

## An Evolving Administrative Law of Targeted Warfare (and the Power of Londoner/BiMetallic)

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**Date :** December 17, 2012

Richard H. Pildes & Samuel Issacharoff, *Targeted Warfare: Individuating Enemy Responsibility*, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 12-40, available at [SSRN](#).

President Obama is a Nobel Peace Prize winner. He also orders missile strikes from drones against targeted individuals in Pakistan, Yemen, and Somalia. According to some vocal critics, such extra-judicial killing makes President Obama a murderer.

This conclusion rests in large part on the premise that the United States is not, properly speaking, in an armed conflict with al Qaeda, the Taliban, and associated forces. As such, the laws and norms of international human rights law (IHRL) and civil law enforcement should apply. Absent exigent circumstances, this legal regime expects judicial authorization of the use of lethal force. President Obama is not a judge, so, when he authorizes a killing, he commits murder. The picture looks different if we concede that the laws of armed conflict (LOAC) apply to the drone strikes. This legal regime requires an attacker to take feasible precautions to ensure that a target is legitimate but does not require judicial authorization for attacks.

So, do President Obama's decisions to authorize targeted killings make him a murderer or perhaps an especially careful military commander? As Professors Pildes and Issacharoff ably demonstrate in *Targeted Warfare: Individuating Enemy Responsibility*, this question rests on a false dichotomy and unhelpful abstraction.

Neither the IHRL nor the LOAC models provide quite the right tools, yet, for guiding the use of lethal force in the current conflict. In al Qaeda, the United States confronts a criminal conspiracy that has committed devastating terrorist attacks and seems intent on committing more. Its members blend into civilian populations in remote areas subject to little or no state control. Reasonable people can conclude that the legal regime for civil law enforcement, broadly construed to include the criminal justice system, is not suited for dealing with the continuing threat posed by this organization.

But it is also the case that "there is a great deal about the laws of war that seems poorly addressed to the current circumstances."<sup>1</sup> Broadly speaking, this legal regime authorizes the use of force based on an opponent's status as a member of an enemy armed force.<sup>2</sup> The nature of the conflict with a terrorist group that eschews the laws of war, however, heightens focus on individualized facts concerning conduct. To determine whether a person is a proper target of a "personality strike," the United States must gather specific information about that particular person's actions.

Putting this point in the language of administrative law, both because of the nature of the enemy and the nature of the United States' technological tools, decisions to use force against particular individuals will turn on issues of contestable adjudicative fact. ((See *id.* at 7.)) And, as readers of a blog devoted to administrative law will recall, the famous *Londoner/BiMetallic* distinction teaches that fair resolution of contested matters of adjudicative fact implicates procedural due process.

The key insight of *Targeted Warfare* is to recognize that reliance on adjudicative facts about particular people to justify targeting will (and should) create a hydraulic force that causes the laws and practices of war to evolve suitable procedures for determining such facts.<sup>3</sup>

*Targeted Warfare* discusses this evolution both in the context of detentions and targeted killings. Regarding detentions, the Article provides an informative survey of relevant international law, Supreme Court case law, and developing military practice. The authors also provide a preliminary assessment of six questions they submit must be answered by governments attempting to develop a detention policy suited for asymmetric warfare against non-state combatants (e.g., justifying initial detentions, determining the length of detentions, determining the role of judicial review, etc.).<sup>4</sup>

Turning to targeted killing, the authors note that the focus on adjudicative facts naturally “fuels the demand in some quarters that the criminal justice system, rather than unilateral executive direction of military force, should be used.” *Id.* at 60. This demand is likely to go unsatisfied for some time as none of the three branches, notably including the courts themselves, seems to have much appetite for heavy judicial involvement in the process or substance of targeted killing in the current conflict—at least not yet. The executive branch is not, however, waiting for judicial review before developing procedures designed to determine individuated enemy responsibility.<sup>5</sup>

Pildes and Issacharoff foresee that as such procedures evolve, “[m]ilitary forces will inevitably have to develop analogues appropriate to the military context for the procedural protections (hearings, evidence-based assessments, and the like) designed to ensure accuracy of adjudicative-like judgments of individual responsibility when coercive state power is deployed domestically.” (*Id.* at 69.) In other words, the military will adopt the tools of administrative law. Eventually, as “the justification for force becomes more closely tied to ascriptions of individualized responsibility,” they foresee courts, too, “play[ing] a somewhat more significant role” in “assess[ing] the use of at least certain exercises of military force.”<sup>6</sup> Of course, limited judicial review, too, is a familiar tool of administrative law.

The United States’ conduct of its “war on terror” has evoked intense controversy—as any quick Google search of “war crime” and “drone” can confirm. Some part of this controversy has arisen from legal uncertainty connected with combating an enemy that does not fit either the “war” or “crime” models very well. In *Targeted Warfare*, Professors Pildes and Issacharoff, through their detailed and thoughtful analysis, demonstrate how the impulses and tools of administrative law may provide a promising path forward. In the nature of things, the path they describe will not satisfy everyone, but everyone with an interest in this important subject should consider it.

1. *Targeted Warfare* at 11. [?]

2. See *id.* at 23. [?]

3. See, e.g., *id.* at 69 (foreseeing military development of increased procedural protections and an enhanced but limited role for judicial review). [?]

4. *Id.* at 35-48. [?]

5. See *id.* at 65-68. [?]

6. *Id.* [?]

Cite as: Richard Murphy, *An Evolving Administrative Law of Targeted Warfare (and the Power of Londoner/BiMetallic)*, JOTWELL (December 17, 2012) (reviewing Richard H. Pildes & Samuel Issacharoff, *Targeted Warfare: Individuating Enemy Responsibility*, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 12-40, available at SSRN. ),

<http://adlaw.jotwell.com/an-evolving-administrative-law-of-targeted-warfare-and-the-power-of-londonerbimetallic/>.