat Bin Laden posed, and (v) the U.S. may use force against Al-Qaeda consistent with its inherent right to self-defense.⁸⁸

⁸³ Unknown Author (October 29, 2012). "Is the U.S. Drone Campaign in Pakistan Legal?" understandingempire.wordpress.com. Retrieved December 2, 2012.

⁸⁴ Unknown Author (October 29, 2012). "Is the U.S. Drone Campaign in Pakistan Legal?" understandingempire.wordpress.com. Retrieved December 2, 2012.

⁸⁵ Unknown Author (October 29, 2012). "Is the U.S. Drone Campaign in Pakistan Legal?" understandingempire.wordpress.com. Retrieved December 2, 2012.

⁸⁶ Unknown Author (October 29, 2012). "Is the U.S. Drone Campaign in Pakistan Legal?" understandingempire.wordpress.com. Retrieved December 2, 2012.

⁸⁷ Unknown Author (October 29, 2012). "Is the U.S. Drone Campaign in Pakistan Legal?" understandingempire.wordpress.com. Retrieved December 2, 2012.

⁸⁸ CNN Website – The Killing of Bin Laden.

Pakistan was also unable or unwilling to take action against Bin Laden. This is evidenced by the fact that Abbottabad is a hotbed for terrorist activity. On numerous occasions, members of Al-Qaeda have fled the mountainous terrain of Afghanistan and have found refuge in the Pakistani city.⁸⁹ There are also various reports that the Pakistani Government was shielding Bin Laden.⁹⁰ Just from an intuitive standpoint it is clear that those reports and allegations deserve merit because Bin Laden's compound was minutes from one of Pakistan's Military Academies.⁹¹

In addition to the foregoing, U.S. Government files, leaked by WikiLeaks, revealed that U.S. Diplomats were being informed that Pakistani Officials were tipping off Bin Laden every time U.S. forces neared his compound.⁹² There are also reports that Pakistan's ISI was covertly running Al-Qaeda militants into Afghanistan to fight NATO.⁹³ Finally, in December 2009, the Government of Tajikistan informed U.S. officials that Pakistan was well aware of Bin Laden's compound.⁹⁴ The U.S. Government simply could not trust Pakistan, and when asked about the raid CIA Chief Leon Panetta said that the CIA did want to inform Pakistan of the operation because it feared that "any effort to work with the Pakistanis [would] jeopardize the mission."⁹⁵

There is clearly a stronger argument, under international law, that the actions of the U.S. Government in targeting and killing Bin Laden were legal. The U.S. had to act with secrecy and

⁸⁹ Brulliard, Karin and De Young, Karen (May 2, 2011). "Pakistan's Critics Ask How Bin Laden's Refuge Went Unnoticed." The Washington Post. Retrieved December 1, 2012.

⁹⁰ Rodriguez, Alex (May 2, 2011). "Suspicious Grow Over Whether Pakistan Aided Bin Laden." Los Angeles Times. Retrieved December 3, 2012.

⁹¹ Unknown Author (May 2, 2011). "Did Pakistan Army Shelter Osama?" The Indian Express. Retrieved December 2, 2012.

⁹² Ross, Tim (May 2, 2011). "WikiLeaks: Osama Bin Laden 'Protected' by Pakistan's Security?" The Daily Telegraph (UK). Retrieved December 4, 2012.

⁹³ Ross, Tim (May 2, 2011). "WikiLeaks: Osama Bin Laden 'Protected' by Pakistan's Security?" The Daily Telegraph (UK). Retrieved December 4, 2012.

⁹⁴ Ross, Tim (May 2, 2011). "WikiLeaks: Osama Bin Laden 'Protected' by Pakistan's Security?" The Daily Telegraph (UK). Retrieved December 4, 2012.

