



Written by [Michael Tennant](#) on November 1, 2011

CIA Drone Assassinations Violate the Law of War

Into the breach has stepped Howard University law professor Morris Davis, who in a recent [column](#) presented a well-researched case that the CIA's drone assassination program is illegal under the law of war and that, as a result, CIA personnel participating in drone strikes could be prosecuted for murder.

Davis knows his subject well. He was a U.S. Air Force judge advocate for 25 years and served as chief prosecutor of the Guantanamo Bay military commissions from 2005 to 2007, resigning from that post in disgust at the use of torture to extract evidence from prisoners and the interference in the proceedings from the Pentagon. He is now executive director and counsel of the Crimes of War Education Project. In other words, Davis' opinion on the matter of war crimes should not be taken lightly.



Central to Davis' argument is the indisputable fact that the CIA is not an arm of the military but "a civilian agency made up of civilian employees and civilian contractors." For those still not convinced, columnist [Nat Hentoff](#) reminds us that "when Gen. David Petraeus (who had led U.S. forces in Afghanistan) became the present head of the CIA, he removed his military uniform."

Before tackling the law-of-war issues, Davis makes short work of the claim that the assassinations were legal under the 2001 Authorization for the Use of Military Force (AUMF). That resolution only authorized the President to undertake military action against those responsible for the 9/11 attacks; it said nothing about the use of civilian agencies such as the CIA. Furthermore, Congress pointedly deleted from the final resolution language proposed by President George W. Bush that would have allowed him to act "to deter and pre-empt any future acts of terrorism or aggression against the United States." Awlaki, at the time living in the United States and only later aligning himself, however tenuously, with al-Qaeda, hardly falls under the scope of the AUMF.

Now comes the real meat of Davis' brief. Simply put, because CIA personnel are not members of the military, they are not entitled to immunity for killing civilians, as indeed Awlaki, his son, and others killed in these strikes were. Says Davis:

Generally, the deliberate killing of another human being is considered murder unless some legal justification provides immunity. The law of war does just that by extending combatant immunity to lawful combatants who kill in the course of armed conflict, provided they comply with the law of war.... The CIA's civilian employees and civilian contractors are not lawful combatants and are not entitled to combatant immunity....



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The law of war provides lawful combatants with immunity from responsibility for collateral damage that occurs when they conduct legitimate attacks on legitimate military objectives. That includes immunity from responsibility for civilians killed in the course of a proper attack on a legitimate military target.

The problem, of course, is that CIA employees and contractors, as civilians, are not considered lawful combatants. Since their drone strikes, even if directed at military targets (Awlaki being a dubious one), are being carried out by civilians, the deaths of civilians in those strikes cannot be chalked up to collateral damage but must be regarded as outright murders — murders for which those involved can be held responsible under the laws of the United States (though the U.S. government is unlikely to prosecute them) and of those countries in which the drone strikes are carried out.

Lest one think that Davis is splitting hairs, he elaborates:

The concern over using civilian CIA personnel to conduct combat operations is not inconsequential. A primary objective of the law of war is to limit the effects of war, particularly the effects on civilians and civilian objects. A fundamental law of war principle is distinction, which mandates uniforms or other distinctive markings to clearly denote combatants. The failure to comply with the principle of distinction, a fundamental requirement for lawful combatancy, is one of the reasons the US cites for classifying enemy detainees as unlawful combatants rather than prisoners of war.

The government also recognizes the significance of this distinction and is trying to send all evidence of this law of war down the memory hole, according to Davis:

The importance of the combatant-civilian distinction was apparent when the Pentagon prepared the latest version of the *Manual for Military Commissions*, the rulebook for the trials of some of the alleged unlawful enemy combatants at Guantanamo Bay. The 2007 version of the *Manual for Military Commissions*, which made rules implementing the Military Commissions Act of 2006, said that “for the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy.” It went on to add that such persons “do not enjoy combatant immunity because they have failed to meet the requirements of lawful combatancy under the law of war.” That language was removed when the current manual was drafted because of concerns among senior US government officials that the language on lawful combatancy and combatant immunity could be viewed as an acknowledgment that CIA civilian drone operators are committing war crimes.

Thus, in using a civilian agency to conduct combat operations, “the US undermines the law of war by blurring the intended bright line separating combatants from civilians,” Davis avers. Should a foreign country’s intelligence service begin assassinating civilians within the borders of the United States, our government would be in no position to demand a halt to the practice. As Davis put it, “The ability to bend the law to what we want it to be at any given moment diminishes us and our commitment to abide by the proper rule of law.”

“Many terrorists around the world, and some right here among us, want to kill us instantly,” observes Hentoff. “For us to survive, does that mandate our government, including the civilian CIA, to act sometimes as our enemies do — no matter ‘the collateral damage’ to innocent civilians, our rule of law and the law of war?”

For far too many Americans, the answer appears to be yes. It is an answer many will come to regret — but not, one hopes, too late to reverse this dangerous slide toward lawlessness.



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Photo of David Petraeus after being sworn in to head the CIA: AP Images



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