⁹⁵ Calabresi, Massimo (May 3, 2011). "CIA Chief Breaks Silence: Pakistan Would Have Jeopardized Bin Laden Raid, 'Impressive' Intel Captured." Time. Retrieved December 1, 2012.

the decisions made by Obama and his cabinet were justified as an act of self-defense warding off the imminent threat of attack from another terrorist plot. While there is a strong case that the U.S. officials who ordered the raid did not violate international law, there still may be an issue as to whether the direct actions of the SEALs on May 2, 2011 were in contravention to U.S. law or international law. The final section of this paper will address the issue.

IV. Actions of the U.S. Navy Seals' on the night of the raid.

A number of experts are concerned that the question of legality may come down to Bin Laden's response at the moment U.S. Navy SEALs raided his compound and, more precisely, the moment at which they burst into his room.⁹⁶ They claim that if a person has his hands in the air and is surrendering you are not authorized to kill him.⁹⁷ Therefore, even if the President had the statutory authority to order the raid, targeted killings are not illegal under international law, and the operation did not invade Pakistan's sovereignty; the U.S. may still have violated international law based on the actions of the SEALs.

International law requires that the SEALs killing of Bin Laden must have been done in self-defense.⁹⁸ Acting in self-defense hinges on the requirement that members of the Seals team "reasonably believed there was a risk to themselves."⁹⁹ Days following the raid CIA Director Leon Panetta said, "[under] the rules of engagement, if he had in fact thrown up his hands,

⁹⁶ Silverleib, Alan (May 4, 2011). "The Killing of Bin Laden: Was it Legal?" cnn.com. Retrieved November 2, 2012.

⁹⁷ Silverleib, Alan (May 4, 2011). "The Killing of Bin Laden: Was it Legal?" cnn.com. Retrieved November 2, 2012.

⁹⁸ Silverleib, Alan (May 4, 2011). "The Killing of Bin Laden: Was it Legal?" cnn.com. Retrieved November 2, 2012.

⁹⁹ Silverleib, Alan (May 4, 2011). "The Killing of Bin Laden: Was it Legal?" cnn.com. Retrieved November 2, 2012.

surrendered, and didn't appear to be representing any kind of threat, then they were to capture him. But they had full authority to kill him.”¹⁰⁰

The initial order to capture Bin Laden eviscerated as soon as the SEALs entered the compound due to the fact that a firefight erupted immediately.¹⁰¹ One of Bin Laden's guards Al-Kuwaiti opened fire on the first SEAL team with an AK-47.¹⁰² After the initial exchange of fire between the SEALs and Bin Laden's henchmen, the SEALs identified Bin Laden on the third floor of the main building.¹⁰³ As Bin Laden peered over a ledge, one of the SEALs that were engaging him took a shot at him.¹⁰⁴ It was dark and the SEALs had previously sustained fire. It is, therefore, clear that the SEALs reasonably believed they were at risk. As Bin Laden was being shot at he retreated to his bedroom and the SEALs followed.¹⁰⁵ More fire erupted in his bedroom and it is unclear as to what exactly happened at this point, but eventually the proverbial “smoke cleared” and Bin Laden was lying on the ground in a pool of blood -- dead.¹⁰⁶ The report indicated that there were two guns next to Bin Laden's body.¹⁰⁷ Of approximately twenty individuals on the compound only four were killed including Bin Laden.¹⁰⁸ Further, during the raid, the SEALs restrained the women and children with plastic hand-ties and did not harm

¹⁰⁰ Silverleib, Alan (May 4, 2011). “The Killing of Bin Laden: Was it Legal?” [cnn.com](#). Retrieved November 2, 2012.

¹⁰¹ Unknown Author (May 3, 2011). “How U.S. Forces Killed Osama Bin Laden. [cnn.com](#). Retrieved December 5, 2012.

¹⁰² Sherwell, Phillip (May 7, 2011). “Osama Bin Laden Killed: Behind the Scenes of the Deadly Raid.” *The Daily Telegraph* (London). Retrieved December 4, 2012.

¹⁰³ Sherwell, Phillip (May 7, 2011). “Osama Bin Laden Killed: Behind the Scenes of the Deadly Raid.” *The Daily Telegraph* (London). Retrieved December 4, 2012.

¹⁰⁴ Sherwell, Phillip (May 7, 2011). “Osama Bin Laden Killed: Behind the Scenes of the Deadly Raid.” *The Daily Telegraph* (London). Retrieved December 4, 2012.

¹⁰⁵ Sherwell, Phillip (May 7, 2011). “Osama Bin Laden Killed: Behind the Scenes of the Deadly Raid.” *The Daily Telegraph* (London). Retrieved December 4, 2012.

¹⁰⁶ Sherwell, Phillip (May 7, 2011). “Osama Bin Laden Killed: Behind the Scenes of the Deadly Raid.” *The Daily Telegraph* (London). Retrieved December 4, 2012.

¹⁰⁷ Sherwell, Phillip (May 7, 2011). “Osama Bin Laden Killed: Behind the Scenes of the Deadly Raid.” *The Daily Telegraph* (London). Retrieved December 4, 2012.

¹⁰⁸ Sherwell, Phillip (May 7, 2011). “Osama Bin Laden Killed: Behind the Scenes of the Deadly Raid.” *The Daily Telegraph* (London). Retrieved December 4, 2012.

them.¹⁰⁹ Within forty-five minutes the SEALs were back on the Black Hawk Helicopters with Bin Laden's body.¹¹⁰ The casualties were minimal and the mission was viewed as an extremely successful one.

It is apparent that the SEALs did not violate U.S. domestic law or international law during the raid. Bin Laden's compound was heavily fortified with trap doors and armed militia. They exchanged fire numerous times during the raid and there are reports that Bin Laden shot at them. Therefore, they were under reasonable belief that their lives were in danger when they shot and killed Bin Laden. Most importantly, a U.S. official claimed that during the raid Bin Laden did not "hold up his hands and surrender."¹¹¹ Another report claims that Bin Laden was offered the possibility to surrender, but he failed to "raise the white flag."¹¹² By virtue of his position as the head of Al-Qaeda Bin Laden was an enemy belligerent, and if he wanted to surrender he needed to make that immediately clear to the SEALs.¹¹³ Not run into his bedroom and try to grab a weapon.

V. Conclusion.

Bin Laden posed an ongoing and continuous threat to U.S. national security. He was the head of Al-Qaeda, a terrorist organization that had conducted the attacks of September 11th.¹¹⁴ Under international law the U.S. has the inherent right to target and kill that individual as an act of self-defense. Some experts argue that the operation was a violation of both international law

¹⁰⁹ Sherwell, Phillip (May 7, 2011). "Osama Bin Laden Killed: Behind the Scenes of the Deadly Raid." The Daily Telegraph (London). Retrieved December 4, 2012.

¹¹⁰ Sherwell, Phillip (May 7, 2011). "Osama Bin Laden Killed: Behind the Scenes of the Deadly Raid." The Daily Telegraph (London). Retrieved December 4, 2012.

¹¹¹ Silverleib, Alan (May 4, 2011). "The Killing of Bin Laden: Was it Legal?" cnn.com. Retrieved November 2, 2012.

¹¹² Silverleib, Alan (May 4, 2011). "The Killing of Bin Laden: Was it Legal?" cnn.com. Retrieved November 2, 2012.

¹¹³ Silverleib, Alan (May 4, 2011). "The Killing of Bin Laden: Was it Legal?" cnn.com. Retrieved November 2, 2012.

¹¹⁴ Silverleib, Alan (May 4, 2011). "The Killing of Bin Laden: Was it Legal?" cnn.com. Retrieved November 2, 2012.

and U.S. domestic law; however, their argument is unsubstantiated and without merit. Although the raid was conducted in a manner fully consistent with the laws of war, the U.S. must be vigilant of the precedent this sets going forward.